Dual Real Estate Agents and the Double Duty of Loyalty

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The top three issues that cause the most disputes in a real estate transaction are dual agency, disclosure, and breach of fiduciary duty. This is despite legislative efforts in the past two decades to clarify and reduce the duties of dual agents. This article addresses residential dual agency, disclosure about dual agency, and the fiduciary duty of loyalty.

Home ownership is the chief source of wealth for most Americans. However, buying a home is one of the most daunting tasks that a modern US consumer will undertake. Agents play a critical role in facilitating home sales, especially for first-time home buyers. Around 90% of home sales involve agents; many of these are dual agents. Driven by economic exigencies, and abetted by legislation which allows ready written consent to dual agency, agents simultaneously represent sellers and buyers in an attempt to save consumers time and earn double commissions. Unfortunately, many agents and consumers fail to see the heightened duty of loyalty agents owe in this capacity. This article examines the dual agent’s duty of loyalty. It is double, not half the loyalty that one would have with one principal. Unless loyalty to consumers grows, confusion and disputes will proliferate. However, if a double duty of loyalty is observed, greater transparency among the agent, seller and buyer will lead to better pricing and contract terms, and ultimately a healthier real estate market. Even in jurisdictions which have lowered standards for dual agents, where lawful, agents can and should exceed these standards.

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INTRODUCTION

According to the National Association of REALTORS®’ (NAR) 2011 Legal Scan: Legal Issues Facing Real-Estate Professionals, the top three issues that cause the most disputes in a real estate transaction are dual agency, disclosure, and breach of fiduciary duty.¹ This is despite legislative efforts in the past two decades to clarify and reduce the duties of dual agents. This article addresses residential dual agency, the fiduciary duty of loyalty and disclosure about dual agency.

Economic incentives and legislation providing for ready written consent inadvertently promote dual agents in residential home sales. Agents simultaneously represent sellers and buyers in an attempt to save consumers time and earn double commissions. Unfortunately, many agents and consumers fail to see the heightened duty of loyalty agents owe in this capacity. It is double, not half the loyalty that one would have with one principal. Unless loyalty to consumers grows, confusion and litigation will proliferate. However, if a double duty of loyalty is observed, greater


[O]ver 83% placed the issue among their top three current issues. Most (59%) respondents believe that the level of disputes will stay the same during the next two years; about 30% believe the number of disputes will increase in importance over the next two years. Eighty percent ranked the issue among their top three potential future issues. Nearly 45% believe there is a significant need for training on Dual Agency.

Id. at 5 (citations omitted).
transparency among the agent, seller and buyer will lead to better pricing and contract terms, and ultimately a healthier real estate market.

First we shall examine the dual vulnerability of consumers and agents in residential sales, including the background of consumers and agents, and the training and compensation of agents. Then we will view the types of dual agencies that are used, then look to the origin of agency and the duty of loyalty in common law. We will survey a few cases to identify the kinds of dual agency breaches of the double duty of loyalty, and then statutory reductions since the 1990’s in the duty of loyalty for dual agents. We conclude with proposed guidelines for observing the double duty of loyalty, and changes to the NAR Code of Ethics and NAR reports. Even in jurisdictions which have lowered standards of loyalty for dual agents, where lawful, agents can and should exceed these standards. Single agency is preferred, but a proper practice of dual agency and the double duty of loyalty can still yield benefits to agents and consumers if transparent exchange of information is used.²

THE DUAL VULNERABILITY OF CONSUMERS AND AGENTS

We were interested in a cute home in the neighborhood for sale. When we called the number in front of the house, the agent said, “What are you looking for? I can help you with other properties, too”. I wondered whom the agent represented. The seller? Us? Himself?³

Buying a home is one of the most daunting tasks that a modern consumer will undertake. Home ownership ideally represents not only a sanctuary, but also a safe major financial investment. In the US home ownership is the chief source of wealth for most Americans.⁴ Who buys homes? Who are real estate agents and what do they do? Why are both home sales and being a real estate agent stressful leading to increased vulnerability for consumers and agents?

² See Thomas J. Miceli et al., Restructuring Agency Relationships in the Real Estate Brokerage Industry: An Economic Analysis, 20 J. REAL ESTATE RES. 31, 32 (2000) (“[A] reduction in the exchange of information leads to higher transaction costs of completing real estate transactions, and therefore to a less efficient market for housing.”).
In the Western industrialized world, home ownership ranges between about 65% to 80% of the nation’s population, with 65% being an approximate median. Since 1960 approximately 2/3 of Americans own homes, making the U.S. fall in the middle compared to other Western industrialized countries. But percentages in the U.S. vary widely among ethnic groups from 71.3% for white owners to 45.7% (Hispanic), 46.3% (African-American), and 53.4% (Asian) for minority owners. Married couples in their sixties and early seventies are most likely to own a home. Single women under the age of 25 are least likely to own a home.

As for individuals who have recently purchased homes, over 85% are white/Caucasian. First time home buyers were on average 31 years old with an income of $62,400, while repeat buyers were on average 53 years old with an income of $96,600. First time home buyers were 37% of all buyers. The largest segment of home buyers is the 25 to 34 years section. Sixty four percent of home buyers are couples, but almost twice as many single females purchase homes as single males do. The typical seller in 2011 was 53 years old, earned an income of $101,500, had lived in

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10 Id.
14 NAT’L ASS’N OF REALTORS, PROFILE OF HOME BUYERS AND SELLERS 2011 12(2011)  
15 NAT’L ASS’N OF REALTORS, PROFILE OF HOME BUYERS AND SELLERS 2011 12 (2011) (listing single females as comprising 18% of home buyers and single males as 10% of home buyers).
his home for nine years and earned a profit of $26,000 on his sale.\textsuperscript{16} Regarding the proportion of a home’s value to a family’s overall wealth, in one survey, the percentages are 95\% (black), 96\% (Hispanic), and 70\% (white).\textsuperscript{17} Also, in addition to car ownership, homeownership in a particular neighborhood is often perceived as the mark of one’s socio-economic status.

The number of home sales is regularly used as an indicator of national economic health and the devastating real estate bust of 2007-9 has caused homeowner vacancy rates to increase significantly.\textsuperscript{18} Homeownership rates have also fallen, from 69.1\% in 2005 to 65.9\% for the second quarter of 2011.\textsuperscript{19} Sadly, in the second quarter of 2011, foreclosed homes were 31\% of home sales.\textsuperscript{20} There have been approximately 2.5 million foreclosures completed since January 2007.\textsuperscript{21} These foreclosures have disproportionately affected minority homeowners. According to the Committee for Responsible Lending, percentages for homeowners who lost their homes or were likely to were 17\% (Latino), 11\% (African American) and 7\% (non-Hispanic white).\textsuperscript{22} African-American borrowers are 76\% more likely to have lost their homes due to foreclosure than non-Hispanic white borrowers, while Latino borrowers are 71\% more likely.\textsuperscript{23}

\begin{itemize}
\item\textsuperscript{16} NAT’L ASS’N OF REALTORS, PROFILE OF HOME BUYERS AND SELLERS 2011 77-80 (2011).
\item\textsuperscript{17} G. William Domhoff, Wealth, Income, and Power, UCSC.EDU, \url{http://www2.ucsc.edu/whorulesamerica/power/wealth.html} (last updated Nov. 2011).
\item\textsuperscript{18} Press Release, U.S. Census Bureau News, Residential Vacancies and Homeownership in the Second Quarter 2011 (July 29, 2011), \url{http://www.census.gov/hhes/www/housing/hvs/qtr211/files/q211press.pdf}. Between 1996 and 2005, vacancy rates remained under 2\%. But in 2006, rates broke the 2\% level, with a high of 2.9\% in 2008. The current vacancy rate is 2.5\%. \textit{Id.}
\item\textsuperscript{19} \textit{Id.}
\item\textsuperscript{22} \textit{Id.} at 3.
\item\textsuperscript{23} \textit{Id.} at 8.
\end{itemize}
Home buyers cite many different reasons for buying a home apart from the desire to own a home. Among the top reasons are the desire for a larger or smaller home, a change in the family’s situation, availability of the home buyer tax credit, one’s job status requiring a move, and retirement. Some of these events are by themselves considered traumatic events, making the process of buying a home even more taxing than it normally would be. But most homeowners eventually find the process worth the trouble, because homeownership provides “a sense of peace of mind,” “a feeling of having roots somewhere,” and a feeling that they have made “one of the best financial investments one can make.” Familial interactions that help form family bonds often revolve around the home, making the home a significant and important place. A new home can be “simultaneously an investment; a source of shelter; a symbol of love, comfort, warmth, and nurturance; [and] a way of life and a means through which the owners express their identities;” but this must be contrasted with the fact that a home is “the most costly purchase most families will ever make.” The tense and life-changing process of buying a home affects family relationships, with different families perhaps adopting different coping strategies for handling the transition. Thus, those who assist in the process must also be aware of the “relationship, psychological, and emotional issues related to home buying.”

The entire home buying process may take four months or more. On average, home buyers spend 12 weeks searching for a home and look at 12 homes. With an added 30 days for closing and any time negotiating a

27 Id. at 199 (giving such examples as “who prepares dinner on which night, who sits where during a meal or while watching TV, how the family generally spends its Sunday morning, and what each family member does when he or she walks in the door after a day at work” as examples of “rituals which give the family a sense of security, continuity, and being a group”).
28 Id. at 202.
29 See id. at 198.
30 Id. at 202.
price with the seller, the entire process can easily exceed four months. The average buyer moved 12 miles to their new home. On the other end of the spectrum, families relocating to a new location may have to compress their search to a few days. A company may fly them in for two to three days of home shopping, and they must make an offer for a home without knowing which neighborhoods are best suited for them. No matter how long a search has been, when buyers find what they are looking for, they may sign an offer to buy the same day. Sometimes this is because they are told “the property will be sold to someone else, the price will increase, or favorable interest rates will be lost…” Sellers, on average, moved 20 miles to their new residence.

In 2011 89% of buyers surveyed used a real estate agent. This number has grown steadily over the past decade, with 69% of buyers in 2001 and 77% of buyers in 2006 using agents. This has now brought buyers’ use of agents in line with sellers’ use of agents, as 87% of home sellers used agents in 2011. This is no doubt related to the complexity and stress of selling and purchasing a home. Most homeowners do not buy and sell homes on a regular basis so the consumer’s learning curve is steep. Also, relocating is traumatic. In one account it ranks only behind losing a loved one and divorce in terms of stress. Pop-culture’s portrayal of buying a home as a joyful and painless event may amplify the stress since the buyer is unprepared for the inevitable strain that does accompany the process.

Among all the benefits and services agents can provide, what buyers are most looking for from their agents is assistance in finding the right

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35 Id.
37 Id.
39 Id. at 106.
41 See Cynthia J. Meyer, Stress: There’s No Place Like a First Home, 36 FAMILY RELATIONS 198, 198 (1987).
Second to this, buyers most want help in negotiating the right purchase price and terms. By far the most common way consumers find an agent is by referral from a friend, relative, or neighbor. When looking for the right agent, the factor buyers consider most important is that the agent be honest and trustworthy. These qualities are at the heart of the duty of loyalty.

The Vulnerability of Agents

Who are real estate agents and what do they do? Brokers are licensed to manage real estate businesses. Agents must work for a brokerage. Most agents are residential real estate agents. There are approximately 400,000 active real estate sales agents in the U.S., with an additional 117,800 real estate brokers. The NAR itself currently lists about 1 million members.

