

ARBITRATING REAL ESTATE AGENCY DISPUTES: THE COMPLEX LANDSCAPE OF REAL ESTATE AGENCY RELATIONSHIPS AND DUTIES

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The concept of agency is an integral part of the real estate brokerage industry. Today, several different kinds of real estate agents are recognized and most work on commission. The traditional agents recognized in the real estate area are: a seller's agent and subagent, a buyer's agent, and a dual agent. A seller's (listing) agent is a licensed real estate broker or salesperson who enters into an agreement with a seller to list and market the seller's property to buyers. Another broker or salesperson who works for the listing agent may act as the seller's subagent by showing the property to potential buyers and working with them until the closing. A buyer's broker represents only the buyer and looks for a suitable property to buy. The buyer's agent's commission may be paid by the seller. A dual agency relationship could arise if the buyer's agent works for the same brokerage as the seller's agent, or the buyer agrees to have the seller's agent work as a dual agent, and both buyer and seller give their informed consent.

States differ in the kinds of real estate agency relationships they recognize and each type carries with it specific duties owed by the agent to the principal. In residential real estate transactions, these include detailed disclosure of the agency relationship in writing to principal(s) in the transaction, and often the nature of the fiduciary duties owed to the principal(s). In general the fiduciary duties owed by an agent to a principal in a real estate transaction include the following:

A duty of loyalty. This duty requires the agent to act only in the principal's best interest and not in the agent's own interest.

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A duty of obedience. This duty requires the agent to carry out all of the principal's lawful instructions.

A duty of confidentiality. This duty requires the agent to keep the principal's confidences unless required by law to disclose specific information (such as disclosure of material facts to buyers).

A duty of reasonable care. This duty requires the agent to use reasonable care in performing the duties of an agent.

A duty of disclosure. This means that the agent will disclose to the principal all material facts of which the agent has or acquires knowledge that might reasonably affect the principal's use and enjoyment of the property.

A duty to provide an accounting. An agent has the duty to account to the principal for all client money and property received by the agent during his or her representation.

Real estate agency relationships are governed by both common law and statutory agency law. The Restatement 3d of Agency defines the term "agency" as "the *fiduciary relationship* that arises when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control and the agent manifests assent or otherwise consents so to act."¹ (Emphasis added.) Under common law, the creation of an agency relationship need not be in writing. An agency relationship could be created orally or by conduct.² Thus, the issue of whether an agency relationship exists under common law that require a person to carry out the fiduciary duties of an agent is a question of whether there are facts showing that the principal sought an agency arrangement and that the alleged agent has consented to it.

Disputes between real estate agents and their principals often arise over the quality of the agent's performance of his or her fiduciary duties, or the amount of commissions allegedly due, or the refusal to

¹ Agency has also been defined in Black's law Dictionary as follows, as a fiduciary relationship created by an express or implied contract or by law, in which one party (an agent) acts on behalf of another party, (the principal). The fiduciary duties of an agency relationship generally require that an agent act with good faith, trust, candor and provide a high standard of care regarding the interests of the principal.

² *PMH Properties v. Nichols*, 263 N.W.2d 799 (Minn. 1978), citing *Watson v. McCabe*, 527 F.2d 286 (6 Cir. 1975) and other cases.

pay commissions. Examples of disputes involving the alleged breach of the agent's fiduciary duties could involve the claim that:

- the agent failed to disclose an inspection report and recommend further inquiry or action to the principal.
- the agent failed to make adequate disclosure of an existing or proposed negative conditions about the property that were not disclosed to a buyer.
and
- the agent failed to disclose to the principal the likelihood of a unit of government acquiring the property.³

These disputes could be arbitrated only if the agreement between the principal and agent (e.g., an exclusive or multiple listing or purchase agreement) contains an arbitration clause. Some state realtor associations publish a standard purchase agreement that includes an arbitration option. Currently, there are no state statutes requiring arbitration of these disputes.

In order to hear and decide these cases, arbitrators must have a solid understanding of the various agent-principal relationships, and the duties and obligations of agents, most of which have evolved during the last 25 years.

