
AGENCY

Question: We listed a home. The CMA came up with a suggested price of \$150,000. After the listing agents filled out the listing agreement, the sellers crossed out the \$150,000 listed price, inserted \$118,900 and initialed it. Agents talked to the sellers and the sellers want to keep the price at \$118,900. The listing was input in the MLS. The listing agents have now decided to buy the property for themselves. What advice would you give under these circumstances?

Answer: The safest way for a licensee to buy property on his/her own account is not to represent the sellers! If the listing agreement has been signed already by the sellers, the listing agents should consider releasing the sellers from the listing agreement and suggesting the sellers obtain independent representation by another agent or attorney. Regardless of whether they release the listing, the agents must disclose in writing that fact that they are purchasing the property for their own account RCW 18.85.230(24)(use JLS Form 325 for this purpose). If they do not release the listing, then they must additionally make "a complete disclosure of all information in his possession as to his legal powers to treat the property as his own, his intentions as to disposition of the property, and his opinion as to its true value." *Moon v. Phipps*, 67 Wn.2d 948, 955-56, 411 P.2d 157 (1966). Although there is no legal requirement to test the market before buying on one's own account, it further reduces the risk to the agents.

Needless to say, the listing agent buying property from their principal is one of the most delicate situations a licensee can face and I generally recommend against it.

Question: When the listing agent sells his/her own listing, how should the "Agency Disclosure" paragraph in the purchase and sale agreement be filled-out?

Answer: When the listing agent sells his/her own listing, there is no selling licensee, so the selling licensee information should be left blank. If the listing agent has a written buyer agency agreement with the buyer, then the listing agent is a dual agent and should disclose in paragraph 15 of the P&SA that the listing agent represents "both parties." Otherwise, the listing agent represents the seller only. RCW 18.86.020(1)(a) and (c).

Question: Does the listing agent have to disclose to the buyer that the seller is his father?

Answer: The only instances in which licensees are required to disclose familial relationships are where (1) the licensee is a principal to the transaction, and (2) a potential conflict of interest exists. Ordinarily, a conflict of interest exists in a transaction involving a relative only where the licensee represents the other party. For example, the fact that the listing agent is related to the seller does not create a conflict of interest, unless the listing agent is a dual agent. The fact that the listing agent is related to the buyer is a potential conflict of interest, which must be timely disclosed to the sellers.

Question: When an agent sells his or her own listing and all parties agree to dual agency, is it a requirement that the buyer(s) sign a separate buyer agency agreement? One of our agents remembers you saying at a class that a listing agent acting as a dual agent must use a buyer agency agreement.

Answer: The only circumstance in which a licensee acts as a dual agent is when the listing agent sells his/her own listing to a buyer with whom the listing agent has a written buyer agency agreement. RCW 18.86.020(1)(c). The agency disclosure in the purchase and sale agreement is disclosure only and does not constitute an "agency agreement," as required under RCW 18.86.020(1)(c). A listing agent without a written buyer agency agreement who discloses in the purchase and sale agreement that he/she represents both parties has made a false disclosure and violated agency and licensing laws.

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Question: Is a listing agent who sells his or her own listing automatically a dual agent? If the listing agent wants to act as a dual agent, is it sufficient to disclose the dual agency in the purchase and sale agreement, or is some additional agreement or consent required?

Answer: Under the agency law, a licensee who sells his or her own listing solely represents the sellers, unless the listing agent also has a *written agency agreement* with the buyers. The agency disclosure in the purchase and sale agreement is *not* an *agency agreement* -- it is a *disclosure* of agency. Agency relationships can be created only by written agreement or statutory presumption. If the listing agent wants to act as a dual agent, then the buyer must sign a buyer agency agreement before the purchase and sale agreement is signed (it does not have to be signed before showing the property). The parties' consent to dual agency is contained in the listing agreement and buyer agency agreement, so no separate or additional consent is required.

In summary, when the listing agent wants to act as a dual agent, the listing agent must have the buyer sign a buyer agency agreement, *then* disclose in the purchase and sale agreement that the listing agent represents both parties.

Question: Is it legal for an agent to write offers for two different buyers on the same property, as long as it is disclosed to both and the agent reveals nothing about either offer to the other buyer?

Answer: Absolutely NOT! A buyer's agent may show property to competing buyers, but once a written offer is signed by a buyer, the buyer's agent cannot take any action that is adverse or detrimental to the buyer's interest in the transaction. See RCW 18.86.050(1)(a).

Question: Can a buyer's agent write-up an offer from another prospective purchaser while a sale is pending to the first buyer represented by the same agent?

Answer: Absolutely not! A *buyer's agent* has a limited duty of passive loyalty to the first buyer to take no action that is adverse or detrimental to the buyer in a transaction. RCW 18.86.050(1)(a). However, a *dual agent* may continue to solicit and present additional offers while a sale pending. RCW 18.86.060(4)(a).

Question: Can a listing agent write offers for two buyers at the same time, if you do not represent either buyer? Could the listing agent represent one but not the other? Could the broker or another agent write one of the offers if both buyers want representation? Which of these is the best way to go?

Answer: A listing agent can write competing offers from more than one buyer at a time, even if the listing agent agrees to act as a dual agent on one or more of the offers. RCW 18.86.060(4). The listing agent may represent either or both of the buyers without breaching any duty to either buyer, so long as the agent does not disclose confidential information from or about a buyer represented by the listing agent. Therefore, it is not necessary to refer any of the buyers to another agent, unless the buyers want sole representation, rather than dual agency. My preference is that the listing agent represent the seller only, and if a buyer demands representation, then refer the buyer to another agent in the same office. I prefer split agency over dual agency.

Question: Able and Baker share a listing. Baker writes an offer as a dual agent after first getting buyer to sign a buyer agency agreement. Then, does Baker represent both buyer and seller, while Able represents the seller only, or does the signing of the buyer agency agreement also obligate Able?

Answer: Agency relationships in real estate are specific to the parties and the transaction. Unless Able has also signed the buyer agency agreement, Able is not a party to it and represents the seller only. However, if Able and Baker are spouses or domestic partners, it would be difficult to persuade a judge or jury that no confidential information was exchanged between Able and Baker. Therefore, if they are spouses or domestic partners, I would recommend they both become parties to the listing and buyer agency agreements and act as dual agents in the transaction.

Question: Who does the Branch Manager represent, if he/she acts as the selling agent in the sale of one of our listings?

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Answer: A Branch Manager may act as any other Sales Associate. The corporation, and not you individually, is the broker. Therefore, you would represent the buyer only in your capacity as selling agent. However, if you become involved in your capacity as Branch Manager, an employee of the corporation, then you would be acting as a dual agent.

Question: When should a licensee use a buyer agency agreement?

Answer: Using buyer agency agreements is a double-edged sword. They do provide protections for the agents. On the other hand, they can cause hard feelings among buyers, if the agents use them to coerce loyalty in instances where the agents have been unsuccessful in earning it.

My advice is to use buyer agency agreements when the agent does not have an established business, social or familial relationship with the buyer, or does not trust the buyer. The agency law creates the relationship and defines and limits the duties owed to the buyer. A buyer agency agreement primarily provides additional economic protections.

Finally, the JLS Form 140 contains an indemnity clause which protects the buyers from multiple liability, so long as the buyers notify the other broker they have terminated their agency relationship and the property purchased was not brought to the buyers' attention by the other broker. It is highly unlikely that a court would enforce an exclusive buyer agency agreement where the agent failed to bring the property to the buyers' attention.

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