The typical agent is a 54 year old married, white woman with at least some college education. Sixty three percent of real estate sales agents are women, while females comprise only 50.8% of the total U.S. population. Minorities tend to be underrepresented in the real estate agent field, as they are in home buying. In the overall U.S. population, 72.4% of

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42 Id. at 61.
43 Id.
44 NAT’L ASS’N OF REALTORS, PROFILE OF HOME BUYERS AND SELLERS 2011 63, 98 (2011) (explaining 41% of buyers find their agents by referrals with an additional 9% by having used the agent previously, and that 39% of sellers found their agents by referrals with an additional 22% having used the agent previously). The next most common ways of finding an agent are significantly lower than referrals and self-referrals. For home buyers, after referrals and agents previously used (a combined 50%), buyers found their agents through the internet (only 9% of buyers) or met the agent by visiting an open house (only 7% of buyers). Id. at 63.
45 Id. at 64.
47 Id.
50 NAT’L ASS’N OF REALTORS, MEMBER PROFILE 2010 68 (2010).
people are white, while 87% of agents are white. 12.6% of U.S. citizens are black or African American, while only 4% of agents are. 16.3% of Americans are Hispanic or Latino, while only 5% of agents are. The Asian population is better represented in the industry, as 4.8% of Americans are Asian, while 4% of agents are Asian. Two percent of agents were previously in the legal field, and it seems safe to assume that many of these agents are lawyers. Fifty-nine % of real estate agents are self-employed.

Real estate agents facilitate home ownership by providing expertise in pricing, marketing, property maintenance and financing. Especially for first-time and first generation homeowners, real estate agents provide an invaluable educational service, and initiate buyers into the responsibilities of home ownership. They save time for sellers and buyers, relieving them from having to negotiate directly with each other, navigating clients through voluminous paperwork, including financing, and ascertaining the condition of the home through a home inspection. Real estate agents therefore need a potent combination of sales, financial, construction, aesthetic, and people skills, with a knack for making consumers feel calm and assured during a nerve-wracking process. Real estate agents frequently emphasize the difficult nature of buying or selling a home and explain that their services

60 NAT’L ASS’N OF REALTORS, MEMBER PROFILE 2010 71 (2010).
62 A full 80% of first-time buyers rely on real estate agents to help them understand the home buying process, compared to 53% for repeat buyers. NAT’L ASS’N OF REALTORS, PROFILE OF HOME BUYERS AND SELLERS 2010 63 (2010).
63 Real estate and insurance agents both regularly put their pictures on their business cards and websites indicating their personableness. I am not sure when this practice started.
will help relieve the buyer or seller of that stress.\textsuperscript{64}

But the real estate agency profession itself is extremely stressful. According to one recent study, real estate agents have the tenth most stressful job in the country, making it more stressful than being a doctor or lawyer.\textsuperscript{65} Part of the reason is the uncertainty involved in not having a guaranteed paycheck, as approximately 94\% of agents are paid on commission.\textsuperscript{66} Others, like some buyer’s brokers, are paid an hourly fee or flat rate, or on how much money they save their clients.\textsuperscript{67} Additionally, agents cannot be certain when their next client will arrive, or that a proposed transaction will close. As stated earlier, most clients come through a referral.\textsuperscript{68} Agents may work for months with a client and not be remunerated if there is no closing. The recent housing bust has also increased pressure on agents. The tension the agent suffers, combined with the tension the client suffers, create a situation that could potentially be volatile.


\textsuperscript{65} America’s Most Stressful Jobs 2011, CNBC.COM, http://www.cnbc.com/id/42649998/Americas_Most_Stressful_Jobs_2011 (follow right arrow icons) (last visited Feb. 9, 2012). The nine more stressful jobs in 2011 were EMT technician, stockbroker, architect, advertising account executive, newscaster, photojournalist, senior corporate executive, public relations director, and commercial airline pilot. \textit{Id.}

\textsuperscript{66} See id. (explaining real estate agents’ incomes are commission-based); Real Estate Compensation in 2011, INMAN.COM, http://www.inman.com/reports/compensation2011/charts/q16-chart.htm (last visited Feb. 9, 2012) (listing a percentage-based commission as the fee structure for 94.3\% of agents).


\textsuperscript{68} See supra note 44 and accompanying text.
Also, there is an inherent conflict of interest between the agent’s compensation based on a percentage of the sales price of the home and a high volume of closings, and consumer interests. Buyers want a lower sales price, and even sellers’ interests may not always align with the agent’s compensation scheme. For example, a study of home sales in Chicago indicated that when agents sell their own homes they sell for 3.7% higher than when they sell other people’s homes.\(^69\) Increasing commissions also increases sales prices.\(^70\)

The contingency fee is normally paid from the sale proceeds from the borrower’s bank to the seller.\(^71\) The commission is based on the sales price of the home and can typically range from 5-7%.\(^72\) The average commission in 2009 was 5.36%.\(^73\) Agents must work with a state-licensed brokerage, and the brokerage receives a percentage of that commission, as much as 60-70% for new agents.\(^74\) More experienced agents that generate high volumes of business may keep 75% or more of the commission,\(^75\) with some agents keeping the entire commission and simply paying the broker a desk fee.\(^76\) Therefore there is a huge economic incentive to work with higher-priced homes, and to streamline services for lower-priced homes.

The “listing agent” is the seller’s agent and places the house on the market for the seller. The listing agent may hold open houses and otherwise advertise the home. One of the prime duties of the listing agent is to select an appropriate list price. The right price should lead to a profit and quick


\(^70\) Id.


\(^76\) Elizabeth Weintraub, *Who Pays the Real Estate Commission?*, ABOUT.COM, [http://homebuying.about.com/od/realestateagents/a/Whopaysagents.htm](http://homebuying.about.com/od/realestateagents/a/Whopaysagents.htm) (last visited Feb. 9, 2012). “Desk fees vary but are generally a flat fee, an agreed upon rate for operating either in the broker's office or under the broker's license or both.” *Id.*
The double duty of loyalty

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sale for the seller; the wrong price could lead to the agony of a long wait. If the seller has already purchased another home, the seller could be saddled with two mortgages and double expenses during this tortuous wait. The more listings an agent has, the higher the likelihood of earning a commission.\textsuperscript{77}

The standard listing agreements that agents have with sellers are the (1) open listing, (2) exclusive agency, and (3) exclusive right to sell agreement. Depending on what sellers negotiate, listing agreements may last from thirty days, sixty days, ninety days, half a year, a year, etc., but can be renewed. Sellers can negotiate this length depending on how fast comparable homes are selling. If a seller is dissatisfied with an agent’s performance, the seller may switch agents after the agreement expires.

In an open listing arrangement, the listing agent does not have an exclusive right to a commission. The agent will only receive a commission if she is the first to produce a ready, willing and able buyer. In an exclusive agency, the listing agent receives a commission regardless of which agent produces a ready, willing and able buyer. In an exclusive right to sell, the listing agent receives a commission if anyone, including the seller, produces a ready, willing and able buyer. Because of what is essentially a guarantee that the agent will receive a commission if the property sells during the listing agreement period, regardless of who procures the buyer, listing agents prefer the last option. The majority of listing agreements are exclusive right to sell agreements,\textsuperscript{78} which may constitute as much as 99% of all residential agreements today.\textsuperscript{79}

One study has shown that exclusive agency, as opposed to the exclusive right to sell arrangement, yields lower sales prices for moderately priced homes.\textsuperscript{80}

In contrast to a “listing agent”, the “selling agent” shows the

\textsuperscript{77} Ashley N. Young, \textit{The Real Estate Agent’s Role in the Housing Crisis: A Proposal for Ethical Reform}, 24 Geo. J. Legal Ethics 973, 977 (2011).
\textsuperscript{80} Royce de R. Barondes & V. Carlos Slawson, Jr., Examining Compliance with Fiduciary Duties: A Study of Real Estate Agents, 84 OR. L. REV. 681, 700 (2005).
property to potential buyers. The “selling agent” is also known as a “cooperating broker”. A savvy selling agent screens buyers to make sure they are serious. Therefore selling agents must solicit buyers’ personal information, including their motivation for buying, financial qualifications, timetable and idiosyncratic tastes.\textsuperscript{81} It is natural for buyers to place trust and confidence in selling agents for this reason.

How do listing and selling agents find each other and make a match? Traditionally, the real estate market has been an interdependent network of listing and cooperating brokers.\textsuperscript{82}

In a multiple listing, the listing agent lists the property with the local board of realtors’ multiple listing service (MLS). The multiple listing service’s appraisal committee determines whether or not the listing price is reasonable.\textsuperscript{83} When a selling/cooperating agent produces a buyer whose offer is accepted, the listing agent usually splits the commission with the selling/cooperating agent. Brokers also must notify the MLS if the property sold, and for what price.\textsuperscript{84}

Therefore, there is not only a huge incentive for agents to achieve a higher selling price regardless if they represent buyers or sellers, but also for agents to be dual agents to avoid splitting a fee.

Real estate agents first appeared in the US in the 19\textsuperscript{th} century.\textsuperscript{85} In the early 1900’s multiple listing systems began to be used, as well as written agreements for exclusive seller agency relationships.\textsuperscript{86} The National Association of Realtors (NAR) was founded in 1908.\textsuperscript{87} Its Code of Ethics

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\textsuperscript{84} Id.
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was based on the Golden Rule. It also used agency in its Code to foster professionalism, as opposed to the model of a “finder, middleman or independent contractor.”

Multiple listing services pool information, thereby creating better matches between sellers and buyers. There is no equivalent service for commercial brokerage. Commission rates for commercial property are also lower.

The 1920’s also saw the beginning of state licensing of real estate agents. There are two types of licensees: sales agents and brokers. As mentioned earlier, sales agents must work for a broker. The education and examination requirements are more rigorous for brokers.

Today, in order to receive a license, a real estate agent must take between thirty to ninety hours of coursework. A typical exam will be closed-book, contain 150 multiple choice questions, and take approximately three hours to complete. Some states have reciprocal agreements and in

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88 Id.
90 Id. at 36.
91 Id. at 38.
92 Id. at 38 n.26. They range from 2.5 to 4%. Id.
94 Compare Real Estate Salesperson License, CALIFORNIA DEPARTMENT OF REAL ESTATE, http://www.dre.ca.gov/exm_sales.html (last visited Feb. 9, 2012) (listing California’s Real Estate Salesperson License requirements, indicating three college-level courses are required to be eligible to take the licensing exam, and having no experience requirement) with Real Estate Broker License, CALIFORNIA DEPARTMENT OF REAL ESTATE, http://www.dre.ca.gov/exm_broker.html (last visited Feb. 9, 2012) (listing California’s Real Estate Broker License requirements, indicating eight college-level courses are required before taking the exam, with an additional requirement that one have two years of full-time licensed salesperson experience).
97 How to Get a Real Estate License in Different States, REAL ESTATE LICENSE DIRECT, http://realestatelicensedirect.com/how-to-get-a-real-estate-license-in-different-states/ (last visited Feb. 9, 2012). Typically, the requirements are that the individual must: 1) have a valid real estate license; 2) complete the reciprocal license application; and 3) pay
some states attorneys may be agents without an exam.\textsuperscript{98}

All real estate agents have a high school degree, and about 90% have at least some college education.\textsuperscript{99} Twenty-nine percent have a bachelor’s degree, and an additional 11% have a graduate degree.\textsuperscript{100} The median income for salaried real estate agents in May 2008 was $40,150.\textsuperscript{101} The middle 50% of agents had an income of between $27,390 and $34,820 per year.\textsuperscript{102} The range of incomes for agents varied greatly, with the bottom 10% earning less than $21,120 and the top 10% earning more than $101,860.\textsuperscript{103}

In terms of upward mobility, real estate sales agents certainly have room to grow. Sales agents generally have lower salaries than other titles.\textsuperscript{104} They can become associate brokers, brokers, managers, or appraisers, all earning significantly more than sales agents, with some roles at almost three times the income of sales agents.\textsuperscript{105} Additionally, real estate agents generally make more money the longer they are in the profession. Those in the profession between 3 and 5 years make on average $25,400, while those having 16 or more years’ experience make on average $52,300.\textsuperscript{106} This upward mobility appears to be attractive to current agents; in 2010, 74% of agents were “very certain” that they would remain in the profession during the next two years, while an additional 18% were somewhat certain.\textsuperscript{107}

One major attraction for this potentially lucrative career is the flexibility of the job. Home buying follows seasonal patterns, with home buying activity rising during spring, peaking in the summer, and declining.
in the fall and winter.\textsuperscript{108} Also, many consumers can only look at homes during evenings and weekends. The average agent works 40 hours a week.\textsuperscript{109} While the median number of hours worked per week is 40, 11\% of agents work less than 20 hours per week, and an additional 30\% work between 20 and 39 hours.\textsuperscript{110} Many agents working less than 40 hours per week are still able to generate significant income.\textsuperscript{111} Seventeen percent of agents hire a personal assistant to perform various tasks for them as well.\textsuperscript{112} Another element of flexibility in the profession is the ability to perform significant work from home, as 71\% of agents maintain a home office.\textsuperscript{113} This may explain why most agents are women, as they may desire flexibility to balance work with child-rearing, taking care of elderly parents and other activities.