Impetus for Real Estate Agency Statutes

Several lawsuits were filed in the early to mid-1980s alleging that the listing brokers working under an exclusive listing agreement with the seller violated the common law by acting as undisclosed dual agents.⁴ In one case, the court emphatically ruled that a dual agency is not *per se* against public policy and, therefore, is not impermissible as a matter of law.⁵ The court went on to find sufficient facts showing that the conduct of the broker (the seller's agent) with a potential buyer created an agency relationship that required him to disclose to this buyer his relationship as a partner in, and agent of, a competing buyer.⁶

³ *Executive Dev., Inc. v. Smith*, 557 So. 2d 1231.

⁴ *Cogan v. Kidder, Mathews & Sanger*, 600 P.2d 655 (Wash. Ct. App. 1980).

⁵ *PMH Properties*, *supra* n. 2.

⁶ Nichols, a real estate broker for Twin Town Realty and a partner in Benson-Mecay along with the president of TTR, entered into a listing agreement with the owner of several apartment buildings. He knew of a potential buyer, PMH Properties, and

The consequences of an undisclosed dual agency relationship are draconian. The agent is denied its brokerage commission and the aggrieved principal may rescind the contract without proving any damages.⁷

The confusion in the real estate industry concerning agency duties and dual agency relationships led the Federal Trade Commission (FTC) to conduct a national study of brokerage practices in transactions involving residential property. The researchers focused on six cities: Los Angeles, Seattle, Boston, Minneapolis-St. Paul, and Jacksonville, Florida. The report was published in 1983. It found a lack of clarity in the listing broker's role, lackluster competition in commission rates, overpricing of properties, under-representation of buyers, and insufficient legal remedies for agent misconduct. However, its main finding was that 75% of buyers who were not represented by their own agent generally erroneously believed that the seller's listing agent represented their interests in the transaction.⁸ This was a major misunderstanding, as the report observed that "brokers are clearly not, in the eyes of buyers and by their own

showed the property to its partners. A PMH partner orally offered Nichols the opportunity to manage the buildings after its purchase. Nichols disclosed this offer to the seller. While PMH was trying to put together the funds, Nichols notified a PMH partner that another buyer was interested, but he did not disclose that it was Benson-Mecay. Benson-Mecay was aware of the PMH offer and made a slightly sweeter offer, which the seller accepted. After the sale, PMH sued Nichols, Twin Town Realty and Benson-Mecay. The issue before the court was whether Nichols owed a fiduciary duty to PMH, which he then breached by competing with PMH. The court found "ample evidence" in the record from which the jury could have concluded that Nichols agreed to manage and resell the apartments for PMH, thereby becoming its agent, making him a dual agent. This meant that Nichols owed a duty of full disclosure to PMH.

⁷ *Id.* (quoting *Anderson v. Anderson*, 197 N.W.2d 720, 724 (Minn. 1972) as follows: "[T]he principal or employer ignorant of the double agency may at his election not only rescind the contract but also defeat the agent's right to receive or retain any compensation for his services.... These consequences follow even though the principal ignorant of the duplicitous agency cannot prove actual injury to himself or that the agent committed an intentional fraud. Nothing will defeat the principal's right or remedy except his own prior consent or ratification after full disclosure of all the facts.").

⁸ 3. Federal Trade Commission. *The Residential Real Estate Brokerage Industry*. Washington, D.C.: U.S. Government Printing Office (1983). And Federal Trade Commission. *The Residential Real Estate Brokerage Industry*. Washington, D.C.: U.S. Government Printing Office. (1987). *The* study also found lackluster competition in commission rates, overpricing of properties, under-representation of buyers, and insufficient legal remedies for agent misconduct.

statements, acting as exclusive representatives of the sellers. As the industry literature and industry leaders indicate, the role and agency status of the broker dealing with the buyer are clouded by uncertainty and confusion.”

The mistaken belief of buyers that seller listing agents act as buyer agents could lead buyers to reveal sensitive information to agents of sellers that would put buyers at a substantial economic disadvantage in the negotiations. The reason is that agents of sellers have a fiduciary duty to reveal all such information to the seller. For example, if a buyer confided in the seller’s agent that she desperately wants to buy the property and the seller learns of this, the seller could refuse to negotiate a lower the price.

