

Should a Buyer Agent Represent Two Buyers Bidding on the Same House?

This is a question that most agents and buyers never really have to think about. How often does this happen? I like to raise the question in my ethics classes for these very reasons. Once people do think about it, it can generate a lively theoretical discussion which generates emotion and opinion. I am not sure there is a *perfect* answer but I think it has so many aspects to it that it is worth discussing. Better now than in an ethics hearing. Let me start with some disclaimers.

First, this is my *opinion* and not intended as legal advice. Second, I am in PA where this practice is not considered “*dual agency*”. In fact, our contracts specifically allow this to happen which I will discuss later in further detail. However, it is considered “*dual agency*” in some states which makes me wonder *why, how can that be*: it either is or it is not “*dual agency*”. How can it be looked at differently in different states? If it were considered “*dual agency*”, which is not allowed in some states, that would at least provide some direction as to how to handle it and remove my concerns. Third, my intent is not to interfere with any existing business relationships although I would respectfully suggest that buyers should know if this situation *might* come up so that they can make an informed decision before entering into a business relationship that might not work for them. In PA many agents refuse to act as “*dual agents*”. I wonder how they view this topic?

I am an analytical thinker so I will look at this from several perspectives. Let’s start with some contract information, meaning some language that a potential buyer-client should know before hiring an agent to represent them. This assumes that a buyer hires an agent and actually discusses their respective roles. Of course, if an agent does not follow our rules and regulations, a member of the public may not be as well informed as they should be. While well over 90% of the public searches online for Real Estate listings and information, I do not believe that most really understand agency representation. We do more than open doors and write contracts. Do prospective buyers know what to ask agents they might hire? Are they resistant when an agent tries to do their job by discussing contracts and agency disclosures? I am going to talk about this from the perspective of being a REALTOR, not just a licensee. This means I will refer to our REALTOR Code of Ethics as well as our state’s “*standard forms*”.

Article 1 of our REALTOR Code of Ethics *requires* that we protect and promote the interests of our *clients* above all else. While we are required to have a business relationship contract with someone to represent them as our client, rather than as our customer, that is not always the case and not having a contract is not an excuse when a problem arises. What is important is what a buyer thinks of our relationship. Our conduct may convey a perception that they are our client when they are technically not. That poses potential problems and it likely means that they know less than they would have had they seen the proper forms. This Article brings up the topic of fiduciary duties which I will discuss later. These are owed to a client but not to a customer.

Article 2 states that “REALTORS shall avoid ... concealment of pertinent facts relating to the property or transaction REALTORS shall not, however, be obligated to ... disclose facts which are confidential”. This Article brings up the topic of confidentiality which I will also discuss later.

In PA we have a form called a “Consumer Notice” that all licensees are required to present and explain to any member of the public before having a “substantive” discussion with them, referring to their

“needs and wants”, and entering into a business relationship. It describes the different relationships available as well as reviewing a number of agency/ representation-related issues.

Under “Buyer Agent”, it says that we “work *exclusively* for the buyer”, that we “must act in the buyer’s best interest” “and must keep all confidential information, confidential”. I mentioned a relationship called “dual agency”. This occurs when an agent or Broker “works for *both* the seller and the buyer” in the same sale. As stated in our Code of Ethics, this relationship requires “full disclosure to and with the informed consent of both parties”, meaning in writing, before acting in that capacity.

The Consumer Notice also includes several other important details. All agents “must disclose, as soon as practicable, all conflicts of interest”. A dual agent may not take any action that is detrimental to either party. In a typical seller/ buyer scenario that is perhaps best explained by saying that a dual agent cannot disclose how low a seller will go or how high a buyer will go in their efforts to sign an agreement of sale or negotiate details later such as inspection issues.

Based on what I have presented so far, my non-legal but educated opinion is that representing two buyer-clients bidding on the same house seems like “dual agency” to me. Again, I do not understand how some states see it that way while others, including PA, do not but I think that there is no harm in treating it as “dual agency”. I have never heard a client complain that their agent over-protected their interests, have you?