As more and more information about property becomes readily available on the internet to the general public, e.g., multiple listing services, appraisals, deeds, etc., real estate agents have had to adjust some of their practices. Nevertheless a savvy real estate agent can still save a consumer much time and hopefully ease, not increase the stress of home sales. Eighty-eight percent of recent home buyers used the internet to search for homes,\textsuperscript{114} and of these internet users, 89\% still used an agent.\textsuperscript{115}

Therefore, the daunting and stressful task of buying a home makes real estate agents welcome advisors. The age, gender, and race of real estate agents tends to match that of home buyers; however, real estate agents are slightly older and mostly female.\textsuperscript{116} Perhaps consumers feel most
comfortable seeking advice from someone similarly situated. Being a real estate agent represents a flexible and potentially lucrative career. It does not require a college degree but can yield a large income; however, this income is usually based on a contingency basis, making the profession one of the most stressful in the US. The vulnerability of the average consumer and the potential financial rewards of a dual agency for the dual agent require a clear understanding of fiduciary duties and guidelines for the real estate agent to follow. The importance of a real estate agent’s fiduciary duties becomes even more evident when one considers that what people most look for in a real estate agent is honesty and trustworthiness—an—characteristics that lie at the heart of an agent’s fiduciary duties.

THE HISTORIC SELLER SUBAGENCY MODEL

“The basic problem is that our agents say one thing and do something else . . . . They are telling buyers, ‘we’re really representing the seller, but we’ll take care of you, too.’”

The law of agency has its roots in equity and the common law. An agency is a fiduciary relation formed by consent between a principal and agent whereby the agent agrees to act on behalf of and subject to the principal. The agent is a fiduciary of the principal who subordinates her interests to that of the principal.

As mentioned above, the NAR formally adopted agency in its Code of Ethics in the early 1900’s to foster professionalism, as opposed to the model of a “finder, middleman or independent contractor.” An independent contractor can be an agent and thus a fiduciary. However, an independent contractor who is not an agent and therefore not a fiduciary, is

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old married, white woman); supra notes 11, 14, 15 (explaining the average home buyer is white and either female or part of a couple, and that ages 25-34 is the largest segment of home buyers).

See supra note 45 and accompanying text (explaining that when looking for a real estate agent, the factor buyers consider most important is that the agent be honest and trustworthy).


RESTATEMENT (SECOND) AGENCY § 1 (1958); RESTATEMENT (THIRD) AGENCY § 1.01 (2006).

RESTATEMENT (SECOND) AGENCY § 13 (1958); RESTATEMENT (THIRD) AGENCY § 1.01 (2006).

merely a person who agrees to perform services for another and does not stand in a position of trust or subordination to the other.

Until the 1990’s listing agents, who were fiduciaries for the seller, required selling agents who worked with buyers, to be subagents, and therefore also fiduciaries of the seller. They did this by only agreeing to split their commission if selling agents agreed to be their subagents. Moreover, sellers unknowingly agreed to this arrangement by the terms of form MLS listing agreements which authorized listing agents to appoint subagents to find a buyer.

As a subagent, the selling agent owed fiduciary duties to the seller. Also the seller was liable to the buyer for actions of the subagent. Therefore, the buyer had no express agent representing him/her. This situation led to much confusion. In a famous survey conducted in 1983 by the Federal Trade Commission investigating the broker industry, 72% of buyers erroneously thought that the selling agent represented them and not the seller. Worse yet, 82% percent of home sellers thought their selling agent actually represented the buyer. Some courts also held agents liable to buyers.

Also selling agents acted as if they were buyer’s agents. They often did not reveal the highest price a buyer would pay to the listing agent, although they had a fiduciary duty to, and did reveal the seller’s lowest acceptable price to buyers, although this was confidential. A study has shown that selling agents promoted the interests of buyers even though they had agreed to be subagents of sellers.

Under pressure from consumer groups, in 1992 the National

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123 Id. at 73.
125 Id. at 67.
128 Id. at 717.
Association of Realtors (“NAR”) finally agreed not to require subagency as a condition of being listed in a multiple listing service. This opened the door for the widespread use of buyer’s brokers, which was already common in commercial real estate sales. The practice of buyer’s brokers in residential sales had begun on the West Coast a few years before then. The previous required offer of subagency became an offer of “cooperation and compensation.”

The NAR’s policy change was based on a 1992 report that found that most real estate agents did not understand common law agency rules. This may explain why as mentioned earlier, one Chicago study showed that real estate agents who sell their own houses reach a 3.7% higher sales price than when they sell their customers’ homes. In the wake of the class action Edina Realty lawsuits (which will be described further below) in which dual agents did not adequately disclose their status, in 1993 the NAR recommended that state legislatures adopt “statutory agency” to supersede the common law.

Since then, state statutes run the spectrum of delineating traditional seller agency/buyer subagency to buyer agency to non-agency relations for brokers, agents, sellers and buyers. In some jurisdictions, “transaction agents” serve neither the seller or buyer, but the transaction. Some states limit the fiduciary duties of dual agents. This new array of options is just as, if not more, befuddling for consumers and agents.

Unfortunately, today’s ongoing disputes about dual agency show that instead of statutory agency, training in fiduciary duties should be

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135 For an excellent survey of state legislation on agency and non-agency relationships, see generally Ann Morales Olazabal, Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses, 40 HARV. J. ON LEGIS. 65 (2003).
promoted instead. This is a straightforward and inexpensive fix to the original problem, the failure of agents to understand what a fiduciary is. Real estate agents agree. In the 2011 Legal Scan, “[n]early 45% believe there is a significant need for training on dual agency.”

TYPES OF DUAL AGENCY

“We feel that it’s a difficult thing to do to represent both parties. It’s confusing not only for the general public, but it’s confusing for Realtors as well.”

With new statutory regimes since the 1990s acknowledging that selling agents no longer have to be subagents of listing agents, many buyers now opt to use buyer’s agents. This has led to more efficiency in the real estate market, including lower home prices and shorter times for sales. In a survey of home sales in Atlanta after the Georgia legislature required disclosure of an agent’s status, prices dropped and homes sold faster presumably because buyers had more information about comparable homes and buyers’ agents were better able to match buyers with homes that they liked.

In a survey of homes in Hawaii, the frequency of dual agency dropped from 43.8% to 28.2% after legislation requiring disclosure was passed.

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139 US Sprint survey reported that relocating employees who used buyer’s agents paid 91% of list price, as opposed to those who paid 96.5% of list price. Ronald Benton Brown et al., Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure, 29 CREIGHTON L. REV. 25, 44 (1995).
140 Christopher Curran & Joel Schrag, Does it Matter Whom an Agent Serves? Evidence from Recent Changes in Real Estate Law, 43 J. LAW & ECON. 265, 282 (2000) (explaining the introduction of buyer’s agents in Georgia reduced home prices, at least for relatively expensive homes, as well as decreased the average time needed to sell a home).
141 Christopher Curran & Joel Schrag, Does it Matter Whom an Agent Serves? Evidence from Recent Changes in Real Estate Law, 43 J. LAW & ECON. 265, 265-68 (2000).
Interestingly, dual agency sales prices were lower than single agency prices before (8.0%) and after the legislation, but only slightly lower after the legislation (1.4%).\footnote{J’Noel Gardiner et al., \textit{The Impact of Dual Agency}, 35 J. REAL ESTATE FIN. & ECON. 39, 53 (2007).} Dual agency also decreased the time on market before (8.5%) and after (8.1%) the Hawaii legislation.\footnote{Id. at 54.}

However, despite showings that post-legislation dual agency has declined, there remain inadvertent incentives for dual agency. This is because the dual agency disclosure statement that jurisdictions require not only identifies which principal agents serve, but is a handy consent form for sellers and buyers to agree to a dual agency. Therefore, listing agents still not only actively solicit buyers to engage them as dual agents but quickly receive their written consent. Also, buyer’s agents can still serve as agents for sellers.

There are three main types of dual agency. The first is an express dual agency with one brokerage, one licensed agent and two principals, the seller and buyer. The agent does not split his or her commission with another agent, but may split it with his or her brokerage.

The second is an express dual agency with one brokerage, two licensed agents and two principals, the seller and buyer. This is sometimes called a “designated agency”, or an “intra-company” or “in-house” sale\footnote{Ann Morales Olazabal, \textit{Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses}, 40 HARV. J. ON LEGIS. 65, 81 (2003).} and may also include express written consent. Two agents split their commission, and also share a percentage with their brokerage.

The third is an inadvertent dual agency. A licensed agent thinks he or she represents only one principal, but has inadvertently consented to representing the other principal as well. This may be even for a limited purpose.

In the first type, the chief incentive for a real estate agent to be a dual agent is to avoid splitting his or her fee with another agent. The chief incentive to use a dual agent is to ostensibly save time and money for each principal. Buyers are especially allured to a dual agent because the seller’s
listing agent will often promise a “better deal” if there is no second agent because of the listing agent’s access to the seller. With a listing agent’s personable and persuasive skills, buyers are readily enticed into signing a consent form.

In the second type, because many brokerage firms dominate their marketplace with hundreds of listings, consumers cannot avoid using the services of licensees within the same brokerage. A seller or buyer may severely limit their choices of potential buyers or homes if they refuse dual agency in this scenario. In this situation each agent is supposed to be the fiduciary of a different principal and the brokerage erects a “Chinese wall” to protect confidential information between the two agents. Studies have shown that buyers pay higher prices in intra-company sales apparently because agents who work for the same brokerage are less aggressive in negotiating for the buyer. Also, intra-company sales yield the greatest net profits for the brokerage. A listing broker may earn 20-40% of the commission owed its firm. Selling brokers may earn 50-60%; some brokerages pay higher commissions to their agents for in-house sales.

Although the NAR collects and publishes extensive data regarding real estate transactions, including statistics regarding what proportion of real estate transactions involve real estate agents, it fails to publish statistics regarding what proportion of transactions involve dual agents. Under one interpretation of recent NAR data, perhaps as many as 29% of residential transactions today involve the use of a dual agent. However, while it is


150 Id.

difficult to estimate exactly what percentage of real estate transactions involve dual agency, it is clear that dual agency plays a significant role in today’s real estate market. In some firms, dual agency transactions can comprise 50% or more of the firm’s transactions. According to one poll of real estate companies and agents, 86.7% of respondents at least sometimes engage in dual agencies, and many of these firms actually encourage dual agency transactions. But even as popular as dual agency is, some real estate agents decline to engage in dual agency, opting instead to avoid the troubles dual agency brings.