In the early 1990s, two lawsuits filed in Minnesota brought further attention to disclosure problems raised by dual agency relationships. The issue in both cases was whether dual agent Edina Realty adequately disclosed to the sellers that it also represented the buyers in the transaction.⁹ While the courts found that broker’s disclosures to the sellers met the statutory disclosure requirements for agents, they also concluded that the common law requirements for undivided loyalty and full disclosure applied but the broker failed to meet them. As a result, the broker was responsible for damages. The two cases eventually settled. These cases stand for the important proposition that common law obligations not in conflict with the statutory requirements for real estate agents continue to apply in Minnesota and may apply as well in other states. Some states may preclude this result. For example, Article 15 of Illinois’ Real Estate license Act, which is scheduled to sunset at the end of 2019, states: “This Article 15 applies to the exclusion of the common law concepts of principal and agent and to the fiduciary duties, which have been applied to real estate brokers, salespersons, and real estate brokerage services.”¹⁰

The FTC report and increased litigation involving real estate brokers led the National Association of Realtors (NAR) and the state chapters to lobby state legislatures to preempt the common law of agency by specifying in state statutes governing real estate broker

⁹ *Dismuke v. Edina Realty* 1993 WL 32771 (Minn. Dist. Ct. 1993), and *Bokusky v Edina Realty*, 1993 WL 515827 (D. Minn. 1993).

¹⁰ 225 IL Compiled Stat. § 454, Art. 15(Agency Relationships).

relationships the duties and disclosure requirements of agents.¹¹ The states complied for the most part. Although there was no uniformity in the statutes, many of which are licensing statutes, the enactments fell into four different types of regimes. At least one of them recognized a new form of agent relationship (the “designated agent”) and one recognized a non-agency broker relationship (that of the facilitator) who assists the parties without representing either of them in the transaction.

Four Statutory Real Estate Broker Regimes

The four regimes are: (1) quasi-traditional agency regime with the option for buyer representation and disclosed dual-agency representation, (2) the “designated agency” regime, which also recognizes the preceding agency relationships, (3) the client-customer model, which distinguishes between “clients” (i.e., actual or potential buyers or sellers who are parties to an agency agreement) and “customer” (i.e., actual or potential buyers or sellers who are not parties to an agency agreement), and (4) the non-agent facilitator regime, which also recognizes the quasi-traditional agency representations, buyer representation, the disclosed dual agency representation and, in some states, the designated agency representation.

It should be borne in mind that even within states that employ the same regime, the definitions of the different agency relationships, and the duties that go along with them, differ. For example, some states expressly require a written agreement in order to have a dual agency relationship and some do not.¹²

¹¹ See C.S. Moore, “Is the Real Estate Liability Crisis Over?,” 142 *Real Est. L.J.* 38 (2009); C. Curran & J. Schrag, “Does it Matter Whom an Agent Serves: Evidence for Recent Changes in Agency Law,” 43(1) *J. Land & Econ.* (2000). Wyatt J., *Beware of the Simple Real Estate Transaction*, *The Advocate*, 48 (2), 2003). Lefcoe, George. *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to Seller Tell All*. 39 *American Bar Association, Real Property, Probate and Trust Journal*, 193 (2004); Brown. R.B., Grohman, J.M. and M.R. Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, *Creighton Law Review* 29 (25) (1995). Olazabal, A.M. *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, *Harvard Journal of Legislation* 40 (65) (2003).

¹² New Hampshire’s statute requires written consent to a dual agency. N.H.R.S.A. § 331-A:25(d)(I), whereas Minnesota’s statute does not specify that informed consent be in writing.

Quasi-traditional representation plus buyer representation and disclosed dual-agency representation. The quasi-traditional representations both represent the seller: the first is the a seller's listing agent. This person a licensed broker or salesperson who lists the seller's property and markets it for sale.

The second is a subagent of the seller's agent. This person is usually a salesperson at the listing broker's firm who markets the property to potential buyers. This regime also permits buyers to have their own exclusive agent to find a suitable property and represent their interests until the conclusion of the transaction. This regime also recognizes an alternative to buyer's and seller's agent. This person is called a dual agent. This type of agency arrangement can come about if a buyer finds a property that is listed by the same real estate brokerage firm as the buyer's agent, and the buyer agrees to purchase the property under a dual agency relationship, the seller agrees to this as well. Consent is supposed to be informed and some states require it to be in writing.¹³ A dual agent owes the seller and buyer the same fiduciary duties and therefore this person cannot act exclusively for either one of them.¹⁴ Thus, a dual agent provides less representation to each party than do separate seller and buyer agents. Fifteen states, including California and New York, have adopted the quasi-traditional regime plus buyer's agent and dual agent.¹⁵ The other states are Alaska, Arizona, Arkansas, Delaware, Hawaii, Maryland, Massachusetts, Mississippi, Nebraska, Rhode Island, Utah, Vermont, and West Virginia.