Now let’s discuss “fiduciary duties”. Working *with* a customer, meaning there is no contract, has requirements. Working *for* a client expands that list as there is agency representation and six fiduciary duties. The list includes: obeying a client’s lawful instructions, being loyal to their purpose or goal, disclosing what you know that could help them succeed, keeping their information confidential, being accountable for keeping them on track with what they need to do throughout the process and providing reasonable care and diligence in your representation to protect them. There is much more to these duties but imagine representing two buyers with similar intentions.

In a “dual agency” relationship two of these fiduciary duties are compromised or negated: you cannot disclose to one party what the other party wants kept confidential. This does not refer to “material facts” that must be disclosed if known. It does refer to things that could hurt someone’s negotiating strategy. A critical question is what is meant by *confidential*?

A listing agent can share details about an offer presented to them by one agent with another agent. Many agents and consumers do not know that. This is another topic that gets my classes going! Absent a previously signed “confidentiality agreement”, such as is often used in commercial listings, the details of an offer are not inherently private and can be “shopped” to get a better offer. Of course, this does not include the buyer’s name or personal information.

That being said, some people are very private and consider things “confidential” that others may not. Learning this is part of getting to know your client. Do you see how this can impact having more than one buyer client interested in the same property?

In PA we have two different buyer representation contracts, one is “exclusive” while the other is “non-exclusive”, the difference being whether a buyer works solely with one agent or has more than one agent assisting them. That alone can present issues but is not my point here. Unfortunately, some

agents do not present either form to their prospective clients or they do so at the point of creating an offer on a property. Better late than never! I know that some clients are resistant to signing contracts or they may be willing to be a customer rather than committing to one Broker/ agent and getting the benefits of full representation. However, there is important information they need to know and an executed contract proves they were at least informed of this information.

In both the exclusive and the non-exclusive contracts, there is the same language regarding issues related to conflicts with two clients. They both say that a “Broker may not take action that is inconsistent with a buyer’s interest”. They both say that an agent “may show the same properties to other buyers and may represent those buyers in attempts to purchase the same property that a buyer wishes to purchase” and that doing this is not a “breach of duty”. They both say that “It is a conflict of interest when a Broker ... cannot put a buyer’s interest before any other”. “Unless permitted by a buyer or required by law, a Broker will not knowingly reveal or use any confidential information of a buyer”. However, it does not specify what the word “confidential” mean. It does talk about not treating the “existence, terms or conditions of any offer as confidential unless there is a confidentiality agreement” but the sentence ends with “between a Buyer and the seller”. I guess the word “exclusive” only works one way, meaning that the buyer is restricted to one agent but the agent is not restricted to one buyer.

Then both contracts go on to say that “it is a conflict of interest when a Broker or licensee ... cannot put a buyer’s interest before any other”. The section concludes by saying that if there is a “conflict of interest, the broker will notify the Buyer in a timely manner”. How does all of this sound to you?

These are not guidelines or suggestions, they are rules. How do you accept all of these rules and properly manage the home searches of two buyers who want to pursue the same house? Of course, if two or more buyers are looking in different areas and price ranges this may never be an issue. But buyer’s plans change. Many buyers end up buying a house vastly different from what they said they wanted.

I am not an attorney but these sections seem to conflict, don’t they? Wouldn’t having more than one buyer interested in making an offer on the same house be about as conflicted as it gets? While the rules say that an agent must mention having a conflict, it does not elaborate. Do I need to do more than say “I have a conflict”? Can I say what the conflict is? Here is the best part: to whom do I mention the conflict and what is the remedy? Do I tell both buyers? Can I just end my relationship with one of the buyers and keep working for the other?

That raises an interesting question: who is allowed to terminate a contract? While I could have another agent take over with one buyer, I think that poses a problem as I would still know information about that buyer that I would not normally know and that could harm them. In fact, when agents encounter problems with seller/ buyer dual agency, I suggest that they completely remove themselves from both client relationships to avoid any perception of problems with disclosure or confidentiality.

As with all Real Estate paperwork, the buyer contracts do encourage the prospective client to seek the services of an appropriate professional, such as an attorney. While that makes sense, is there time to do that? If a buyer has done as I suggest, all of this would have been taken care of before I showed them any houses. Conflicts that arise after that may not be able to be undone and it could impact a buyer’s opportunity to make an offer and get it signed.

Let's drill down further to the *real* issue. Aside from whether one agent can truly best represent the separate but conflicting interests of two different buyers, remember that only one buyer gets the house, does the agent have the right to tell each buyer-client about the other's interest in the same house? Does doing that conflict with the fiduciary duties owed to each buyer-client? What is the goal?