In the haste of entering into a lucrative fee arrangement for the dual agent, and the allure of accessibility and time savings for consumers, fiduciary duties, including the duty of loyalty are misunderstood and neglected.

THE ORIGINS OF AGENCY AND THE DUTY OF LOYALTY

Fiduciary duties have roots in Roman and canon law. The heart of a fiduciary is selflessness. It is a relationship of confidence and trust and emphatically not an arms-length relationship. Modernly the fiduciary has been described as a “person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity.”

The NAR rightly promoted the use of agency in the early 1900’s because agency provides the highest standards of professionalism.


153 See id. (providing anonymous responses to a survey question on dual agency, with one response indicating that dual agency is “actually encouraged”).

154 See Jay Thompson, On Dual Agency, THE PHOENIX REAL ESTATE GUY (July 24, 2009), http://www.phoenixrealestateguy.com/on-dual-agency/ (pushing back against the trend toward engaging in dual agency, arguing that it is against clients’ best interests in all cases); http://www.inman.com/reports/compensation2011/charts/q19-chart.htm (providing anonymous responses to a survey question on dual agency, with some responses indicating that dual agency is disfavored or disallowed).

155 Portions of this section are based in part on Mary Szto, Limited Liability Company Morality: Fiduciary Duties in Historical Context, 23 QUINNIPIAC L. REV. 61 (2004). This article also provides a lengthier discussion of the origins of agency.

Fiduciary duties in Roman law began in inheritance law in contemplation of mortality. They mediated between the present world and the world to come. Medieval clergy adapted Roman duties and crafted *utilitas ecclesiae*, which mediated between temporal property and spiritual ownership. *Utilitas ecclesiae* led to the use and the trust. These birthed agency, partnership, corporate and LLC law. (See diagram below).

![The Roots of Real Estate Fiduciary Duties](image)

**Figure 1 The Roots of Real Estate Fiduciary Duties**

Their origin has also been stated to be immutable truth and justice.157 “Ad opus” was used in the 1200’s to describe a person entrusted with money for the use of another. 158

A. Early Cases

Cases and commentators in the 1800’s established an agent’s “trust-like” and equitable fiduciary duties. Agents must steer clear of conflicts of interest and act with skill, diligence and zeal.

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Several early cases involved property sales. In an 1820 British case an agent was disqualified from purchasing the principal’s property. A surveyor was hired to measure and value the principal’s land. The surveyor’s son assisted the surveyor and also acted as auctioneer for the land. After receiving no bids, the defendant auctioneer purchased the property the next day at a low price. Twelve years later, the court set aside the purchase, noting that the auctioneer was an agent and had been in a position of confidence. The court noted: “persons who are in any way invested with a trust, or an employment to be performed by them to the advantage of their cestui que trust, or principal, are, prima facie, virtually disqualified from placing themselves in a situation incompatible with the honest discharge of their duty” and “agents, auctioneers, and other persons so situated, are not capable of purchasing, by reason of the duties which they must fulfill.”

In 1859 a New York court had a parallel ruling concerning the agent’s fidelity. The Supreme Court of New York held in Cumberland Coal and Iron Company v. Sherman that an agent employed to value property could not purchase the property himself. The court stated that to hold otherwise would be to “overturn principles of equity well settled…and …declared to be founded on immutable truth and justice, and to stand upon our great moral obligation to refrain from placing ourselves in relations which excite a conflict between self interest and integrity”.

In the 1800’s Justice Story also wrote about both the duty of care and loyalty of the agent. He wrote that the principal “bargains, in the employment [of the agent] for the exercise of the disinterested skill, diligence and zeal of the agent, for his own exclusive benefit.” Moreover, the Christian adage that “no man can faithfully serve two masters, whose interests are in conflict” was used by Justice Story to describe the duty of loyalty of the agent to his principal.

In 1898 one federal court stated that “[t]he law, on grounds of public policy, demands the utmost loyalty from agent to principal at all times,”
preventing the agent from assuming “an attitude in conflict with the very best interests of his principal,” stating that the reasoning for this rule was “to shut the door against temptation” and that the rule at this point was “well settled in the English and in our American jurisprudence.”  

Also, early cases disfavored dual agency. The Pennsylvania Supreme Court, in the 1872 case of *Everhart v. Searle*, denied the agent his commission from the defendant buyer. The agent, Searle, did not disclose his dual agency to either the seller or buyer. The court stated it was irrelevant that “there was no fraud meditated and no injury done; the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it.” Also, 

We have the authority of Holy Writ for saying that ‘no man can serve two masters; for either he will hate the one and despise the other. All human experience sanctions the undoubted truth and purity of this philosophy, and it is received as a cardinal principle in every system of enlightened jurisprudence. 

In the Rhode Island Supreme Court 1876 case *Lynch v. Fallon* the dual agent brokered an even exchange of property, a hotel for a tract of land with both holding an apparent value of $125,000. The agent sued to collect a $2,500 commission after the party relinquishing the hotel (hotel owner) in the trade refused to pay it. The agent was an employee of the company that originally owned the tract of land. However, he never disclosed to his employer that he was an agent for the hotel owner. 

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166 Union Cent. L. Ins. Co. v. Berlin, 90 F. 779, 781 (6th Cir. 1898).
168 See id. at 260 (citation omitted).
169 *Id.* at 259.
170 See Lynch v. Fallon, 11 R.I. 311, 312-13 (1876). The court did not explicitly rule on whether it would allow disclosed dual agencies, but it did state:

[This case] indicates what temptations and facilities such a double agency presents for unconscionable concealments and misrepresentations, and how dangerous it would be even if it were exercised with the consent of both parties; and, certainly, without such consent, freely and fully given, the law ought not to tolerate it for a moment.

*Id.* at 313.
171 See *id.* at 311.
172 *Id.* at 311.
173 *Id.* at 312.
174 *Id.* at 311, 312.
company continually conferred with the agent during the negotiations.\textsuperscript{175} During these conversations, the agent cooperated with the company to inflate the value of the land when negotiating with the hotel owner, convincing the hotel owner to trade his $125,000 hotel for the tract of land the company had originally valued at only $50,000.\textsuperscript{176}

In denying the agent his commission from the hotel owner, the court wrote that a dual agent can easily

\ldots become, either consciously or unconsciously, a mere instrument in the hands of the more adroit and sharp-witted party in hoodwinking the other, and decoying him into a disadvantageous bargain. It indicates what temptations and facilities such as double agency presents for unconscionable concealments and misrepresentations, and how dangerous it would be even if it were exercised with the consent of both parties; and, certainly, without such consent, freely and fully given, the law ought not to tolerate it for a moment."\textsuperscript{177}

The court also explained that the dual agent is

\ldots exposed to a temptation to sacrifice the interests of one or both of his principals to secure his double commissions. As agent for the vendor, his duty is to sell at the highest price; as agent for the vendee, his duty is to buy for the lowest; and even if the parties bargain for themselves, they are entitled to the benefit of the skill, knowledge, and advice of the agent, and, at the same time, to communicate with him without the slightest fear of betrayal, so that it is hardly possible for him to be true to the one without being false to the other. The claim to charge commissions to both parties is so unreasonable that it cannot be justified by any custom or usage.\textsuperscript{178}

In 1892 the Missouri Court of Appeals emphasized the importance of disclosure and consent of both parties in a dual agency transaction in \textit{Chapman v. Currie}.\textsuperscript{179} The agent sued the defendant for a transaction he brokered whereby the defendant transferred a farm in exchange for real

\textsuperscript{175} See \textit{id.} at 312-13.
\textsuperscript{176} \textit{Id.} at 312-13.
\textsuperscript{177} \textit{Id.} at 313.
\textsuperscript{178} \textit{Id.} at 312.
estate that another party owned.\textsuperscript{180} The trial court found for the agent and awarded the commission, but the verdict was reversed on appeal.\textsuperscript{181} The court took issue with the trial court’s jury instruction, which generally indicated that the agent could recover commissions against the defendant if \textit{merely the defendant} knew about the dual agency.\textsuperscript{182} In reversing the judgment for the plaintiff agent, the court stated that the jury instruction was improper since a dual agency “exercised without full knowledge and free consent of \textit{both parties} . . . is not to be tolerated.”\textsuperscript{183}

The court also stated,

The general rule is that a man cannot act as the agent or representative of both parties to a trade, and, if he puts himself in so unworthy a position, the law will not recognize any of his pretended rights growing out of it. Such contracts are held to be absolutely void as being contrary to public policy. It makes no difference that such common agent was guilty of no actual wrong. The courts refuse to countenance such an employment, not for the sake of the principals, but for the sake of the law.\textsuperscript{184}

The court also cited another case, “Contracts which are opposed to open, upright and fair dealing are opposed to public policy. A contract, by which one is placed under a direct inducement to violate the confidence reposed in him by another, is of this character.”\textsuperscript{185}

Thus early agency cases and commentary from the 1800’s detailed the agent’s equitable fiduciary duties. They required the avoidance of conflicts of interest and the skill, diligence and zeal of the agent, and they disfavored dual agency. We turn now to the Restatements of Agency.

B. Restatements of Agency

For the most part, agency principles from the 1800’s were summarized in the Restatements of Agency.

\textsuperscript{180} See id. at 41.
\textsuperscript{181} Id. at 41-42, 46.
\textsuperscript{182} See id. at
\textsuperscript{183} Id. at 44 (emphasis added).
\textsuperscript{184} Id. at 43.
\textsuperscript{185} Id. at 44 (citing Rice v. Wood, 113 Mass. 133 (1873)).
The Restatement of Agency was first published in 1933 and then restated in 1958 and 2006. According to the introduction of the Restatement of Agency (Second), “agency is both a consensual and a fiduciary relation...an agent is not merely a promisor or a promisee but is also a fiduciary.”

Also, agency is the “fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”

The Restatement (Third) Agency uses similar language and also states “Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.”

The general principle for the agent’s duty of loyalty is that unless otherwise agreed, an agent must act “solely for the benefit of the principal” in all matters connected with his agency. The Restatement (Third) states under the heading, “General Fiduciary Principle”, “An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”

This selflessness is defined by the Restatement (Third) as “…subordinat[ing] the agent's interests to those of the principal and plac[ing] the principal's interests first as to matters connected with the agency relationship” and “…disallow[ing] the pursuit of self-interest as a motivating force in actions the agent determines to take on the principal's behalf.” Also, a “…principal may choose to structure the basis on which an agent will be compensated so that the agent's interests are concurrent with those of the principal”.

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187 Restatement (Second) of Agency Introductory Note (1958).
188 Restatement (Second) of Agency §1(1) (1958).
189 Restatement (Third) of Agency §1.01 (2006).
190 Restatement (Third) of Agency §1.02 (2006).
191 Restatement (Second) of Agency §387 (1958). In one classic case, an agent was supposed to buy land for his principal but acquired it for himself. The land was held in constructive trust for his principal. Krzysko v. Gaudynski, 242 N.W. 186 (Wis. 1932).
192 Restatement (Third) of Agency §8.01 (2006).
194 Restatement (Third) of Agency §8.01 cmt. b (2006).
The general duty of loyalty includes more specific duties such as the duty to account for profits arising out of employment, the duty not to compete, the duty not to act for someone with a conflicting interest, and the duty not to disclose confidential information.

On the other hand, unless otherwise agreed, an agent has a fiduciary duty to give information to his principal “relevant to affairs entrusted to him”, and “which can be communicated without violating a superior duty to a third person.” The Restatement (Third) of Agency uses the language “facts material to the agent’s duties to the principal”. Also, “An agent’s failure to provide material information to the principal may facilitate the agent's breach of the agent's duties of loyalty to the principal.” Examples of a “superior duty” include to reveal the commission of a crime to law enforcement officers.

