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# Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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## Inside This Issue

3

**Pre-Agency**

5

**Subagency**

7

**Working with a Client**

9

**Client Agency Representation Models**

10

**Designated Agency**

11

**Multiple Representation without Designated Agency**

12

**The Boxing Ring Analogies**

15

**Changing the Relationship Choice**

16

**Completing Line 1 of the Offer to Purchase**

17

**Resources**

## Agency Law Revisited

Agency is the relationship that results when someone agrees to have another person act on his or her behalf and the other person agrees to act in this manner. It is the relationship between a principal and an agent whereby the principal, expressly or impliedly, authorizes the agent to work under his control and on his behalf. In the real estate world, an agency relationship would be present when a property owner agrees to have a real estate broker, subject to the owner's control, act on his or her behalf in the sale or rental of the owner's property and the real estate broker agrees. The property owner is the principal, and the real estate broker is the agent. A broker also can agree to seek a property for a buyer or tenant and, thus, become the buyer's or tenant's agent.

An agent receives his or her authority from the agency agreement with the principal. Their respective rights and obligations are determined by the agreement and applicable law. In Wisconsin real estate practice, real estate agency relationships are structured and regulated by the Wisconsin Statutes, enacted by the Legislature, and the Wisconsin Administrative Code, adopted by the Department of Regulation and Licensing. This applies to the agency relationships between consumers, businesses and other parties to a real estate transaction and the broker/companies and real estate agents who assist them. It also pertains to the relationships between broker/companies and the real estate agents engaged by them to provide real estate brokerage services.

This *Legal Update* begins with an overview of real estate agency relationships and then discusses the types of real estate agency relationships used by Wisconsin licensees as they provide brokerage services to consumers and to their customers and clients. These include pre-agency, subagency, traditional client relationships, designated agency and multiple representation without designated agency (dual agency). Tips for documenting agency changes requested by parties and for completing line 1 of the offer to purchase are provided. Several sections include Legal Hotline questions and answers. A glossary of agency terminology is also included.

## **Real Estate Agency Relationships Broker/Company – Real Estate Agents**

In the intra-office relationship between the broker/company and the agents (including persons with salespersons' licenses and persons with brokers' licenses), the broker/company is the principal, and the brokers and salespersons affiliated with the broker/company are the agents. While both the broker/company and the affiliated licensees are agents of the client and have similar duties and responsibilities to the client, the agent derives his or her authority through the broker/company. The relationship between the broker/company and the agent who works for the broker/company is based on statutory and common law agency

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principles. The broker/company is contractually obligated to the clients and must supervise and be responsible for the brokerage services performed by the broker/company's agents.

## Broker/Company – Transaction Parties

For the parties to a real estate transaction, their agency relationships are established with the broker/company, not individual agents. For example, a listing contract is a contract reflecting the relationship between the seller and the broker/company and the buyer agency agreement is a contract reflecting the relationship between the buyer and the broker/company. It is the broker/company that is the party to these contracts, not the individual agent who sat down with the party and who likely signed the agency agreement on behalf of the broker/company. The individual agents are the ones who work with the consumers and convince them that it is to their benefit to enter into the agency relationship and execute the agency agreement. Yet the listing contracts and the buyer agency agreements “belong” to the broker/company. This can be difficult for some consumers to understand even though the DRL-approved listing contracts and buyer agency agreements address this point in the termination sections of these forms.

With respect to subagency, this is a relationship between the cooperating broker/company and the listing broker/company. This relationship at its core is between the broker/companies and not the agents who actually work with the parties on the transactions.

Even though it is the broker/company that is the party to the agency agreements with clients, the following discussion is primarily addressed to and speaks in terms of what an agent might do in a given situation because it is the agents who are

out there on the front line. They are the ones who most often take action with regard to consumers and they must be aware of how agency law impacts their day-to-day practice.

## Client Relationships

A client, by contract, engages the professional services of a real estate broker/company. One or more of the agents affiliated with that broker/company use their knowledge about buying and selling real estate to protect the best interests of the client.

When a property owner sells his or her home as a client of the real estate broker/company, the owner signs a listing contract. The listing agent then works for the seller and the listing broker receives the commission agreed upon in the listing contract when the property is sold. In a seller/client relationship, the agent guides the seller throughout the real estate transaction, providing information on such issues as pricing the home, which purchase offers are fair, and how to structure a purchase contract to the seller's advantage.

Buyers can also work with the broker/company as clients in a buyer agency relationship. The buyer signs a contract with the broker/company and the buyer's agent works for the buyer and the buyer's broker receives a fee according to the buyer agency agreement. In a buyer/client relationship, the agent helps the buyer find a suitable property and guides the buyer throughout the real estate transaction, providing information on issues such as how much to offer for the property and how to structure a purchase contract to the buyer's advantage.

The agency agreement – the listing contract or the buyer agency agreement – are with consumers, businesses or other parties who will be clients. If the broker/company does not have an agency agreement with the party, then the party is either a

customer or in the pre-agency stage and has not yet committed to the type of agency relationship that will work best in the particular situation.

## Customer Relationships

In a customer relationship, a customer receives services from a real estate broker/company that is performing on behalf of and for the benefit of the broker/company's client. In a customer relationship there is no contract between the customer and the broker/company. If a party is a buyer/customer, the seller's agent will show the customer the properties the customer is interested in seeing, get more information about properties of interest and draft the purchase contract as the customer directs.

When the broker/company works with a party as a buyer/customer, the broker/company cannot provide advice or opinions contrary to the interests of the seller/client. At the same time, the agent of the broker/company is required by law to treat the buyer/customer fairly and honestly even though the customer is not the broker/company's client. The broker/company must provide the buyer/customer with information about any known property defects and help identify those situations when other expertise may be needed. The broker/company may suggest that the buyer/customer consult with a professional, such as a home inspector or roofing contractor to help evaluate a property condition, or an attorney or accountant to advise on legal or tax matters.

## Pre-Agency

Wisconsin agency law recognizes an initial stage in the interactions between agents and consumers when it is not yet necessary to require the consumers to choose agency relationships. During this "pre-agency" stage, agents may provide information

and some brokerage services without first establishing an agency relationship. The agent has the role of a neutral information provider who represents neither party because agency relationships are not yet determined. The agent does not act as an advocate for any party in this preliminary stage when the consumer is simply collecting information.