The second type of regime recognizes all of the foregoing types of agency relationship, plus a new form of agency called a "designated agency." Under this regime, the buyer has the option of deciding that its agent, if affiliated with the same broker as the listing agent, can be the buyer's "exclusive agent." The designated buyer's agent provides the buyer with better representation than a subagent of the seller or

¹³ N.H.R.S.A. § 331-A:25(d)(I) (requiring written consent to a dual agency). Compare Minn. *Stats.* 82.197 (2011) (does not specify informed consent in writing).

¹⁴ Minnesota also recognizes a dual agency when two salespersons working for the same licensed broker each represent a party to the transaction. ADD citation to MINN STAT.

¹⁵ New York's real estate license law also recognizes a "broker's agent." This type of agent is engaged by the seller's agent or buyer's agent to help find a buyer or a suitable property, but does not work for the seller's or buyer's agent. NYR.P.L. art. 12-A, §443(1)(k).

even a dual agent because the designated buyer's agent's loyalty is only to the buyer. Ten states recognized the designated agency relationship. They are Connecticut, Maine, Nevada, North Carolina, North Dakota, Ohio, Oregon, Texas, Virginia and Washington.

The third type of regime applies in only six states—Idaho, Illinois, Indiana, Iowa, Louisiana, and Wisconsin. This regime uses the terms “customer” and “client” to distinguish between sellers and buyers who are parties to a brokerage agency agreement and those who are not.¹⁶ States that follow this regime recognize a non-agent broker relationship with a customer.¹⁷ Brokers in a non-agent relationship with a customer are not permitted to negotiate on behalf of the customer.¹⁸ Both non-agent brokers and agent brokers have statutory duties to perform. The duties of a non-agent broker to customers are less extensive than the broker agent's duties to clients. Among the shared duties of non-agent and agent brokers are the duty of confidentiality, to provide fair and honest services, reasonable care and skill, and accurate information about market conditions in a reasonable time if such information is requested, among other things.

Finally, the last regime is the most common, being employed in 16 states: Alabama, Colorado, Florida, Georgia, Kansas, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Dakota, and Wyoming. What distinguishes this regime from the other three is that it recognizes that a broker can serve as a facilitator of the transaction without representing either party and without being considered an agent. Minnesota's statute describes a facilitator as “[a] broker or salesperson who performs services for a Buyer, a Seller, or both but does not represent either in a fiduciary capacity as a Buyer's Broker, Seller's Broker, or Dual Agent. THE FACILITATOR BROKER OR

¹⁶ The Idaho Real Estate License Law, Idaho Stat. 54-2083(5) & (7), defines a “client” as “a buyer or seller, or a prospective buyer or seller, or both who have entered into an express written contract or agreement with a brokerage for agency representation in a regulated real estate transaction”; it defines a “customer” to mean “a buyer or seller, or prospective buyer or seller, who is not represented in an agency relationship in a regulated real estate transaction.”). Section 54-2083(14) defines a “regulated real estate transaction” as “those real estate transactions for which a real estate license is required.”

¹⁷ Wis. Stats. 452.134, stating that a brokerage agreement is not required. Idaho expressly recognizes a nonagency brokerage relationship with a customer. “ Idaho Stat. 54-2084(1).

¹⁸ Wis. Stats. 452.1341(b).

SALESPERSON DOES NOT OWE ANY PARTY ANY OF THE FIDUCIARY DUTIES LISTED BELOW, EXCEPT CONFIDENTIALITY, UNLESS THOSE DUTIES ARE INCLUDED IN A WRITTEN FACILITATOR SERVICES AGREEMENT.”

There need not be a contractual relationship between the facilitator and the buyer and/or seller.¹⁹

The duties of a facilitator vary from state to state. In Minnesota, a facilitator “owes the duty of confidentiality to the party but owes no other duty to the party except those duties required by law or contained in a written facilitator services agreement, if any.” In Missouri a “transaction broker” has these duties: (1) protect the confidences of both parties. (2) exercise reasonable care and skill, (3) present all written offers in a timely manner, (3) keep the parties fully informed, (4) account for all money and property received, (5) assist the parties in complying with the terms and conditions of the contract, (6) disclose to each party ... any adverse material facts known by the licensee [i.e., (the licensed broker)], and (7) suggest that the parties obtain expert advice.” In New Hampshire, the facilitator’s duties include treating prospective buyers and sellers honestly, disclosing to a prospective buyer before an offer is made “any material physical, regulatory, mechanical, or on-site environmental condition affecting the subject property of which the facilitator has actual knowledge.” With regard to confidentiality, the statute provides: “Unless otherwise agreed, the licensee acting as a facilitator shall have no duty to keep information received from the seller ... or the buyer ... confidential.”²⁰

A facilitator provides less representation to buyers than a buyer’s agent or a dual agent.