The Restatement (Third) of Agency states that a principal may consent to a breach of duty of loyalty if the agent has obtained that consent in good faith, with disclosure of all material facts, and otherwise has dealt

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196 RESTATEMENT (SECOND) OF AGENCY § 388 (1958).
197 RESTATEMENT (SECOND) OF AGENCY § 393 (1958); RESTATEMENT (THIRD) OF AGENCY § 8.04 (2006).
198 RESTATEMENT (SECOND) OF AGENCY § 394 (1958); RESTATEMENT (THIRD) OF AGENCY § 8.03 (2006).
199 RESTATEMENT (SECOND) OF AGENCY § 395 (1958); RESTATEMENT (THIRD) OF AGENCY § 8.05 (2006).
200 RESTATEMENT (SECOND) OF AGENCY § 381 (1958); RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006).
203 RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c (2006).
fairly with the principal.\textsuperscript{204} Also, the Restatement (Third) of Agency specifically states that in a dual or multiple agency the agent must deal in good faith with each principal, and disclose all facts that would affect the principal’s judgment, including the fact of dual agency.\textsuperscript{205} According to the Restatement (\textsuperscript{3}\textsuperscript{rd}) §8.06 “If an agent’s duties of confidentiality to one principal prevent the agent from fulfilling the duties of disclosure that the agent owes to any other principal, the agent breaches the agent's duties by continuing to act on behalf of the principal or principals to whom the agent may not make the required disclosure.”

With respect to fulfilling the duty of loyalty in receiving consent to a dual agency,

The agent’s disclosure must include not only the fact that he is acting on behalf of the other party, but also all facts which are relevant in enabling the principal to make an intelligent determination, such as the prior relations between the agent and the other party…”.\textsuperscript{206}

After informed consent is given for a dual agency, the dual agent has a double duty of loyalty, not half a duty.

Unfortunately, in practice, dual agents disclose “whatever the broker can get away with in order to close the sale.”\textsuperscript{207} And, interestingly, in one case, the court held that a dual agent does not have a duty to disclose confidential information of one principal to the other principal.\textsuperscript{208}

\textbf{Remedies for Violating the Duty of Loyalty}

Violation of a fiduciary duty is fraud as a matter of law.\textsuperscript{209} If an agency relation is established, the agent has the burden of proving that she has acted in the utmost good faith towards her principal.\textsuperscript{210}

\begin{footnotesize}
\textsuperscript{204} Restatement (Third) of Agency § 8.06(1)(a)(i)-(iii) (2006).
\textsuperscript{205} Restatement (Third) of Agency § 8.06(2)(a)-(c) (2006).
\textsuperscript{206} Restatement (Second) of Agency § 392 cmt. b (1958).
\textsuperscript{210} Id.
\end{footnotesize}
If an agent violates the duty of loyalty, where applicable, the principal may bring an action in contract, tort, restitution, or other equitable remedy, including an injunction. The statutes of limitations and possible defenses will of course vary.

The principal need not prove harm to receive a remedy. However, provable damages in contract and/or tort will lead to a damages recovery by the principal. If a third party brings an action against the principal as a result of the agent’s breach, the principal may recover from the agent the principal’s legal expenses and damages from the suit.\textsuperscript{211} Also, as in other torts, punitive damages are available for a breach of the duty of loyalty.

Under the law of restitution and unjust enrichment, the principal may rescind a transaction between the agent and principal leading to forfeiture of his/her commission. Also the agent must disgorge any illicit profits and hand them over to the principal. The courts find a “constructive trust” in favor of the principal.\textsuperscript{212} Disgorgement and rescission are available without proof of damage.

Under the remedy of forfeiture, an agent must also forfeit his commission for a breach of his duty of loyalty.

In an unauthorized dual agency, a principal without knowledge of the dual agency may void the contract.\textsuperscript{213}

A principal may also discharge an agent for breach of the duty of loyalty\textsuperscript{214} because this is a material breach of a contract with the agent.

A real estate agent may also lose her license for an unauthorized dual agency.

\textsuperscript{211} WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 71 (3d ed. 2001).
\textsuperscript{212} Id.
\textsuperscript{213} Olson v. Pettibone, 210 N.W. 149, 150-51 (Minn. 1926) (allowing the seller to rescind the sales contract when an undisclosed dual agency resulted in the seller not knowing the true identity of the buyer, a material fact to the seller).
\textsuperscript{214} See, e.g., Dawson v. Clark, 358 P.2d. 591, 592 (Colo. 1961) (explaining an agent’s discharge was justifiable because of the agent’s wrongful conduct).
CAUTIONARY LESSONS FROM RECENT DUAL AGENCY CASES

“The real estate industry has so far been protective of the dual-dip transaction, because brokers and agents can work half as hard to get results—one transaction closed; two commission sides collected.”215

No matter what type of dual agency is involved, an agent owes a selfless duty of loyalty to each principal. A dual real estate agent owes “all fiduciary and other agency duties to both principals.”216 This is a double duty of loyalty.

The following cases illustrate problems that can arise during dual agency transactions. Some involve commercial transactions but still illustrate troubles that can arise in residential transactions.

There are four scenarios. First, an agent may inadvertently become a dual agent. Second, the agent may completely fail to disclose her status as a dual agent to the client. Third, the agent may provide some form of disclosure of the dual agency, but the disclosure is inadequate, violating the double duty of loyalty. Finally, the agent may provide satisfactory dual agency disclosures to each client but still breach her double duty of loyalty in another fashion.

A. Inadvertent Dual Agency

The 1993 Indiana case Runde v. Vigus involved buyers Rundes who enlisted the services of a home inspector so the seller could repair any defects before the Rundes purchased their home.217 The broker involved in the transaction initially represented only the seller.218 But the broker later agreed to communicate any defects found by the inspector to the seller.219 The broker prepared an inspection response which was signed with the Rundes’ names “by R.L. Neuman, broker for Vigus Realty, as per phone instructions from purchasers.” The response failed to list all the defects that the Rundes noted. The Rundes did not sign the form nor any other form. The Rundes purchased the property and ended up paying for correcting the

218 Id. at 573, 575.
219 Id. at 575.
defects omitted from the Response.\textsuperscript{220}

In reversing a judgment to dismiss the Rundes’ complaint, the court ruled that the broker’s agreement to communicate the defects to the seller made the broker a gratuitous agent of the buyer, at least for purposes of communicating the defects to the seller.\textsuperscript{221} By not including all defects noted by the Rundes, the broker, even as a gratuitous agent, violated his duty of care to the Rundes. This case illustrates that a seller’s agent can inadvertently become the buyer’s agent as well, not necessarily for representing the buyer in the entire transaction, but for a limited purpose as well.\textsuperscript{222}

\textit{No Disclosure of Dual Agency}

The 2010 Mississippi case \textit{Whalen v. Bistes} shows how an unlicensed buyer’s broker’s attempt to become the seller’s agent failed not only because of the lack of a license but because of nondisclosure of the dual agency.\textsuperscript{223}

Michael Whalen represented a family partnership in buying real estate. He approached the owner of a parcel of land, Gregory Bistes, Jr. Bistes agreed to sell the property and signed a contract of sale that required the buyer to accept the offer and deposit a promissory note with the seller’s agent by a certain date.\textsuperscript{224} Bistes also agreed in the contract to pay Whalen a six-percent commission upon closing.\textsuperscript{225} Although required by Mississippi law, Whalen never disclosed his dual agency to Bistes nor ensured Bistes and the family partnership’s explicit acknowledgment to the dual agency on a form provided by the Mississippi Real Estate Commission.\textsuperscript{226}

The family partnership deposited the note with Whalen the day before the deadline, but Whalen did not tell Bistes until over a week after the deadline.\textsuperscript{227} When Whalen finally did tell Bistes, Bistes stated that the contract was void and unenforceable because he had not received an

\begin{itemize}
\item \textsuperscript{220} Id. at 573.
\item \textsuperscript{221} Id. at 575-76.
\item \textsuperscript{222} Id. at 576.
\item \textsuperscript{223} \textit{Whalen v. Bistes}, 45 So. 3d 290, 291 (Miss. Ct. App. 2010).
\item \textsuperscript{224} Id. at 292.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id. at 293.
\item \textsuperscript{227} Id. at 292.
\end{itemize}
acceptance nor promissory note by the deadline. After Whalen told the family partnership, they nevertheless instructed Whalen to proceed with the closing and to record the contract of sale, which he did. Bistes did not respond to a notice of the closing nor did he attend it. Subsequently the partnership assigned their rights to Whalen, which Whalen claimed entitled him to an action of specific performance.

Whalen filed a lis pendens claim. Whalen argued that his acceptance of the offer should be imputed to Bistes, since Whalen was Bistes’ agent in the transaction as well. Under the traditional rules of agency, “knowledge and information acquired by an agent transacting the principal’s business is imputed to the principal, even if not communicated by the agent to the principal.”

The appellate court rejected this argument, affirming the lower court’s decision that because Whalen did not disclose his dual agency, delivery was ineffective and the contract was voidable at Bistes’ election. The court correctly emphasized a dual agent’s double duty of loyalty, stating, “the agent must act ‘with a heightened sense of duty and conduct to assure that he serves both masters’ interests fully. And an agent may never act to the detriment of his principal.’” An undisclosed dual agency is contrary to public policy. The right to void the contract is regardless of whether the principal suffers an actual injury.

B. Inadequate Disclosure of Dual Agency

In the famous 1993 Minnesota class action suit that sent shockwaves throughout the nation’s real estate industry, defendant Edina Realty was found to have given around 40,000 sellers inadequate disclosure for dual

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228 Id.
229 Id.
230 Id.
231 Id.
232 Id.
233 Id. at 293.
234 Id.
235 Id. at 291. Furthermore, the court was dismayed at the fact that Whalen was not a licensed real-estate broker when he began the transaction, in violation of Mississippi law. Id. at 294-95.
236 Id. at 293.
237 Id.
238 Id.
agency transactions. This was even though Edina used a disclosure statement that may have complied with Minnesota’s then statute. Ironically, in 1990 Consumer Reports had also ranked the company No.1 in customer satisfaction.

The state court suit, and its almost identical twin suit in federal court, focused on intra-company dual agency, in which Edina Realty represented both buyers and sellers. The state court action involved sellers who hired the company between 1986 and 1993 and a potential $210 million in commissions that Edina Realty would have to forfeit. The federal suit involved buyers and sellers, and an additional potential liability of $630 million.

At the time, Edina Realty was one of the country’s biggest brokers, with plans of breaking off from its parent company to become one of the country’s first independent, public real estate firms. Edina had 2000 agents in 59 offices in Minnesota and Wisconsin. Edina Realty’s president, Ronald Peltier, stated the suit was a “serious distraction” in the midst of the company’s vast expansion plans and refused to go public while the litigation was still pending. The company was also concerned

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241 Id.


247 Aron Kahn, Edina Realty Settlement Plan Sparks Lawyers’ Fight: Lawsuit Deal Called ‘Buyout’ of Attorneys, ST. PAUL PIONEER PRESS, Nov. 19, 1993, at 1A. ---editors:
2-28-12  DUAL REAL ESTATE AGENTS AND THE DOUBLE DUTY OF LOYALTY

about the “potentially catastrophic financial implications” of the lawsuits. The Minnesota Association of Realtors’ annual convention that year saw agency issues suddenly garner more attention than any other issue.