Like the name implies, the "pre-agency stage" occurs before there really needs to be any agency relationship. It makes sense that real estate licensees should be able to provide property information and perform some basic preliminary services so that consumers can get to know the agent and decide whether they want to continue working together. Thus, when an agent calls to set up a showing, the agency relationship and the allegiance of the agent may not yet have been determined. When the listing agent asks the agent whom he or she represents, that agent may now reply, "I don't know," or, "that has not yet been decided" if that agent is working in the information-providing pre-agency stage.


When an agent first meets with prospects and takes them to see properties, there is no need to rush them into agency relationships. Before 2006, Wisconsin licensees often experienced that awkward moment of trying to get prospects to sign agency disclosures before they could even provide any real estate information. Under pre-agency, agents can even show properties, if they are careful to make sure that the showings do not involve negotiation.


## Duties Owed to All Persons


In the pre-agency phase, Wis. Stat. § 452.133(1) and (5) provide that an agent owes the person he or she is working with (typically the buyer) the seven fair treatment duties owed to all persons in a transaction:


## Glossary

 **Client:** a party to a transaction who has an agency agreement with a broker for brokerage services.

 **Customer:** a party to a transaction who is provided brokerage services by a broker but who is not a client.

 **Designated Agency:** a multiple representation relationship in which each client of the broker/company receives negotiation services from agents of the broker/company who are not providing negotiation services to any other client of the broker/company in the transaction. With the consent of each client involved in the transaction, one or more of the broker/company's agents are designated to provide full service, information, opinions and advice to the seller/client, and other agents from the broker/company are designated to provide full service, information, opinions and advice to the buyer/client, all in the same transaction.

 **Multiple Representation:** a relationship in which the same broker/company has a listing contract with the seller and a buyer agency agreement with the buyer, and both the buyer and the seller are involved in the same transaction.

 **Multiple Representation without Designated Agency:** the form of multiple representation where, with the consent of each client involved in the transaction, the broker/company provides brokerage services to each party and gives information and advice, but the broker/company and the broker/company's agents cannot place the interests of one client ahead of the other during negotiations (also sometimes referred to as dual agency).

1. **Fair and Honest Treatment.** Every agent must provide brokerage services honestly and fairly. When answering a consumer's questions, the agent must be honest and accurate.

2. **Reasonable Skill and Care.** Every agent must use reasonable skill and care when:

- Giving a general explanation of the real estate laws, public policies and current market conditions.
- Making reasonable efforts to find a property meeting the prospect's criteria.
- Recommending that a prospect or party seek third-party advisers (such as attorneys, accountants, home inspectors or basement contractors).

3. **Disclosure of Material Adverse Facts.** Every agent must disclose material adverse facts that the consumer does not already know and cannot discover through vigilant observation. The exception would be if there is a law preventing disclosure. Material adverse facts are significant such that they would affect (a) a consumer's decision to enter into an offer to purchase or other contract, or (b) the terms the consumer would want in the offer or contract.

Some examples of material adverse facts include:

- No legal vehicular access to the property.
- The seller will not be able to provide clear title.
- Persistent basement moisture after heavy rainfalls, despite the owner's prior corrective measures.
- Two sets of survey markers resulting in a description discrepancy and overlapping lots.
- Diseased trees, particularly after their leaves have fallen off.
- A buried fuel oil tank that is no longer in use.

4. **Confidentiality.** Every agent must keep confidential any information that a prospect or party indicates is confidential and any information that the agent knows a reasonable person would want held in confidence. A consumer who has chosen an agency relationship may list confidential information in the Broker Disclosure to Clients section of the agency agreement or in the Broker Disclosure to Customers.

5. **Provision of Accurate Market Condition Information.** A consumer may ask an agent to provide timely and accurate information about market conditions, and every agent must respond within a reasonable time with examples of sale prices for comparable properties and other market information. The agent cannot, however, give an opinion about whether a particular house is priced too high or low unless the person is the agent's client.

6. **Accounting.** Every agent must safeguard all funds, property or other things of value received from the persons in the transaction. Funds, such as earnest money or cash advances, are held in the agent's trust account and separate records are kept for each transaction. This duty would obviously not apply to pre-agency because negotiation would have already occurred.

7. **Objective Presentation of Offers.** Every agent must make an objective and unbiased presentation of all proposals and offers, and indicate the advantages and disadvantages of each. This duty would obviously not apply to pre-agency because negotiation would have already occurred.

In addition, Wis. Stat. § 452.133(5) indicates that an agent in the pre-agency phase may not give advice or opinions relating to the transaction contrary to the interests of any other person in that current or prospective transaction. This protects the interests of the seller. An agent in the pre-agency stage

must remain objective and neutral.

Note that the ability to provide information and conduct showings during the pre-agency phase of an agent's interactions with consumers requires that the individual providing these brokerage services have a valid real estate license. Pre-agency phase services are still brokerage services.

## Legal Hotline Questions and Answers: Pre-Agency

*Is it possible to change an agency relationship midstream? If the broker shows a house and now the buyers want a buyers agency with him, is this okay?*

Wisconsin agency law contemplates a pre-agency phase. Before negotiation occurs the broker may work with the buyer without entering into a WB-36 Buyer Agency/Tenant Representation Agreement with the buyer or giving the buyer a Broker Disclosure to Customers. Once a buyer enters into a buyer agency agreement, the buyer's agent is required to disclose buyer agency status. The disclosures to the listing broker should be made to accurately describe the agent's representation – either subagent of the listing broker, buyer's agent or "yet to be determined." The buyer's agent is also required to disclose buyer agency upon first contact with the seller or the listing broker. The offer to purchase then confirms the buyer agency status.

*A property owned by a relative of the agent's broker is going to be listed with that broker, but currently there is no listing contract in place. The agent was contacted by a potential buyer from California and was told that she could provide information to that buyer about the afore-mentioned property. The agent did that and then the potential buyer asked for comps. The agent was instructed to obtain a buyer agency agreement with the potential buyer, but the potential*

*buyer does not wish to sign that agreement. Are comps and information that could be used for negotiations only to be given to buyer-clients under a buyer agency agreement? If so, what is the statute or rule that prevents an agent from sending the information without a buyer agency agreement?*

Wis. Stat. § 452.135(1)(a) provides that a broker may not negotiate on behalf of a party who is not the broker's client, that is, a customer, without first providing the party with a Broker Disclosure to Customers form. In other words, a broker must have a client relationship or be acting as a subagent of the listing broker before negotiation services may be provided. There would have to be at least one broker involved in a transaction who has a written listing or a written buyer agency agreement.

