

# Mutually Dependent Transactions and the Creation of Dual Agency

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The Department of State has for many years published a series of Legal Memoranda, one of which (Legal Memorandum LI12) is entitled "Be Wary of Dual Agency". The Memorandum discusses the nature of dual agency. It essentially discourages consumers from dual agency because of the loss of the undivided loyalty of the agent first hired by the consumer. The Memorandum reflects the longstanding disdain of the New York State Department of State to dual agency which emanated from views expressed by the legal staff of the Secretary of State during the 1980s.

Legal Memorandum LI12 includes the following paragraph:

**"Dual agency can also arise in a more subtle way: A real estate broker who represents the seller procures a prospective purchaser who needs to sell her property before she is able to buy the seller's property. The prospective purchaser then signs a listing agreement with the real estate broker to sell her property so that she can purchase the seller's property. The real estate broker is now a dual agent representing both parties in a mutually dependent transaction."**

Although the Memorandum also addresses the requirement that an agent obtain the informed consent of both seller and buyer to the dual agency relationship, this Memorandum infers that there are circumstances in which the dual agency relationship may come about even without "informed written consent". This is not a new concept and may be viewed in the light of dual agency circumstances in which licensees may find themselves because they have a listing which is being shown to a close relative, business partner or to a person who is in a relationship with the licensee which would not enable the licensee to be objective in providing undivided loyalty to the seller.

## **How Does Dual Agency Come About?**

Dual agency is not dependent upon whether the licensee receives compensation from the buyer, the seller or from both parties in the transaction. New York State's Regulations require that when a licensee receives compensation from more than one party, that the knowledge and consent of both parties are required. (Regulation 175.7 of the Department of State Regulations).

The Agency Relationship Disclosure Form, which is required to be signed pursuant to Section 443 of the Real Property Law of the State of New York, acknowledges that dual

agency results in both principals giving up the right to “undivided loyalty” from the licensee.

The signing of a Section 443 Disclosure Form acknowledging the dual agency relationship is an essential element of legal compliance by real estate licensees. Even when the circumstances such as those in a “mutually dependent” transaction mandate dual agency, the Section 443 Disclosure Form acknowledging same by both buyer and seller is an imperative. In the event that one of the parties does not consent to the dual agency, the licensee should not proceed to represent either party in the transaction. This is the same concept which applies to circumstances in which a licensee elects to purchase a property listed with the licensee’s office. Under such circumstances, the licensee would be best served by refusing any commission and should give up the listing.

### **Undisclosed Dual Agency**

Undisclosed dual agency remains a particularly difficult problem in New York State. The Department of State’s objections to dual agency on behalf of consumers, despite the fact that the right to act as a dual agent is fully set forth in RPL Section 443 and in the Agency Relationship Disclosure Form, have resulted in numerous complaints against licensees. Undisclosed dual agency comes about when the licensee fails to obtain the informed consent of both buyer client and seller client (or the landlord client and tenant client) in a particular transaction. Such consent must be memorialized by the signing of a Section 443 Agency Relationship Disclosure Form.

### **Designated Agency**

When Section 443 of the Real Property Law was amended and became effective as of January 1, 2008, the concept of designated agency, embraced in virtually every other state, finally became a part of New York law. In a designated agency relationship, a licensee within a firm works on behalf of the seller and another licensee in the firm works on behalf of the buyer. The firm is a disclosed dual agent. The designated agents are “dual agents” but as designated agents under the Law, have the right to advocate on behalf of the individuals for whom they are designated.

### **Not Every Client Involved in Two Transactions Causes Dual Agency**

When a client sells a home and then comes back to a licensee indicating a desire to now purchase a new residence, the new transaction is not a “mutually dependent” transaction. The fact the individual was a client in the first transaction does not require that the individual be a client in the second transaction. That choice should be made by the former client and the broker. Agency is a “consensual relationship.” It can come about by agreement or by virtue of the actions of the parties. When an individual has been a client on one occasion, that does not necessitate the same relationship to be inferred or agreed upon in all future transactions. In other words, the former client can

be a customer in a subsequent transaction. An RPL Section 443 Disclosure Form should be signed acknowledging the consumer's status as a customer. If that customer is shown an in-house listing, dual agency is not applicable. A forthright agent however, would want the seller client to know that the buyer customer is a former client of the firm.

### **Now is the Time!**

It is clearly the appropriate time for every agent to review his or her understanding of dual agency and the importance of making full disclosure to clients represented within a firm. In particular, the growth of very large and widespread firms creates a greater likelihood of dual agency circumstances. Undisclosed dual agency cannot be permitted without dire consequences. When a person has acted as an undisclosed dual agent the transaction becomes voidable by either party, the commission is deemed to be forfeitable by the licensee and the licensee is subject to prosecution by the Department of State for untrustworthiness and incompetence.

In general, dual agency is a circumstance which comes about when a client buyer and a client seller are being represented by individuals within the same firm. The nuances, however, of a "mutually dependent" or obvious (e.g. I am working with my daughter) relationship, compel dual agency to be addressed along with the necessity for full compliance with the Agency Relationship Disclosures required under Real Property Law Section 443.