In the state court action, Dismuke v. Edina Realty, the plaintiffs were sellers who had entered into an exclusive listing arrangement with Edina Realty. The only disclosure of dual agency that Edina Realty gave the plaintiffs was language in their standard sales contract which stated,

AGENCY DISCLOSURE: ______

(selling agent)

STIPULATES HE OR SHE IS REPRESENTING THE ______ IN THIS TRANSACTION. THE LISTING AGENT OR BROKER STIPULATES HE OR SHE IS REPRESENTING THE SELLER IN THIS TRANSACTION. BUYER & SELLER INITIAL: Buyer(s) _______ Seller(s) _______

Edina Realty agreed that it relied solely on this cursory disclosure to explain its dual agency in the transactions. Plaintiffs alleged that Edina Realty had breached its duty of loyalty by failing to “fully and adequately disclose the consequences . . . of its dual agency status.” Although the court agreed that Edina Realty probably had satisfied Minnesota’s statutory disclosure requirement, it held that the company did not satisfy the common law disclosure requirement, which requires that a dual agent disclose all facts concerning the dual agency. The plaintiffs did not have to prove fraud or actual injury, stating that Edina Realty’s breach of fiduciary duty was sufficient for the plaintiffs to win.

Peltier stated in an affidavit for the state claim that agents were available at 1993 WL 515827


251 Id.

252 Id.

253 Id. at *3.

254 Id.
instructed to “maintain their adversarial posture during in-house transactions.”\textsuperscript{255} He also stated that the company set up “Chinese walls,”\textsuperscript{256} so confidential information would not be shared; agents were instructed “not to share client confidences within Edina Realty, even with their sales manager, unless absolutely necessary, and sales managers were instructed not to share any confidences they might receive.”\textsuperscript{257} However, these acts did not undo the breach of not disclosing all facts of the dual agency prior to receiving the sellers’ consent.

The court awarded summary judgment to the plaintiffs who were entitled to the return of the commissions paid to Edina Realty. However, the parties agreed to a settlement involving stock options and coupons for discounts on future services, valued at a total of $5.9 million.\textsuperscript{258}

In the second case, \textit{Bokusky v. Edina Realty, Inc.}, the plaintiffs were sellers and buyers. The U.S. District Court allowed the suit to proceed as a class action suit and denied Edina Realty’s motion to dismiss the case.\textsuperscript{259} This case was settled for a total of $14 million.\textsuperscript{260} Following these two court rulings, Edina Realty agreed to give a discount on future services, to give the plaintiffs stock options for the new public Edina Realty, and to pay the plaintiffs’ legal expenses with any excess going to an undisclosed charity.\textsuperscript{261}


\textsuperscript{256} The phrase “Chinese walls” may be considered offensive, and some are pushing for the abandonment of its use. The ABA itself prefers use of the word “screen,” as evidenced by its use in the Model Rules of Professional Responsibility. \textit{See MODEL RULES OF PROF’L CONDUCT R. 1.0(k) (1983) (defining “screened”).} Additionally, one court noted:

\begin{quote}
The term has an ethnic focus which many would consider a subtle form of linguistic discrimination. Certainly, the continued use of the term would be insensitive to the ethnic identity of the many persons of Chinese descent. Modern courts should not perpetuate the biases which creep into language from outmoded, and more primitive, ways of thought.
\end{quote}


\textsuperscript{257} \textit{Id.}

\textsuperscript{258} Royce de R. Barondes & V. Carlos Slawson, Jr., \textit{Examining Compliance with Fiduciary Duties: A Study of Real Estate Agents}, 84 OR. L. REV. 681, 695 n.55 (2005).


\textsuperscript{261} Aron Kahn, \textit{Edina Realty Settlement Plan Sparks Lawyers’ Fight: Lawsuit Deal Called ‘Buyout’ of Attorneys}, ST. PAUL PIONEER PRESS, Nov. 19, 1993, at 1A. ---editors:
In another case publicized among realtors, an Alaska court decided in 2002 in Columbus v. Mehner, that in addition to compensatory damages, punitive damages were warranted for an agent’s outrageous breach of her duty of loyalty, including inadequate disclosure of her dual agency.\textsuperscript{262} The parties settled for $200,000 in punitive damages. The defendant, Bonnie Mehner, had been an agent for twenty seven years.\textsuperscript{263} In one newspaper account, she had won sales awards and earned over $600,000 a year;\textsuperscript{264} and thirty to 60\% of her earnings came from dual agency sales.\textsuperscript{265} Alaska’s statute required the consent of both principals before an agent could represent both. She testified that complying with this was “impractical” and contrary to industry practice.\textsuperscript{266}

The buyer, Joseph Columbus, was first represented by another agent, Charlie McAlpine.\textsuperscript{267} Columbus found a property he was interested in, but since his agent was out of town, he called Mehner, the listing agent, to make an inquiry.\textsuperscript{268} When she showed Columbus the house, Columbus told her that he was represented by McAlpine and showed her McAlpine’s card.\textsuperscript{269} She replied that she could work with McAlpine.\textsuperscript{270} When Columbus indicated that this house was not ideal, Mehner offered to show him other properties.\textsuperscript{271}

With his agent still out of town, Columbus called Mehner the following day, Wednesday, July 21, and Mehner showed him other properties, including one owned by Frank Brown.\textsuperscript{272} Mehner had helped Brown purchase that home four years earlier; since then Mehner and Brown were friends and neighbors.\textsuperscript{273} Columbus liked the Brown home, but

\begin{enumerate}
\item\textsuperscript{262} Columbus v. Mehner, No. 3AN-00-9060 CI, at Conclusions of Law §§ 2, 3 (Super. Ct. Alaska 2000), copy on file with author.
\item\textsuperscript{263} Columbus, No. 3AN-00-9060, at Findings of Fact ¶ 5.
\item\textsuperscript{264} Blanche Evans, Anchorage Case Puts Cold Chill on Dual Agency, \textsc{realtytimes} (July 30, 2002), \url{http://realtytimes.com/rtpages/20020730_dualagency.htm}.
\item\textsuperscript{265} Id.
\item\textsuperscript{266} Columbus, No. 3AN-00-9060, at Findings of Fact ¶ 39.
\item\textsuperscript{267} Id. at Findings of Fact ¶ 8.
\item\textsuperscript{268} Id. at Findings of Fact ¶ 9.
\item\textsuperscript{269} Id. at Findings of Fact ¶ 11.
\item\textsuperscript{270} Id. at Findings of Fact ¶ 11.
\item\textsuperscript{271} See id. at Findings of Fact ¶ 12.
\item\textsuperscript{272} Id. at Findings of Fact ¶ 13.
\item\textsuperscript{273} Id. at Findings of Fact ¶ 42.
\end{enumerate}
Mehner did not tell him she was representing Brown, nor about her relationship with Brown. Although Mehner did not inquire further about McAlpine, she presumed that she was now Columbus’ agent. The court agreed, holding at this point that Mehner should have fully informed Columbus and Brown about dual agency and received their consent prior to such representation.

Mehner’s breach, however, went further. Instead of fulfilling her fiduciary duties to both principals, Mehner pursued her own economic gain. Unfortunately, she withheld information and persuaded Columbus not only that he had to hire her to purchase the Brown home, but that he had to offer the full listing price.

That Sunday, July 25, Mehner told Columbus he had to “act quickly” because there were two offers on the table when actually there was only one. After McAlpine’s associate Robert Holbrook presented an offer to Mehner on Monday morning on behalf of Columbus, Mehner called Columbus. According to the court record, “She was very angry, scolding and made Columbus feel like he had done something wrong in going to Holbrook. Mehner said that she expected to get both sides of the commission in the transaction”.

Columbus then asked Mehner about his offering price. Although Brown testified later that he expected to negotiate down from his listing price, and Mehner possessed appraisal, tax, and other information that indicated the listing price was inflated, Mehner told Columbus that he would need to offer a price at or near the listing price in order to purchase it. Additionally, it was not until this day that Mehner mentioned she represented the seller and had Columbus sign a dual agency agreement.

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274 Columbus, No. 3AN-00-9060, at Findings of Fact ¶ 42.

275 Id. at Findings of Fact ¶ 13.

276 See id. at Conclusions of Law § 1.

277 Id. at Findings of Fact ¶ 25, Conclusions of Law § 5.

278 Id. at Findings of Fact ¶ 25.

279 Id. at Findings of Fact ¶ 30.

280 Id. at Findings of Fact ¶ 37.

281 See id. at Findings of Fact ¶¶ 37, 40, 43-45.

282 Id. at Findings of Fact ¶¶ 23, 37.
The court stated that under these circumstances, “Columbus was not able to make the kind of informed, self-interested judgment about consenting to dual agency that the statute contemplates.” He clearly wanted this house, and was persuaded that not only did he have to act quickly, but that he had no choice but to engage Mehner. Also, at the time Mehner wrote up Columbus’ offer, she had not procured Brown’s consent to dual representation. Ultimately, Columbus did purchase the property for the full list price. The court awarded Columbus $8,760 (representing 1.5% of the purchase price) and his initial agent $17,520 (representing half of the full 6% commission).

In the 2006 New York case of Browne v. Faulkner, the agent also allegedly misused a dual agency disclosure form. According to the plaintiff seller, the agent backdated the form, which was signed two days after the closing. The seller, Browne, was represented by broker Faulkner. The seller sued the broker after the broker used a “phony buyer” (a corporation that Faulkner controlled) to purchase the property for himself, receiving a commission for the sale. The seller argued Faulkner breached his fiduciary duties to the seller, claiming that although there was a competing offer from another buyer, the broker coerced the seller into selling the property to the broker’s corporation.

The court denied Faulkner’s motion to dismiss the case. Apparently, Faulkner never disclosed his ownership interest in the corporation that bought the property, and so Browne was not aware that Faulkner was essentially representing the buyer while he was representing Browne.

In the 2007 case Jenkins v. Strauss, the District of Columbia Court

283 Id. at Conclusions of Law § 3.
284 Id. at Findings of Fact ¶ 37.
285 Id. at Findings of Fact ¶ 48.
286 See id. at Conclusion of Law § 7.
287 See id.
289 Id. at *1-3.
290 Id. at *1-3. Browne’s complaint contained nine additional causes of action, including fraud, breach of contract, and conspiracy to defraud, among others. Id. at *3.
291 Id. at *6.
292 Id. at *6-7.
of Appeals held that a dual agent inadequately disclosed his status and breached his fiduciary duties to the seller. The court wrote, “[t]he fiduciary duty owed by a real estate agent…requires the exercise of the highest fidelity toward the principal. It encompasses the obligation to inform the principal of every development affecting his interest…”.

The homeowner, William Strauss, was about 80 years old and had Alzheimer’s disease, and so he gave power of attorney to his brother, Benjamin, who was 76. The house appraised for $136,000. Benjamin hired Jenkins, a real estate agent he knew from church. He told Jenkins that because of their advanced age, they needed to do an all-cash transaction and to net at least $120,000 to cover William’s nursing home expenses. Although Jenkins found a buyer who paid $130,000 for the house, he disobeyed his instructions and only netted the brothers around $70,000 in cash. How did this happen?

Jenkins had a “cavalier attitude toward his client’s trust and financial interests”. Contrary to DC law, he never gave Benjamin a written listing agreement nor received written consent for his dual agency. Jenkins also represented the buyer Ms. Brooks in selling her home. Jenkins testified, “[Benjamin] knew that I was representing Ms. Brooks as well as representing him. He should have known that I was in a dual capacity.” The court wrote, “The phrase ‘should have known’ is in itself an implicit acknowledgment that Jenkins had failed to disclose fully the dual agency relationship. Providing further corroboration is Jenkins’ own testimony that he ‘usually doesn’t go into a lot of details about dual relationships’. The court opined “[w]here a fiduciary acts in his own interest in dereliction of his beneficiaries’ interest, more than some ‘by the way’ notice [of dual agency] is required” and that “by the way” notice is all Jenkins provided to Benjamin.