In this case, the agent may send comps and accurate market information, upon request. The agent also may provide other property information to the potential buyer as a neutral information provider. In this pre-agency stage, the agent may not enter into any negotiations or give any advice or opinions contrary to the interests of any other person in the prospective transaction. If the buyer ends up being a customer, the Broker Disclosure to Customers form must be provided prior to any negotiations.

## Subagency

The discussion in this section analyzes the issues and choices faced by an agent who is working with a buyer prospect in pre-agency and who ends up working as a selling or cooperating broker or, in other words, the subagent of the listing broker. Before 2006, the cooperating broker was characterized as the subagent of the seller, but since July 2006, the cooperating or selling broker is the subagent of the listing broker.

If the buyer has decided against buyer agency, then the agent's broker/company will be the selling or cooperating broker. This is a subagency relationship and the agent's broker is the subagent of the listing broker, but not the subagent of the seller. Generally it is the listing broker (the principal broker) who is offering cooperation and compensation, so this only makes sense. The cooperating agent has never seen the listing contract or met the seller, so there is no logical reason for this agent to treat the seller like a client.


A subagent owes his or her customer (the buyer) the duties owed to all persons in a transaction, the same duties that are owed by an agent in pre-agency to all persons. A subagent owes all persons in a transaction the duty to:

- Provide brokerage services honestly, fairly, and with reasonable skill and care;
- Disclose material adverse facts in writing and in a timely manner unless otherwise prohibited by law;
- Keep confidential information;
- Provide accurate information about market conditions upon request unless prohibited by law;
- Safeguard trust funds and other property; and
- Present offers and other proposals in an objective and unbiased manner, disclosing the advantages and disadvantages of the proposals.


A subagent also owes the client of the principal broker (the seller in this example) a duty of loyalty:


- A subagent may not give advice or opinions to the parties in the transaction that is contrary to the interests of the seller (the client of the principal broker), unless otherwise required by law.
- A subagent cannot put his or her interests ahead of the interests of the clients of the principal broker (the seller in this example).


## Glossary

 **Negotiation:** to provide to a party assistance within the scope of the knowledge, skills and training required under chapter 452 of the Wisconsin Statutes in developing a proposal or agreement relating to a transaction, including doing any of the following:

- (a) Acting as an intermediary by facilitating or participating in communications between parties related to the parties' interests in a transaction. Providing advice or opinions on matters that are material to a transaction in which a person is engaged or intends to engage or showing a party real estate does not, in and of itself, constitute acting as an intermediary by facilitating or participating in communications between parties.
- (b) Completing, when requested by a party, appropriate DRL-approved forms or other writings to document the party's proposal consistent with the party's intent.
- (c) Presenting to a party the proposals of other parties to the transaction and giving the party a general explanation of the proposal provisions. [Wis. Stat. § 452.01(5m)]

 **Party:** a person seeking to engage in a real estate transaction.

 **Person:** natural persons, corporations, partnerships, associations, governmental agencies and entities, and other legal entities.

 **Pre-Agency:** the initial interactions between an agent and a consumer when information and preliminary brokerage services are provided to a consumer who has not yet decided whether he or she will be a customer or a client. The agent owes the consumer the duties owed to all persons and may not provide advice or opinions contrary to the interests of any other party.

The primary concern for agents in this situation is recognizing when they shift from the information-providing stage to the negotiation stage. It is then that the party (most often a buyer) needs to decide whether to enter into a client relationship (typically buyer agency) or move forward as a customer. Assuming that this party is a buyer, that means that either the buyer will enter into a WB-36 Buyer Agency/Tenant Representation Agreement (that includes the mandatory Broker Disclosure to Clients language) or will receive the Broker Disclosure to Customers no later than the commencement of negotiation. Once the Broker Disclosure to Customers has been given, the subagent will thereafter work as the agent of the listing broker.

## Beginning Negotiation

Negotiation occurs when the prospect has enough information and wants to develop proposals for the other party's consideration and work on reaching an agreement with the other parties. Negotiation begins when the conversation shifts from market or property information to contract contingencies and deadlines, when the focus shifts to what is included with the property and the parties engage in "give and take" discussions.

Negotiation may or may not begin during a showing, depending upon what is discussed. For example, when a buyer asks questions about the property, such as, "How long has the property been on the market?" or "How old is the roof?" and the

agent provides the answers, that is not negotiation. That is providing information. However, when the conversation turns to strategy or contract terms, for example, "Do you think I can make a lower offer since they have been trying to sell it for so long?" or "Can I have them put on a new roof if I make an offer?" then the buyer and the agent are discussing strategy and offer terms, and that is negotiation.

Negotiation occurs when the agent acts as the intermediary or facilitator between two parties, when there is a back and forth discussion about a proposal or about contract terms. If the agent is preparing an offer to purchase, or presenting and explaining the other party's proposals, that clearly constitutes negotiation.



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## Broker Disclosure to Customers

The Broker Disclosure to Customers must be given to a customer before negotiation begins. It is used when the agent's broker will be the subagent of the listing broker and will work as the selling or cooperating broker. The Broker Disclosure to Customers is also used if the listing agent or another agent of the listing broker is going to work with the buyer or when the buyer's agent or another agent of the buyer's broker is going to work with the seller, for instance, in a FSBO scenario. The Broker Disclosure to Customers form should be given to all persons who will receive brokerage services from the agent or the agent's broker and who are not clients of the principal broker.

## Legal Hotline Questions and Answers: Subagency

*When a broker has a listing and sub-agents or buyer's agents show the property, must they disclose potential buyers' names to the listing broker when asked?*

Although Wisconsin's licensing laws do not specifically address this type of policy, the National Association of REALTORS®' Code of Ethics Standard of Practice 3-5 states that subagents must provide listing agents with all pertinent facts relating to the transaction. Because the name of a prospective buyer is arguably a pertinent fact, a subagent should provide this name if requested by the listing agent. Finally, some listing brokers establish the duty to disclose the buyer's name as a condition of their offer of cooperation (usually through a policy letter). However, if the buyer has requested that his or her name remain confidential, the subagent's duty of confidentiality owed to all parties would override the duty of cooperation owed to the listing agent.

As for buyer's agents, there is no duty to disclose this information. However, it may be advantageous for the buyer's agents to disclose the buyers' names if only to protect their own interests.