In situations where an agent works with a client and no agency agreement exists, some state statutes define the agency relationship. The state definitions for the-lack of agent/principal agreements range from the imposition of non-agency to traditional agency relationships. Other states however have not created a default position for consumers whom have not entered into an agency agreement. These states require the consumer to select a form of agency representation: dual agency, buyer’s broker or a form of non-agency-

¹⁹ N.H.R.S.A. § 331-A:IV. The statute recognizes that the parties “may or may not enter into a contractual relationship.”

²⁰ The statute acknowledges that the parties may or may not enter into a contractual confidential relationship. N.H. Rev. Stat. Ann. § 331.-A: 25(III).

The Process of Agency Disclosure

The agency disclosure requirements form of disclosure generally required that the definitions of agency relationships be stated in the disclosure form. Typical definitions can be found in the Minnesota Statutes and include:

Seller's Broker: A broker who lists a property, or a salesperson who is licensed to the listing broker, represents the seller and acts on behalf of the seller. A broker or salesperson working with a buyer may also act as a subagent of the seller, in which case the buyer is the broker's customer and is not represented by that broker. A seller's broker owes to the seller the fiduciary duties of loyalty, obedience, disclosure, confidentiality and reasonable care. Secondly, the broker must also disclose to the buyer any material facts of which the broker is aware that could adversely and significantly affect the buyer's use or enjoyment of the property. A broker or salesperson who is working with a buyer as a customer and representing the seller and to whom any information is disclosed must act in the seller's interests and must tell the seller the information. In that case, the buyer will not be represented and will not receive advice and counsel from the broker or salesperson.

Buyer's Broker: A buyer may enter into an agreement for the broker or salesperson to represent and act on behalf of the buyer. The broker may represent the buyer only, and not the seller, even if the broker is being paid in whole or in part by the seller. A buyer's broker owes to the buyer the fiduciary duties of loyalty, obedience, disclosure, confidentiality and reasonable care. Secondly, a buyer's broker must disclose to the buyer any material facts of which the broker is aware that could adversely and significantly affect the buyer's use or enjoyment of the property.

Dual Agency-Broker Representing both Seller and Buyer: Dual agency occurs when one broker or salesperson represents both parties to a transaction, or when two salespersons licensed to the same broker each represent a party to the transaction. Dual agency requires the informed consent of all parties, and means that the broker and salesperson have the same duties to the seller and the buyer. This role limits the level of representation the broker and salespersons can provide, and prohibits them from acting exclusively for either party. In a dual agency, confidential information about price, terms, and

motivation for pursuing a transaction must be kept confidential unless one party instructs the broker or salesperson in writing to disclose specific information. Other information will be shared. Dual agents may not advocate for one party to the detriment of the other. Within the limitations described above, dual agents owe to both seller and buyer the fiduciary duties of loyalty, obedience, disclosure, confidentiality and reasonable care. Dual agents must disclose to buyers any material facts of which the broker is aware that could adversely and significantly affect the buyer's use or enjoyment of the property.

Nonagent: A broker or salesperson may perform services for either party as a nonagent, if that party signs a nonagency services agreement. As a nonagent, the broker or salesperson facilitates the transaction, but does not act on behalf of either party. The nonagent broker or salesperson does not owe any party the fiduciary duties of loyalty, obedience, disclosure, confidentiality or reasonable care unless those duties are included in the written nonagency services agreement. The nonagent broker or salesperson owes only those duties required by law or contained in the written nonagency services agreement.”

Statutory Disclosure Form

States that regulate real estate broker agency relationships usually require real estate brokers to provide the principal with a pre-printed disclosure form that explains the real estate agency relationships (and sometimes non-agency relationships) recognized by the state and the duties of the real estate broker or salesperson. In some states the form may be required only in residential real estate transactions.²¹ Some states also have additional requirements. For example, Idaho's license law requires the disclosure form to have “[a conspicuous notice that no representation will exist absent a written agreement between the buyer or seller and the brokerage.”²² New Hampshire's disclosure form similarly warns customers that brokers and salespersons are not

²¹ Minnesota and New York are examples. 2012 Minn. Stats., ch.82, § 82.67(1) (“The disclosures required by this subdivision apply only to residential real property transactions.”). N.Y. Real Est. Licensing L. 12-A: 4431(2).