The court stated that further breaches “vividly illustrate[d] the

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294 Jenkins, 931 A.2d at 1033 (quoting Vicki Bagley Realty, Inc. v. Laufer, 482 A. 2d 359, 364-65 (D.C. 1984)).
295 Id. at 1028.
296 Id. at 1027-28, 1032.
297 Id. at 1033.
298 Id. at 1028.
299 Id. at 1034.
300 See id. at 1033-34 (citation omitted).
consequences of [the] inadequately disclosed dual representation.\textsuperscript{301} Jenkins never provided a copy of the sales contract to Benjamin. In fact, the sales contract contained William and Benjamin’s forged signatures.\textsuperscript{302} Benjamin was “unaware of and never approved the terms of the sales contract.”\textsuperscript{303}

Jenkins had a duty to negotiate “the most favorable terms possible” for the sellers.\textsuperscript{304} Instead Jenkins used settlement proceeds to pay off the buyer’s retail consumer accounts (for Sears, Wards and Norwest) and property taxes; Jenkins’ 6% commission for not only William’s house, but Ms. Brook’s house; and to add insult to injury, created a purchase money mortgage subordinate to the institutional lender’s mortgage so that the brothers only received $70,000 in cash. This was $50,000 less than what Jenkins was authorized to negotiate. The court wrote, “Jenkins appeared to have been motivated to do this not because there would be any benefit to [the seller]…but rather because of a desire to realize two commissions…”.\textsuperscript{305}

Ultimately, the court awarded approximately $25,000 in damages for Jenkins’ commission for selling William’s home, and the wrongful payments for the buyer’s commission, retail accounts and property taxes.\textsuperscript{306}

C. Adequate Disclosure but Other Breaches of Duty of Loyalty

Even with adequate disclosure, an agent may still breach her duty of loyalty to both clients. Chief challenges for dual agents are keeping confidential their client’s motivations and information about asking and selling prices.\textsuperscript{307}

A 2007 Louisiana case found a dual agent favoring the seller at the expense of the buyer. In \textit{Waddles v. LaCour}, the court held that real estate agent Fern Posey breached her duty to the buyer, Jerry Waddles.\textsuperscript{308}

\begin{footnotes}
\item[301] Id. at 1034.
\item[302] Id. at 1029.
\item[303] Id. at 1036.
\item[304] Id. at 1034.
\item[305] Id. at 1035.
\item[306] Id. at 1038.
\item[308] Waddles v. LaCour, 950 So. 2d 937, 942-43 (La. Ct. App. 2007).
\end{footnotes}
Waddles was in the market for a retirement home. Posey was already representing the seller, and Waddles signed a dual agency agreement allowing dual representation. Waddles signed the agreement the same night he saw the home and made an offer because he was leaving town the next day.

The home had been marketed as a custom home when in fact 25% of the home had once been a mobile home. Posey had received three separate phone calls from neighbors asking whether the home had once been a mobile home. After each call, Posey questioned the sellers, who each time denied that the home was a mobile home and stated that there merely had once been a mobile home on the land some time ago that was now gone. Choosing to believe the sellers, Posey did not inform Waddles about the phone calls or the seller’s replies, and so she did not inform Waddles about any suspicion that the home may have been a mobile home. Waddles explained that he would not have purchased the home had he known that it was part mobile home and that the whole experience was so embarrassing that it made him sick.

The court held Posey had a duty to inform Waddles about the phone calls. The court cited a Louisiana statute which allows dual agency and lists certain duties that dual agents must abide by, including “[t]reat[ing] all clients honestly” and “[p]rovid[ing] information about the property to the buyer or tenant.” The court understood that a double duty of loyalty exists in dual agency transactions, noting that Posey “did not have any greater duty toward the seller than [she] did to the buyer” with regard to the phone calls. The court was concerned that Posey “expressed concern [only] with [her] duty to the seller and with maintaining the sale” and that she at no time expressed “any concern with the buyer or any understanding of the dual agency agreement.” The court also lamented the fact that

309 Id. at 940-41.
310 Id. at 940.
311 Id. at 939.
312 Id. at 940.
313 Id. at 942.
314 Id. at 942.
315 Id. at 940-41.
316 Id. at 945.
317 Id. at 942-43.
318 Id. at 940-41 (citing LA. REV. STAT. ANN. § 9:3897 (2011)).
319 Id. at 941.
320 Id. at 941.
Posey trusted the sellers at the buyer’s expense, stating that “[a]ny reasonable person would have become sufficiently alerted” by the receipt of three phone calls “to understand that the dual agency obligation required a disclosure.” So dissatisfied was the court with Posey’s conduct that it upheld the trial court’s assessment of $10,000 in mental anguish damages.

Thus, these cases illustrate the confusion about the double duty of loyalty in dual agency disclosure and representation. It is unfortunate that the 2011 Legalscan shows that these issues persist today.

D. Statutory Dual Agencies and A Lessened Duty of Loyalty

“Concern about agency issues prompted about 250 convention-goers to pack a Hyatt Regency ballroom...for an aptly titled seminar-“The Troubled Waters of Agency”....

As mentioned, since the 1990’s many states require the written consent of the parties to a dual agency. Moreover, some states allow the dual agent a reduced duty of loyalty or level of confidentiality. These latter statutes are unfortunately, contrary to the essence and spirit of agency law.

In general, disclosure of the agent’s status should be made as soon as possible to avoid the consumer revealing confidential information to a person not acting in their best interest. This will also avoid the situation in Columbus v. Mehner mentioned above, where the consumer feels trapped in agreeing to the dual agency after the consumer has decided to make an offer on a house and is told he must act quickly.

However, several surveys indicate that providing adequate and timely disclosure to consumers is generally on a downward trend. A 1993

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321 Id. at 941.
322 See id. at 944-45. Posey was assessed two-thirds of this amount, and another agent involved in the transaction was assessed the other third. Id. at 940, 945.
325 Id.
326 Id. at 114.
NAR survey reported that only 65% of buyers “either had knowledge or were informed of agency representation by the first contact”. In a 1999 NAR survey, only 66% of buyers had signed a disclosure statement. In the NAR’s 2005 Profile of Home Buyers and Sellers, only 30% of buyers received a disclosure when they first met their agents, 28% received a disclosure when they signed a contract for sale, 22% never received a disclosure and 5% were unsure. The 2010 figures fared even worse, with only 27% of buyers signing a disclosure at the first meeting, 22% when the contract was written, 23% not receiving a disclosure at all, and 18% unsure of whether they received a disclosure. Fortunately, the 2011 figures showed slight improvement with 31% of buyers receiving a disclosure at the first meeting, 23% when the contract was written, and 12% at some other time.

It is understandable why disclosure statements are bewildering, ignored or overlooked. They are usually written in small print, buried among voluminous pages of form papers describing the property, often called the “disclosure package”, and consumers are usually not trained to read the fine print. Most are written for readers with at least a 12th grade reading level, although half of American adults read at the 8th grade level or less. And even trained consumers will have paper fatigue in reading every single page of the disclosure package, especially after an exhausting and possibly whirlwind home search. If a consumer asks the agent to explain the disclosure statement, the agent may be (1) similarly bewildered; (2) or wary of losing a client if the explanation is too clear. Because the selling agent prequalifies buyers, a buyer may also be emotionally unprepared to accept that a “selling agent” whom she has already confided in could be representing the seller.

330 NAT’L ASS’N OF REALTORS, PROFILE OF HOME BUYERS AND SELLERS 2010 60 (2010).
332 Ann Morales Olazabal, Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses, 40 HARV. J. ON LEGIS. 65, 123 (2003). Forms used in California, Minnesota, and Texas, among other states, required a college reading level. Id. at 123 n.300.
333 Id. at 123.
334 Ronald Benton Brown et al., Real Estate Brokerage: Recent Changes in
However, if the consumer is not given the disclosure statement until an offer to purchase is made, there is hardly any time for reflection or review. As stated earlier, after being told to act quickly because of competing offers, rising prices or interest rates, buyers may submit an offer the same day or very soon after they see a home. This haste does not facilitate a reflective, or detailed review of voluminous form documents. The disclosure statement may be attached to an offer, which is often written on a form contract of sale, sometimes almost ten legal-sized pages of 10 point font.

E. State Dual Agency Disclosures Compared

"Agents say that they explain it well but as a manager, I end up hearing 'he/she didn't explain it to me that he/she would be working for both parties and not able to tell me everything the other party said.'"\(^{335}\)

"[Disclosure] is done poorly on a routine basis. I travel the country as an instructor and find it to be true that most agents are not educated and afraid to do it. Their brokers condone and in some cases encourage the behavior."\(^{336}\)

1. California

California was the first state to define real estate agency relationships and to require mandatory written disclosure. As soon as practicable, the agent must disclose whom she is representing.\(^{337}\) Then this must be confirmed in writing no later than execution of the contract of sale in a mandatory disclosure form.\(^{338}\) In the disclosure form, the fiduciary duties of a seller’s agent, buyer’s agent, and dual agent are explained. A seller’s agent owes a “fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller.”\(^{339}\) A buyer’s agent owes a “fiduciary duty of utmost care, integrity, honesty, and loyalty” to the Buyer.\(^{340}\)

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\(^{335}\) NAT’L ASS’N OF REALTORS, 2011 LEGAL SCAN: LEGAL ISSUES FACING REAL-ESTATE PROFESSIONALS 6-7 (2011).

\(^{336}\) Id. at 9.

\(^{337}\) CAL. CIVIL CODE § 2079.17 (West 2012).

\(^{338}\) Id.

\(^{339}\) CAL. CIVIL CODE § 2079.16 (West 2012).

\(^{340}\) Id.
owed to both the Buyer and Seller.\footnote{Id.} This is absolutely correct. This is a double duty of loyalty.

The disclosure form also states “the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.”\footnote{Id.; see also CAL. CIVIL CODE § 2079.21 (West 2012).} Also, the duty of confidentiality to each principal other than with respect to price is not altered.\footnote{CAL. CIVIL CODE § 2079.21 (West 2012).} This is helpful, but agents and consumers should have additional guidance on how to effectuate this double duty of loyalty.

2. \textit{Minnesota}

Minnesota also requires written consent for dual agency. In the midst of the Edina Realty litigation the legislature amended its statute. At least three written disclosures are necessary.

The statute provides that at “first substantive contact”, a real estate broker or salesperson must provide a consumer with an agency disclosure form which describes five types of representation: seller’s broker, subagent, buyer’s broker, dual agency, and facilitation.\footnote{MINN. STAT. § 82.67 (2010).} The “first substantive contact” is not defined. The consumer must acknowledge receipt of this form. After given this form, a consumer may choose to sign a written contract for one of the listed types of representation.\footnote{Id.} Until that contract is signed, the broker cannot represent the consumer and acts only as a facilitator and the consumer is considered a “customer”, not a “client”\footnote{MINN. STAT. § 82.67 subd. 3 (2010).}.

The agency disclosure form describes the fiduciary duties, if any, that are owed in the five types of relationships. The form states that dual agency “limits the level of representation the broker and salespersons can provide, and prohibits them from acting exclusively for either party.”\footnote{Id.} Also, “[d]ual agents may not advocate for one party to the detriment of the other” but still owe the fiduciary duties of loyalty, obedience, disclosure, confidentiality, reasonable care, and accounting (subject to the limitations
inherent in dual agency). Confidential information concerning price, terms and motivation, must be kept confidential unless otherwise agreed; all other information will be shared. This contrasts with the California approach to confidentiality above. Also, in Minnesota dual agents “owe the same duties to the Seller and the Buyer.”

The consumer receives a second written disclosure about dual agency when the consumer engages either a seller’s agent or a buyer’s agent. In both the seller’s listing agreement and the buyer’s agent agreement, there is required language similar to that in the initial agency disclosure form.

The consumer receives a third written disclosure about dual agency in the purchase agreement with similar required language.

Thus, the revised statute provides more written disclosure than before the Edina Realty cases. It properly recognizes the double duty of loyalty; however it could provide more guidance on both disclosure of the agent’s prior relations with the other principal, and how to conduct dual representation to avoid a conflict of interest. Also, the five types of representation, including facilitation, are understandably confusing to agents and the average consumer.