*In a subagency situation (a co-broke has written an offer on the company's listing) where line 1 of the offer declares the subagent an "agent of the Seller," who is ultimately responsible for the delivery of the proper disclosure form to the buyer: the co-broke (selling agent) or the listing agent (since the selling agent is an agent for the listing broker)?*

A licensee working with a buyer-customer must provide a written agency disclosure statement prior to negotiations. Negotiations, simply stated, would include acting as an intermediary, drafting approved forms and presenting approved forms. Therefore, the subagent would be responsible to provide the buyer-customer with a copy of the Broker Disclosure to Customers form prior to drafting the offer to purchase. The listing broker may request, and the subagent must provide, a copy of that Broker Disclosure to Customers form upon the listing broker's request because the selling agent is acting as an agent of the listing broker in that transaction.

*If a buyer's agent writes an offer on a FSBO property and the seller wants to counter, can the agent draft the counter for the seller?*

Yes, the agent may draft the counter-offer. The agent must be sure to give the seller a Broker Disclosure to Customers form to make sure the seller knows the agent is working with the seller as a customer, not a client. The seller may, in the alternative, draft documents himself or hire an attorney to draft transaction documents.

## Working with a Client Broker Disclosure to Clients

A person, business or other party becomes a client when that party executes an agency agreement. Wis. Stat. § 452.135 requires that the prospective client also be provided with a written copy of the mandatory Broker Disclosure to Clients disclosure statement when the client enters into an agency agreement (listing or buyer agency). If the Broker Disclosure to Clients is not contained within the agency agreement and the brokerage

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services shall be with regard to property primarily intended for use as a one- to four-family residential property, then the broker must also ask that the client sign an acknowledgment that the client has received the separate Broker Disclosure to Clients.

The Broker Disclosure to Clients form will need to be used with all DRL-approved listing contracts and other agency agreements that have not been revised to incorporate the mandatory agency disclosure language required by Wis. Stat. § 452.135. The Broker Disclosure to Clients has been incorporated into the following:

- WB-1 Residential Listing Contract
- WB-2 Farm Listing Contract
- WB-3 Vacant Land Listing Contract
- WB-4 Residential Condominium Listing Contract
- WB-5 Commercial Listing Contract
- WB-36 Buyer Agency/Tenant Representation Agreement

The Broker Disclosure to Clients has not been incorporated into the following:

- WB-6 Business Listing Contract
- WB-8 Time Share Listing Contract
- WB-37 Listing Contract for Lease of Real Property
- WRA Property Management Agreement

In WRA ZipForm, the program lines out the outdated agency disclosure language in these forms and brings up a Broker Disclosure to Clients that can be executed concurrently with the agency agreement in conformance with the statutes.

When asking a client to complete and sign the Broker Disclosure to Clients, whether on a separate form or within the agency agreement, the agent should review the agency relationship choices with the client. The form includes mandatory disclosure

language explaining multiple representation and subagency and a section where the clients initial to indicate their selection of a multiple representation model. The agent should be familiar with these explanations and stand ready to answer any questions so clients may make informed decisions.

The Broker Disclosure to Clients also addresses disclosure of material adverse facts, confidential information and the duties owed to clients.

## Duties Owed to Clients

As stated in Wis. Stat. § 452.133(1)-(2), an agent representing a client owes the client the duties owed to all persons in a transaction plus the additional duties a broker owes to a client:

1. **Duty of Loyalty.** An agent must loyally represent the client, avoid all conflicts of interest and:
  - Must place the client's interests ahead of the agent's interests and the interests of the other parties to the transaction.
  - Cannot disclose information or give advice to the other parties in the transaction that is contrary to the client's interests, unless otherwise required by law.
2. **Provide Information and Advice.** An agent must, when requested by a client, provide information and advice on real estate matters that are material to the client's transaction and that are within the scope of a real estate licensee's knowledge, skills and training.
3. **Disclosure of Material Information.** An agent must disclose to the client all information known by the agent that is material to the transaction and that the client doesn't already know and cannot discover through reasonably vigilant observation. This duty to disclose material facts, however, does not permit an agent to disclose other parties' confidential information or information that cannot otherwise be disclosed under

law. Material information is information that a reasonable person might feel is important in choosing a course of action. Examples of material information include:

- The existence of other offers
- The reason the seller is selling, provided the seller permits this information to be shared with others and does not require it to be kept confidential
- The buyer is seeking financing even though the offer appears to be a cash offer

4. **Obedience.** The agent must carry out the obligations stated in the listing contract or the buyer agency agreement and must honor the client's lawful orders that are within the scope of the agency agreement. For example, the agent must order a survey or appraisal on the client's behalf if asked to do so, provided this function lies within the scope of the agency agreement. However, an agent does not have to obey a request if it causes the agent to violate the law.
5. **Negotiate.** The agent has the duty to negotiate on behalf of the client; however, this duty may be waived.

## Legal Hotline Questions and Answers: Clients

*Another company is requesting a copy of the agency disclosure the buyer's agent provided to the buyer. Is this mandatory?*

No. Wisconsin law does not require a buyer's broker to provide the listing broker with evidence of the Broker Disclosure to Clients. In fact, because the Broker Disclosure to Clients provisions are part of the WB-36 Buyer Agency Agreement, the buyer's agent arguably is prohibited from providing a copy of this form without permission from the buyer, due to the confidential nature of its contents. The listing broker does not have a right to see the actual buyer agency agreement,



but may request a written statement from the buyer's broker confirming that the broker is working under a current buyer agency agreement.

## Client Agency Representation Models

Agents working with clients (sellers with listing contracts and buyers with buyer agency agreements) must be aware of the multiple representation relationship choices that must be offered to these parties. These agents must be prepared to explain the differences and answer questions that parties might ask regarding multiple representation concerns.

In the updated DRL-approved listing contracts and the buyer agency agreement, clients are asked to initial a line to indicate their selection of client agency representation model:

### INITIAL ONLY ONE OF THE THREE LINES BELOW:

\_\_\_\_\_ I consent to designated agency.

\_\_\_\_\_ I consent to multiple representation relationships, but I do not consent to designated agency.

\_\_\_\_\_ I reject multiple representation relationships

## Multiple Representation

Multiple representation only pertains to clients, not customers. A multiple representation relationship exists when two or more of a real estate broker's clients are parties in the same transaction, for instance, the seller has a listing contract and the buyer has a buyer agency agreement with the same real estate broker/company.

There are two types of multiple representation: one with designated agency and one without designated agency. Clients are free to choose either type of multiple representation,

or none at all. A broker may not provide brokerage services in any multiple representation relationship without the written consent of all of the broker/company's clients who are parties to the transaction.