²² Idaho Stat. § 54-2085(1). Idaho also requires a brokerage to disclose the type of relationship it has to both buyer and seller no later than the preparation or presentation of a purchase and sale agreement. § 54-2085(3).

their agents and will not keep their confidences. Only “clients” (i.e., buyers or sellers who have signed an agreement for agency representation have an agency relationship and can expect the agent to have fiduciary duties, including the duty of confidentiality.

The failure of a licensee to timely give a buyer or seller the agency disclosure brochure or the failure of a licensee to properly and timely obtain any written agreement or confirmation required by this chapter shall be a violation of the Idaho real estate license law and may subject the licensee to disciplinary action according to the provisions of sections 5.

The forms differ from state to state and the degree of variation can be substantial.

In some states only the buyer receives the form, while in others it is both buyers and sellers. The timing for giving out the forms may vary from state to state. In New Hampshire, the disclosure forum states that it must be given to the consumer at the broker’s first business meeting with that person—meaning a seller or buyer who has not yet signed an agreement for agency representation. The Idaho license law for brokers provides that “[a] licensee shall give to a prospective buyer or seller at the first substantial business contact.”²³ In Minnesota the disclosure form must be given to the consumer ‘at the first substantive contact.’²⁴

Arbitration and Broker Disputes

Many potential areas of confusion still remain concerning the role of real estate brokers and agents. Is the broker a seller’s agent, subagent, or cooperating agent? Is the broker a buyer’s agent or cooperating agent? A dual agent or a non-agent facilitator? Has the broker made the required disclosures to the proper party or parties? If an agent, has the agent complied with all the fiduciary duties? If a non-agent, has the broker complied with the statutory requirements owed to customers?

There are also many pitfalls involved in being a dual agent. For example, it is entirely too easy to omit to disclose something pertinent to both buyer and seller. *Waddles v. LaCour* demonstrates the

²³ Idaho Stat. § 54-2085(1).

²⁴ 2012 Minn. Stats. Ch. 82, §82.67(1).

vulnerability of dual agents.²⁵ In this case, the seller represented to the buyer that the mobile home that had been on the property when the seller purchased it had been removed prior to construction of the house. The dual agent received telephone calls from the seller's neighbors informing her that the mobile home was not removed and that the house was built around the mobile home. The agent did not disclose this information to the buyer because she felt that the information was not significant. The court found otherwise, concluding that the dual agent violated her fiduciary duty.

More recent research has shown that the use of mandatory disclosure forms has given some brokers a better understanding of their role, but more needs to be done. Lack of clarity about the broker's agency role, defaults in the broker's performance and nonpayment issues can all lead to disputes in the listing, sale and leasing of residential and commercial property. The majority of agency disputes allege violations of the fiduciary duties, particularly the duty to disclose material information about the property. Because real estate is a physical artifact, arbitrators are often faced with determining if a seller's agent or a dual agent knew of a property condition that was not disclosed to a buyer. Historically, allegations of material misrepresentation of the condition of the property were directed to both the listing agent and the seller.

Arbitrators must understand the different categories of agents and the fiduciary duties imposed on them by state statutes. This is especially difficult in cases where dual agency has been created by agreement of the parties and the agents involved in a transaction cannot negotiate for either a seller or buyer. Nevertheless, broker fiduciary duties are not eliminated as a result of a dual agency.²⁶

²⁵ 950 So.2d 937 (La. Ct. App. 3d Cir. 2007).

²⁶ G. Moore, "Agency Status and Disclosure," 29(1) Real Estate Review. (1999) Moore surveyed real estate agents in Ohio on two occasions (1990 and 1996) and found that, as a result of the agency disclosure legislation and agency education programs, buyer and dual agents had a clearer picture of their roles and duties. Moore concluded that the "beliefs of agents who identified themselves as the buyer's agents or as dual agents were more in conformity with the facts of their legal status than the attitudes of sellers' agents. Unfortunately, a substantial amount of confusion continues to exist particularly among those agents who see themselves as seller's agents.

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