I have had agents tell me that they want to be "*fair*". Really? Who gets to decide what is "*fair*"? What does that even mean? The REALTOR Code of Ethics used to have that word in Article 1: it said that, while we had a duty to protect and promote the best interests of our clients, we had a duty to treat people *fairly*. If you are a sports fan, what is fair? Is a pitch a ball or strike? Did a referee miss a penalty or make a bad call? The word, however nice it sounds, is confusing because it is *unclear*. Do any two people, especially those working on the same sale, define the term *the same*? Again, only one buyer can win. Perhaps neither buyer will succeed but that does not mean that all is well. Anyway, the Code of Ethics was amended years ago to say that we have to treat people *honestly*. I'll leave that alone but telling two buyer clients about the interest of the other is not a measure of honesty to me.

Years ago I had an agent in my office show one of my listings. They brought me an offer which was negotiated, accepted and signed. When I called to tell them that it was signed by my seller-client they made a very unusual request of me: they asked if I would enter my name in the MLS as the buyer's agent. I asked why and was told that this agent had sent the same property listing information to four different clients but only one seized the opportunity and quickly got the house under agreement. The agent was concerned that the other three would blame them for not telling them what had happened. I commended this agent for what they did! I can't imagine what might have happened had they shown the house to the other clients and written and negotiated multiple offers on the same house.

The question then becomes what happens next? Let me explore a couple possibilities.

- (1) If neither buyer gets the house, there may have been no harm done but the question of whether our actions are ethical or professional is based on our *conduct* and not the outcome. "No harm, no foul" is not the measure. Did our actions possibly cause both buyers to lose a sale?
- (2) Suppose one of your two buyers wins. Did they improve their offer because they knew they had competition? If so, did they spend or do more than they really had to and might have done if they did not know? Did the other buyer hold back or drop out because they felt they could not win? Some people want to compete, even if they overdo it, while others will not compete even if they might succeed. Saying that both buyers knew that other agents had interested buyers does not change my opinion.

To conclude, there is a lot to what seems like a simple question. Ultimately, it "appears" that our forms and contracts allow us to represent more than one buyer interested in buying the same house but I am not sure there is sufficient guidance as far as what to do when this situation comes up. I have disclosure and confidentiality concerns. I think each client should be allowed to make that decision. I would guess that both would like to know about the other even if wanting their own interest kept quiet. Suppose one cares and the other doesn't? Is it fair for one to know but not the other? There is that word again, "*fair*". Trying to work this out once the situation comes up is too late.

Let me add two thoughts. First, this is not the same as a listing agent sharing the details of your client's offer with another agent or having them let you know that other agents have made offers on a

property that interests one or more of your buyer clients. You must tell them that information. However, you have no fiduciary duty to the listing agent, the seller or any other agent's buyer clients.

My second thought is more of a question. Suppose you write and present an offer for one buyer-client and it is rejected or countered without leading to having a signed agreement of sale. Do you have the right or authority to tell another buyer-client the details? While telling them what did not work with one buyer-client seems to make sense, perhaps that offer would work now if no one else has made a better offer. Seller expectations do change. Does telling another buyer how the seller countered an offer accomplish anything? There is no guarantee that the seller would still be interested in that amount with a different buyer-client and, if the market is competitive, your current buyer client may only get one chance to make an offer. Suppose you tell them a number and they lose. An offer is more than the price and two buyers offering the same number may have very different terms and conditions. Suppose the buyer-client whose offer failed decides to make another offer?

I am not trying to scare anyone but, if nothing else, I hope that people who read or listen to this will better understand how Real Estate works. It is not retail where everyone is able to buy a product for a known price and there is ample supply. Again, we do so much more than open doors and write contracts. Real Estate requires experience, training and education. It is not for everyone and it can get more complicated than it needs to be at any given moment. Life would be easy if sellers would just accept their asking price or if buyers would just offer the asking price when they make an offer. Of course, both of those statements are unrealistic if not ridiculous. If they were true, you wouldn't need a professional! This is EXACTLY why I end my blogs and podcasts like this:

There is no time for inexperience, empty promises or false expectations.

HIRE WISELY: We are not all the same!