3. New York

New York Statute § 443 provides for a mandatory disclosure form detailing five types of representation that must be given consumers before they engage an agent. This form must also be given by a seller’s agent to a buyer or buyer’s agent, and by a buyer’s agent to a seller or seller’s agent at the time of a “first substantive contact” indicating what capacity the agent is working in. The form also includes a place for “advance informed consent to either dual agency or dual agency with designated sales agents”. The agent must keep a copy of a signed acknowledgment from the consumer, or an affirmation stating that the consumer refused to sign an acknowledgment, for three years.

348 Id.
349 See id.
350 Id.
351 N.Y. REAL PROPERTY LAW § 443 subd. 2-4 (2011).
352 N.Y. REAL PROPERTY LAW § 443 subd. 3.b and c (2011).
353 N.Y. REAL PROPERTY LAW § 443 subd. 3.d and e (2011).
The five types of representation are seller’s agent, buyer’s agent, broker’s agents, dual agent, and dual agent with designated sales agents. Broker’s agents are agents of a seller’s or buyer’s agent, but apparently not subagents of the seller or buyer. A dual agency with designated sales agents is an intra-company dual agency.

The form states that the dual agent “must explain carefully to both the buyer and seller that the agent is acting for the other party as well.” Furthermore, agents “must explain the possible effects of dual representation, including that by consenting to the dual agency . . . the buyer and seller are giving up their right to undivided loyalty,” and agents are “not . . . able to provide the full range of fiduciary duties to the buyer and seller.” This language is certainly helpful for clients in helping them understand possible compromises involved in dual agency transactions; however, it does not provide necessary guidance for the actual agent engaging in the dual agency.

Also, such language must be accompanied by training agents in how to provide these explanations to consumers.

4. Texas

Texas requires that at the time of the “first substantive dialogue”, a broker provide a consumer a statement in at least 10-point type describing the three types of representation allowed. These are seller’s agent or subagent; buyer’s agent; or intermediary representing two parties. There is no dual agency in Texas. The seller’s listing agreement and buyer’s representation agreement need not be in writing.

Written consent must be obtained for dual representation transactions, mandating that the consent state who will pay the broker and the broker’s “obligations as an intermediary.” Also, the consent must state in

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354 N.Y. REAL PROPERTY LAW § 443 subd. 4 (2011).
355 N.Y. REAL PROPERTY LAW § 443 subd. 1.k, 4 (2011).
356 Id.
357 Id.
358 TEX. OCCUPATIONS CODE ANN. § 1101.558 (West 2011).
359 TEX. OCCUPATIONS CODE ANN. § 1101.561(B) (West 2011).
360 TEX. OCCUPATIONS CODE ANN. § 1101.558 (West 2011).
361 Id.
“conspicuous bold or underlined print” the intermediary’s obligations. The intermediary must “treat all parties honestly” and may not disclose, similar to California, that the buyer is willing to pay a higher price or the seller is willing to accept a lower price. The intermediary may also not disclose any other confidential information the buyer or seller specifically tells the intermediary in writing not to disclose. The statute further states that “[t]he duties of a license holder acting as an intermediary under this subchapter supersede the duties of a license holder established under any other law, including common law,” making the intermediary subject not to common law agency rules, but rather chapter 1101 of the Texas Code.

It is encouraging that Texas’ law promotes single agency. But it is unfortunate that the downgrading of dual representation to a non-agency relationship means less protection for consumers, e.g., consumers have the burden of providing specific written instructions to intermediaries not to disclose confidential information.

**Other States**

Other states may state the dual agent’s duty to maintain confidentiality regarding motivation for the sale and willingness to accept less favorable financing.

Thus, state statutes address the issue of disclosure of dual agency. Written disclosure and consent is generally required so that clients have some notice of what dual agency is. Also, some minimal guidance is often provided for agents during these transactions, typically a restriction on disclosing pricing and motivation. But both aspects could be improved upon—disclosures could be more complete, requiring agents to also disclose the nature of their relationship with the other party, and more

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362 Id.
363 Id. The statute also provides that brokers may not disclose confidential information. Id. See also TEX. OCCUPATIONS CODE ANN. § 1101.557 (West 2011).
364 TEX. OCCUPATIONS CODE ANN. § 1101.558 (West 2011).
365 TEX. OCCUPATIONS CODE ANN. § 1101.561 (West 2011).
366 TEX. OCCUPATIONS CODE ANN. § 1101.558 (West 2011) (“A broker may act as an intermediary between the parties if the broker complies with The Texas Real Estate License Act.”).
368 For example, a buyer would surely like to know if the seller that the agent will also represent happens to be a friend or family member of the agent.
detailed guidance could be provided so that dual agents understand how to be loyal to both clients in the transaction.

PROPOSALS

If single agency is not possible, dual agency should be practiced with the utmost precautions. In fact, properly used, dual agency may lead to greater transparency, information flow, and a more efficient and healthy market. Just as the MLS provides initial information in matching buyers and sellers, transparency in the bargaining stage can also be effective.\(^{369}\) Dual agents should facilitate, not obfuscate this.

A) Practice Transparency in Negotiations

Dual agents have twice the duty of loyalty and selflessness, not half. How can this be practiced? Dual agency must foster a confluence of the interests of not only both principals, but a subordination of the interests of the dual agent to that of both principals.

Therefore, dual agents may agree to:

1) Serve each principal wholeheartedly (not just deal in good faith), and not favor one principal (usually the seller) over the other.
2) Unless the seller and buyer already know each other and regularly communicate with each other, agree to only conduct negotiations/consultations when both parties are either electronically or physically present. (For example, email/SMS correspondence should always be sent to both simultaneously).
3) After consultation with both principals, propose the best sales price and contract terms for both the seller and buyer, and explain in writing and in person why this sales price and contract terms serve the best needs of both seller and buyer.
4) Agree to accept half the commission because of savings in time in not having to negotiate with another agent, or a flat fee.

B) Disclose Prior Relations in Obtaining Consent

Before dual agency is agreed to, sellers and buyers must know what

prior relations the agent has had with the other principal. This includes professional and personal contacts.

Dual agency disclosure and consent may be compared to the legal profession, where attorneys must disclose conflicts and obtain consent from clients before representing them. This includes cases where one client is directly adverse to the other, and where representation of one client might be materially limited by representation of or responsibilities to another client. Notably, the attorney must obtain informed consent. Informed consent requires communication of “adequate information and explanation about the material risks of and reasonably available alternatives” to the dual representation. The commentary to the rule further states:

Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.

Real estate dual agency disclosure should mirror this approach. Real estate agents should disclose not just the existence of a conflict or potential conflict, but the facts and circumstances giving rise to the conflict, including whether the other client is a friend, relative, employer, etc. of the agent. A buyer might consent to dual agency when the sellers are the agent’s parents, but this is a fact that the buyer should certainly be aware of. Real estate agents should also disclose the disadvantages involved in dual agency and the advantages of independent representation.

C) Revise the NAR Code of Ethics

The NAR’s Code of Ethics could better articulate the double duty of loyalty of dual agency. This would promote the NAR’s commitment to “competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations.” There are at least five

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370 MODEL RULES OF PROF’L CONDUCT R. 1.7 (1983).
372 See MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (1983).
374 NAT’L ASS’N OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE
ways the Code could be improved. First, the definition of “agency” should be strengthened and placed at the beginning of the Code, including an emphasis on what it means to be a selfless fiduciary. Second, the Code should explain what exactly full disclosure and informed consent entail.\footnote{National Association of Realtors pmbl. (2010).} Third, the current requirement of agents to advise clients of “any potential”\footnote{National Association of Realtors, Code of Ethics and Standards of Practice of the National Association of Realtors art. I, § 1-12(3), 1-13(4) (2010).} to act as disclosed dual agents should be explained so that agents know what the disclosure should contain. Fourth, the Code should provide guidance as to how agents should treat the confidentiality of each client when engaged in a dual agency transaction. Finally, the Code should be revised so as to make disclosure of status more even between buyers and sellers.\footnote{The code appears to treat disclosures more favorably for sellers than buyers. Compare National Association of Realtors, Code of Ethics and Standards of Practice of the National Association of Realtors art. I, § 16-10 (2010) (providing that agents representing buyers must disclose that fact to sellers at first contact with the seller) with National Association of Realtors, Code of Ethics and Standards of Practice of the National Association of Realtors art. I, § 16-12 (2010) (providing that agents representing sellers need only disclose that fact to buyers “as soon as practicable”).}

D) Publish Dual Agency Statistics and the Educational Level of Home Consumers

Although the NAR collects and publishes extensive data regarding real estate transactions, it fails to publish statistics regarding what proportion of transactions involve dual agents. As stated in the NAR’s Code of Ethics, the industry strives for “integrity and honor” by seeking “to eliminate practices which may damage the public or which might discredit or bring dishonor to the real estate profession” by “willingly shar[ing] the fruit of [its] experience and study with others.”\footnote{National Association of Realtors pmbl. (2010).} As indicated by the profession’s acknowledgment of dual agency being one of the top three sources of disputes,\footnote{See supra note 1 and accompanying text (listing dual agency, disclosure, and breach of fiduciary duty as the top three issues that cause disputes in real estate transactions).} and as illustrated by the cases examined above, dual agency

\begin{itemize}
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  \item \textbf{Second}, the Code should explain what exactly full disclosure and informed consent entail.
  \item \textbf{Third}, the current requirement of agents to advise clients of “any potential” to act as disclosed dual agents should be explained so that agents know what the disclosure should contain.
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\end{itemize}
often serves to discredit and bring dishonor to the real estate profession. If the industry is to meet its ethical goals in regards to dual agency, it should provide to the public more complete disclosure regarding the true extent of dual agency in the industry.

Also the NAR should report statistics on the educational level of home sellers and buyers. This will facilitate evaluation of proper written disclosure to consumers.

CONCLUSION

Real estate agents have long played an essential role in facilitating home ownership and the growth of the US economy. For most Americans, homeownership is the prime means of accumulating wealth. Until the 1990’s multiple listing services required selling agents to be subagents of listing agents in order to share their commissions. Therefore, both agents owed fiduciary duties to sellers, even though the majority of sellers and buyers thought the selling agents represented buyers. Because of litigation and consumer pressure, since the 1990’s more and more jurisdictions have encouraged exclusive buyer’s agents or dual agency only with written consent. However, this has not lessened confusion over dual agency. In 2011, 83% of agents surveyed ranked dual agency among their top three concerns. Agents still encourage their services as dual agents and receive ready written consent on standard forms embedded in real estate contracts. This phenomenon is fraught with peril for the consumer and agent. Dual agents often default to putting their own interests ahead of their principals, and/or one party’s interests ahead of the other’s, or a lessened duty of loyalty to each. Some statutes even state a lower duty of loyalty for dual agents. Dual agents must alert themselves that even with statutorily lowered standards, where lawful, they should be twice as loyal, not half as much.

Selflessness is the heart of a fiduciary, and of a professional. What consumers are looking for most in an agent is honesty and trustworthiness. Dual agency should be rare. When it is used, this article has proposed guidelines for the double duty of loyalty that requires complete transparency in the negotiating process, i.e., unless the two principals already communicate regularly with each other, that the dual agent conduct all negotiations when both parties are present. Also, dual

\[380\] See supra note 45 and accompanying text.
agents should reveal all prior relations with each principal before obtaining consent, and receive half a commission, or a flat fee. Instead of proliferating litigation and confusion, such transparency and facilitation of unity of purpose will lead to less stress, superior pricing and a healthier real estate market. The fruit of loyalty is loyalty. Most people find their agents through referrals. Any double commissions that dual agents “lose” will be returned over and over again from referrals from loyal consumers.

See supra note 44 and accompanying text.