If clients do not consent to multiple representation, this may impact their ability to find a good buyer or find the perfect property, and the broker/company may represent only one party as a client in the transaction. Without multiple representation, the agent or broker/company is not able to show buyer-clients the listings of the broker/company's seller clients. If a seller does not consent to multiple representation, that generally means that all buyers who have a buyer agency agreement with the same broker/company where the property is listed will either have to change their agency relationship to subagency or they will not be able to buy that seller's property. A buyer-client who does not consent to multiple representation typically will not be able to buy any properties listed by the same broker/company unless they switch to subagency.

## Consenting to Multiple Representation


Neither variety of multiple representation may be practiced by a broker/company and its agents without the written consent of all clients who are parties involved in the transaction. Written consent is provided in most of the DRL-approved listing contracts and in the buyer agency agreements when the client initials one of the three lines provided to indicate his or her selection of a client agency representation model. With regard to any listing contract or other agency agreement that does not offer the three choices, the parties may give written consent by initialing one of the three lines provided in the Broker Disclosure to Clients form.


If both parties to the transaction agree to multiple representation without designated agency (dual agency)


in their agency agreements, that agency representation model is authorized and the broker/company and its agents may act as dual agents. Similarly, with multiple representation with designated agency (designated agency), if both parties to the transactions have given their written consent to designated agency, the broker/company and its agents may provide brokerage services to these clients as designated agents.

Wis. Stat. § 452.134(4) indicates that if one client party consents to designated agency and the other client party consents to dual agency, then that broker/company and its agents may not provide services as designated agents and must instead act as dual agents. Under these circumstances, each client party has consented to multiple representation, but one client has consented to designated agency and one has not. Designated agency cannot be used because they have not both consented to that agency representation model. Both parties consented to multiple representation (without designated agency), so by default the dual agency representation model

## Glossary

 **Principal Broker:** a broker who engages a subagent to provide brokerage services in a transaction.

 **Subagency:** exists when a broker is engaged by another broker to provide brokerage services in a transaction, but is not the other broker's employee. For example, a cooperating broker works for a listing broker to help find a buyer and sell the property.

 **Transaction:** the sale, exchange, purchase or rental of, or the granting or acceptance of an option to sell, exchange, purchase or rent, an interest in real estate, a business or a business opportunity.

may be employed by the broker/company and its agents. The same result is obtained if both clients initially consent to designated agency and one later withdraws that consent and decides to choose dual agency instead.

## Designated Agency

Multiple representation with designated agency (designated agency) is a form of multiple representation that starts the same as multiple representation without designated agency (dual agency). The same broker/company has a listing contract with the seller and a buyer agency agreement with the buyer.

Designated agency is a basic concept whereby the listing agent and the buyer's agent provide the same services that they ordinarily would. The only difference is that the listing agent and the buyer's agent each work for the same broker/company instead of different broker/companies. Each client in the transaction receives negotiation services from different agents of the broker/company; each party has his or her own agent who negotiates just for him or her in any given transaction. In other words, the broker/company of the listing agent and the broker/company of the buyer's agent are one in the same.

In designated agency, the listing broker represents the seller. That same broker also has a buyer agency agreement with the buyer. That broker may assign or designate two agents, one to represent the seller as a seller's agent (typically the listing agent), and one to represent the buyer as a buyer's agent. Each agent will provide full negotiation services to each respective client. These designated agents may give the respective clients advice, opinions and strategies intended to further the interests of the client they are working with, but must maintain all confidentiality duties.

Consider the following example: Seller Steve has a listing contract with broker/company XYZ. Buyer Beulah has a buyer agency agreement with broker/company XYZ. Seller Steve is working with Listing Agent Larry and Buyer Beulah has a relationship with Buyer's Agent Barbara. If Seller Steve and Buyer Beulah both select and consent to designated agency in their respective agency agreements, then Listing Agent Larry may continue to work with Seller Steve and Buyer Beulah may continue to work with Buyer's Agent Barbara in an essentially seamless manner with each agent providing the same services they would have if the two parties had agents from different broker/companies.

The potential downside to this situation is that some parties may not feel comfortable knowing that the agent working with them goes to work in the same company, perhaps the same office, as the agent representing the other party to the transaction. Consumers may distrust this arrangement and fear that notes will be compared, confidences will be broken and the agents will steer the transaction in a manner that benefits the broker/company and its agents.

The features of designated agency are:

- All parties in a transaction must consent in writing to create designated agency.
- Any or all of the parties may thereafter withdraw consent, in writing, at any time.
- Each designated agent will keep the confidential information of the clients confidential.
- Each designated agent is allowed to provide advice and opinions to assist the client he or she is working with in negotiations, even if that advice and those opinions favor the interests of that client over the interests the broker's other client in the transaction.

## Legal Hotline Questions and Answers: Designated Agency

*If an agent has a buyer agency agreement with a buyer who wants to purchase the agent's own listing, and both clients consented to designated agency, do different agents from the office have to negotiate on behalf of each client? Or may one agent negotiate for both?*

To provide designated agency, there must be two agents, one working with the buyer and one working with the seller. An individual broker or agent cannot provide designated agency alone. Either another agent must be included in the transaction or the one agent may provide multiple representation without designated agency, provided one or both clients change their agency representation selection in writing (using amendments to the agency agreements). The agent also may refer to office policy regarding such transactions.

*If an agent has a buyer agency agreement with a buyer who wants to purchase an in-house listing (not the buyer's agent's listing), and both clients consented to the designated agency, may the listing agent negotiate on behalf of the seller while the buyer's agent negotiates on behalf of the buyer?*

Yes, this is an example of a multiple representation with designated agency.

*Does the broker/company need to have at least two agents to offer designated agency?*

Yes, the practice of designated agency requires a separate designated agent for each party in the transaction. A sole proprietor broker/owner plus one agent is not enough because the broker/owner is the broker/company and needs to supervise the other agents. Either the sole proprietor needs two agents, or one additional agent will suffice if the sole proprietor forms a corporation or an LLC and that

entity becomes the broker/company.

*Can a designated broker be a designated agent in a transaction?*

Yes, the practice of designated agency requires a separate designated agent for each party in the transaction. The fact that the broker is the office manager/designated broker does not disqualify her because the company is a corporation and has another broker of record per the DRL.

## Multiple Representation without Designated Agency

Multiple representation without designated agency (dual agency) is a form of multiple representation and starts the same as designated agency. The same broker/company has a listing contract with the seller and a buyer agency agreement with the buyer.

Multiple representation without designated agency is present when one broker/company represents both the seller and the buyer, as clients, in one transaction, but client-level services are not provided. When it comes time to negotiate, the broker/company and its agents must remain neutral and cannot provide any advice or opinions that place the interests of one client ahead of the other.

Multiple representation without designated agency can accommodate the situation where only one real estate agent of the broker/company represents both the seller and the buyer as clients in the same transaction. The buyer and seller will likely, at some point, have opposing interests in the transaction, making it impossible for the agent to provide the fullest client-level services at all times. In multiple representation without designated agency, the agent – and all other agents of that broker/company – will

assume a neutral role in negotiations. For example, the agent or broker/company will prepare contract proposals as directed by either party, but may not provide either party with advice or opinions on how to gain an advantage over the other.

Multiple representation does not occur when there are two separate brokerage companies involved. There is no dual agency when the buyer has a buyer agency agreement with a different broker/company (one other than the listing broker/company).

Consider the following example: Seller Steve has a listing contract with broker/company XYZ. Buyer Beulah has a buyer agency agreement with broker/company XYZ. Seller Steve is working with Listing Agent Dana and Buyer Beulah has a relationship with Buyer's Agent Dana. Dana is working with Seller Steve as the listing agent and Dana is also working with Buyer Beulah as a buyer's agent.

If Buyer Beulah decides that she wants to see the property listed by Seller Steve, Dana will have to check to see what agency relationships were authorized by Buyer Beulah in the buyer agency agreement and by Seller Steve in the listing contract. If they each selected "I consent to multiple representation relationships, but do not consent to designated agency," then Dana may function as a dual agent.

When the parties select dual multiple representation without designated agency, the dual agent must treat everyone equally. This may be hard to do. With negotiation or pricing, the strategies that the dual agent uses cannot favor one party over the other. Dual Agent Dana cannot provide any advice that favors Buyer Beulah over Seller Steve. Any advice that Dual Agent Dana gives must be neutral and equal. Dual Agent Dana cannot give Seller Steve or Buyer Beulah a heads up or advice that would normally work to the advantage of

one and to the disadvantage of the other as long as Dana is a dual agent.

## Legal Hotline Questions and Answers: Dual Agency

*What are the three primary ways that a multiple representation without designated agency relationship is authorized by the parties?*

1. The same broker/company represents a seller-client (listing agreement) and a buyer-client (buyer agency agreement) in the same transaction, and one of these clients consented to designated agency while the other consented to multiple representation without designated agency in their respective agency agreements.

Without the consent of both clients to designated agency, this becomes a multiple representation without designated agency relationship in accordance with Wis. Stat. § 452.134(4). In this instance, the broker represents both clients as a dual agent and cannot place the interests of either client ahead of the interests of the other client in the transaction.

2. The same broker/company represents a seller client (listing agreement) and a buyer client (buyer agency agreement) in the transaction, but one or both of the clients have withdrawn consent to designated agency after previously consenting.

This means that when the agency contracts were first entered into, both of the clients consented to multiple representation with designated agency, but later one or both clients withdrew their consent to designated agency. This then becomes a multiple representation relationship without designated agency, and the broker/company cannot thereafter place the interests of one client ahead of the interests of the other client in the transaction.

3. All clients consented to multiple representation without designated agency in their agency contracts with the same broker/company.

This means that when the agency contracts were first entered into by the buyer and the seller (typically a buyer agency agreement and a seller listing agreement), both of the clients consented to multiple representation without designated agency. The broker/company represents both clients, but cannot put the interests of one client ahead of the interests of the other client in the transaction.

*The agent has a listing and a buyer agency agreement. Both clients have consented to multiple representation with designated agency. The buyer-client wants to draft an offer on the seller-client's listing. How can this be done?*

The agent should review office policy regarding such a situation. A single agent cannot provide designated agency representation in this transaction so something will need to be changed with regard to the agency relationships. There are several ways that this situation might be resolved, depending upon the preferences of the clients and the agent. Some possible solutions include:

- a) The buyer or seller (or both) may change their consent for representation to multiple representation without designated agency. By operation of law, when both parties have consented to multiple representation (either with or without designated agency), but neither or only one has selected the designated agency component, then the agency relationship for both parties is automatically deemed to be multiple representation without designated agency (dual agency), and the agent may not place the interests of any client ahead of the interests of any other client.
- b) Another agent in the company may be brought in to represent either the buyer or the seller in the transaction so that everyone can proceed with the multiple representation with designated agency selected by both parties.
- c) The buyer agency agreement may

be modified to exclude the listed property from the agreement. The agent may then proceed to work for the seller as the listing agent, and the agent may provide services to the buyer as a subagent or the buyer may work with an attorney.

- d) The listing contract may be modified to make the buyer an exception to the listing and the agent then would work as a buyer's agent. The agent may provide brokerage services to the seller as a customer or the seller can work with an attorney.

*Can a sole proprietor practice multiple representation without designated agency?*

A sole proprietorship is an unincorporated business owned and operated by one individual. Sole practitioners may practice multiple representation without designated agency (dual agency). The sole proprietor agent should explain to the clients when they sign their agency agreements that if the agent negotiates for both the buyer and the seller in the same transaction, then the agent will have to be neutral. The sole proprietor will be in "the middle" and simply cannot place the interests of one client ahead of the other in negotiations.

*Currently there is no listing and no buyer agency. The agent is thinking about doing a one-party listing and will be working with the buyer as a buyer's agent. Can the agent be a dual agent? Would the agent have the parties initial that they are consenting to multiple representation without designated agency?*

The type of agency representation is determined by the parties as stated in the agency agreements, subject to any company policy constraints. There are three possible choices: the agent may be a buyer's agent, the agent may be a listing agent or the agent may enter into both a buyer agency agreement with the buyer and a listing contract with the seller. In the third scenario,

the agent would be a dual agent if both parties agree to multiple representation without designated agency.

## The Boxing Ring Analogies

It may be helpful when explaining client agency representation concepts to consumers to use a boxing match analogy, an example often used by Attorney Dave Sayas when he explains designated and dual agency.

Imagine, for example, a boxing match in the center ring, as illustrated in the diagrams on Page 13 of this *Update*.

In the first diagram, the seller and the buyer each sit in one corner of the ring. They are the clients. When the buyer is working with a buyer's agent from a broker/company other than the broker/company that has the property listed, the listing agent will be in the seller's corner and will box for the seller and the buyer's agent will be in the buyer's corner and will box for the buyer. The buyer's agent and the listing agent are from different broker/companies, so they can give it their all and really duke it out (within the confines of the law, of course) on behalf of their respective clients. Advice, strategies, pricing and negotiation can all be geared to derive the best and greatest benefit for the respective clients. The buyer's broker watches from outside of the ring, as does the listing broker, to provide supervision and guidance to their respective agents, as needed.

The second diagram depicts multiple representation without designated agency, or dual agency. Again, the seller and the buyer each sit in one corner of the ring. They are the clients. This time, the listing agent and the buyer's agent all appear in the center of the ring. They are not boxers this time. Rather they – and their broker/company – must stay in the center of the ring and act as neutral

referees. The buyer's agent and the listing agent must treat the parties in each corner equally and make impartial calls. They cannot make a call for one corner to the detriment or disadvantage of the other corner. The broker/company stays in the center of the ring with the agents to help supervise and ensure that all calls made are impartial, basic information or advice that is general in nature and does not favor one client over the other. Outside assistance may be necessary in some cases. For instance, if the application of the definition of defect in the inspection contingency is unclear, then the corners might be wise to each engage separate attorneys who can advise and assist them without the neutrality restrictions of the dual agents.

When designated agency is used, the roles change, as is shown in the third diagram. When each client has consented to designated agency, the parties seated in the corners are no longer alone and they each have a boxer to fight for them. In the seller's corner is the designated agent for the seller, often the listing agent. In the buyer's corner is the designated agent for the buyer, often the buyer's agent. These agents will box for the parties.

The third diagram resembles the first one because the designated agents can give it their all and really duke it out (within the confines of the law, of course) on behalf of their respective clients. Advice, strategies, pricing and negotiation can all be geared to derive the best and greatest benefit for the respective clients. The broker/company watches from outside of the ring to provide supervision and guidance as needed. For multiple representation with designated agency, there must be two agents because you need two boxers.

Obviously a one-person office will not be able to work with designated agency because this requires a "boxer" for each party. Multiple representation without designated agency (dual agency) would be available. The broker would adopt a neutral and impartial posture and work from the center of the ring as the referee.

If there is a sole proprietor and one

Figure 1 - Buyer Working with Buyer's Agent from Different Brokerage Company



Figure 2 - Multiple Representation without Designated Agency (Dual Agency)

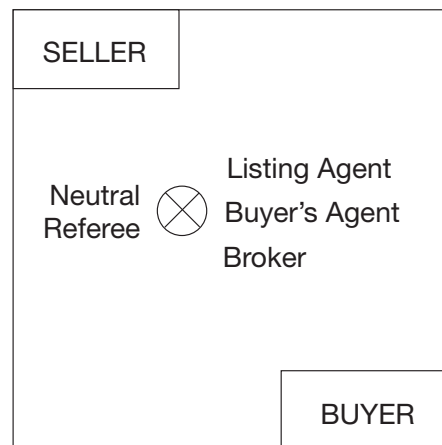
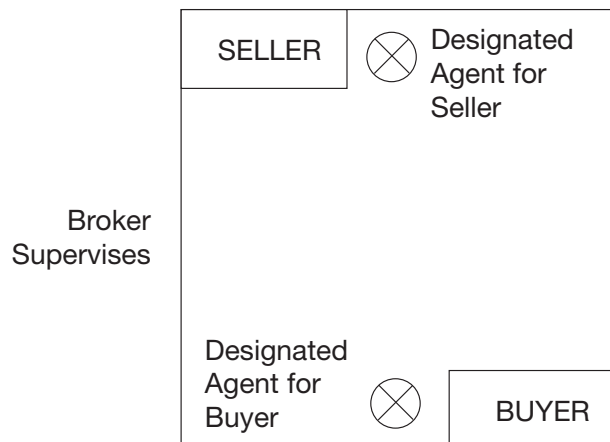


Figure 3 - Multiple Representation with Designated Agency



agent working for him or her, they can perform under a dual agency or multiple representation without designated agency scenario, but designated agency still would not be available. Designated agency requires at least one agent for each party plus a broker/company to supervise the designated agents. If the sole proprietor broker was to incorporate or set up an LLC and the broker entity was licensed, then the broker entity technically is charged with supervising the situation and the individual broker and agent can “box in the ring” as the designated agents.

With designated agency, the parties have their own "boxers" fighting for their benefit and advantage. They can give advice and provide negotiation strategies favoring only the party in their corner. With dual agency, the parties do not enjoy the benefits of having boxers in their corners. Instead, they have neutral referees who provide impartial assistance.

If one or both clients refuse multiple representation, then the company's listing cannot be shown to anyone with a buyer agency agreement with that broker/company and everyone loses out.

Consumers can decide for themselves whether they want a referee or a boxer in their corner.

## Legal Hotline Questions and Answers: General Multiple Representation

*Please clarify how to use the listing and buyer agency contract in relation to agency. It is the broker's understanding that there are three types of agency:*

1. All agents in office represent only the seller.
2. The listing agent works with the seller and another agent from the same office can represent the buyer; however, one agent cannot represent both the buyer and the seller.
3. The listing agent also represents the buyer.

When a seller selects a multiple representation relationship, either with or without designated agency, that seller is contemplating a possible situation in which the buyer has a buyer agency agreement with the listing broker/company.

1. If the seller selects no multiple representation relationships, and a buyer is interested in the seller's property and that buyer has a buyer agency agreement with the listing company, the buyer will not be able to see or purchase the property unless the parties make a change in their authorized agency relationships for the purpose of that potential transaction.

Multiple representation comes in two forms: multiple representation without designated agency and multiple representation with designated agency. All parties in a transaction must consent in writing to create either multiple representation relationship.

2. In multiple representation with designated agency, the listing broker/company represents the seller. If that same broker/company also has a buyer agency agreement with the buyer, designated agency may come into play. For that transaction, there must be two agents from the broker/company working on the transaction – one to represent the seller as a seller's agent and one to represent the buyer as a buyer's agent. Each agent will provide full negotiation services to each respective client. Each designated agent is allowed to provide advice and opinions to assist the client he or she is working with in negotiations, even if that advice and those opinions favor the interests of that client over the interests of the broker's other client in the transaction. Each designated agent will keep the confidential information of each client confidential.

For the seller, selecting multiple representation with designated agency means that if a buyer interested in the seller's property has a buyer agency agreement with same brokerage

company that has the listing, and if the buyer also selects designated agency, then the seller will work with the listing agent and the buyer's agent will work with the buyer. The same company will have both the seller and the buyer as clients.

3. In multiple representation without designated agency, the listing broker/company represents the seller. If that same broker/company also has a buyer agency agreement with the buyer, multiple representation without designated agency may come into play. For that transaction there may be two agents from the broker/company working on the transaction – one to represent the seller as a seller's agent and one to represent the buyer as a buyer's agent – or the same agent may be both the listing agent and the buyer's agent. The difference is that when it comes time to negotiate, the agent or agents must remain neutral and cannot provide any advice or opinions that place the interests of one client ahead of the other. The obligation to keep the confidential information of each client confidential is again present. This is what used to be referred to as dual agency.

For the seller, selecting multiple representation without designated agency means that if a buyer interested in the seller's property has a buyer agency agreement with same brokerage company that has the listing, and if the buyer also selects multiple representation without designated agency, then the seller will work with the listing agent, who may also be the buyer's agent. However, the agents must be neutral and neither party will receive full client-level services. The same company will have both the seller and the buyer as clients.

*What happens if one client in the transaction consented to designated agency and the other client in that same transaction consented to multiple representation without designated agency?*

This would be a multiple representation relationship where the broker/

company and the broker/company's agents may not place the interests of any client ahead of the interests of another during negotiations. Designated agency is one type of multiple representation, so a client's consent to designated agency also is effectively a consent to multiple representation without designated agency if the other party does not consent to designated agency. Wis. Stat. § 452.134(4) indicates that, "If a broker's client in a multiple representation relationship does not consent to designated agency or withdraws consent to designated agency, the broker and the broker's employees may not place the interests of any client ahead of the interests of any other in the negotiations."

*Does a licensee need an agency disclosure form if the licensee is working on a lease arrangement? The licensee is representing the owner and working with a tenant.*

The Broker Disclosure forms are required to be used in all transactions where a licensee is providing brokerage services to a party. This includes services being provided in a transaction for the sale of residential, commercial, industrial, farm and vacant land property. The disclosure forms are also required when a licensee is providing negotiation services in a lease transaction where the licensee (who represents the landlord) is negotiating the terms of a lease with a tenant. Licensees entering into listings for lease or property management contracts with property owners would present the Broker Disclosure to Clients form to their clients when entering into the agency agreement. If the licensee is working with the tenant as a customer, a Broker Disclosure to Customers should be given. The disclosure is not necessary if a rental unit is only being shown to the prospective tenant or a completed lease form is being presented to a prospective tenant in a "take it or leave it" manner.

*A broker is acting as a buyer's agent on a FSBO property that is a 12-unit building. Does the broker need to provide any disclosure of agency to the seller?*

Wis. Admin Code § RL 24.07(8)(a)1 provides, "Prior to providing brokerage services to a party, each licensee shall provide a copy of the agency disclosure form required under s. 452.135, Stats. If the services are for the sale of real estate used or intended to be used principally for one to 4 family residential purposes, the licensee shall, at the time the disclosure is provided, request the party to acknowledge in writing the receipt of a copy of the disclosure form."

If the broker is acting as a buyer's agent and intends to provide any brokerage services to the seller, the licensee should provide the seller with a Broker Disclosure to Customers, identifying the broker as an agent of the buyer. It may be prudent to do this as a precautionary measure in all FSBO situations in case the licensee later on in the transaction provides negotiation to the seller and forgets to disclose the agency relationship.

The 12-unit property is considered commercial for the purpose of this disclosure, so the license may use the Broker Disclosure to Non-Residential Customers, designed for commercial transactions. In commercial transactions, it is not necessary to ask the other party to sign the Broker Disclosure to Customers form.

*Does every broker/company have to offer designated agency and multiple representation without designated agency?*

No, each broker/company may set its own policies as to what client agency representation alternatives will be made available to clients. Some broker/companies may not be able to provide brokerage services in a multiple representation relationship if the company is very small, and others may choose not to engage in multiple

representation as a policy decision. Broker/companies are free to work with clients and customers using single party agency relationships. The clients of such broker/companies will execute the Broker Disclosure to Clients form to indicate that they reject multiple representation relationships.

*An agent is about to list a property for a new client. This client also wants to write an offer on one of the agent's other listings. If the first seller chose multiple representation with designated agency and is opposed to dual agency representation, can the agent still list the new seller's home? Can the buyer work with another agent and/or broker as a buyer's agent when writing an offer on the agent's other listing?*

Any listing agreement entered into with the new seller does not create multiple representation relating to the first listing. These are separate transactions. If the new client wants buyer agency representation for the purchase of the agent's other listing, either another agent from the company will need to represent the buyer as a designated agent or the buyer may seek buyer agency with another company. If the buyer is comfortable with being a customer to purchase the agent's other listing, the listing agent may draft an offer to purchase as an agent of the first seller.

## Changing the Relationship Choice

After making a selection with regard to multiple representation relationships, some clients will undoubtedly change their minds. Agents must be prepared to properly document these changes of heart. For instance, if the client previously consented to multiple representation without designated agency or rejected multiple representation relationships and now wants to authorize designated agency, the change may be made using an amendment to the client's agency agreement.

## Legal Hotline Questions and Answers: Changing the Relationship Choice

*If a client withdraws his or her consent to designated agency in the middle of negotiations, does the relationship automatically become a multiple representation without designated agency?*

Yes, this is confirmed in Wis. stat. § 452.134(4). The broker/company and the broker/company's designated agents will immediately stop providing any information, advice, opinions or other brokerage services that give an advantage or place the interests of one of the broker/company's clients ahead of the interests of another during negotiations. The broker/company and the broker/company's agents may continue to provide brokerage services to the clients, but they must remain neutral and cannot place the interests of any of the broker/company's clients ahead of the interests of another during negotiation.

*How does a client withdraw consent to designated agency or to multiple representation relationships?*

A client may withdraw his or her consent to dual agency or designated agency at any time. The client's withdrawal must be in writing. If the agent is asked to prepare a proper withdrawal document for the client to sign, a good choice may be to use the WB-42 Amendment to Listing Contract or the WB-47 Amendment to Buyer Agency/Tenant Representation Agreement, respectively.

The client is free to have such a withdrawal prepared by his or her attorney. Another option for a client might be to use a copy of the Broker Disclosure to Clients form to make the client's new choice, and then sign and date the form. A note indicating that this is the client's new choice, superseding the prior choice, would be helpful.

*What should an agent do if his buyer-client rejected all multiple representation relationships and*

*now wants to see a property listed by the agent's broker/company?*

At this point there would seem to be three options. First, the buyer could choose to change the selection he or she made with respect to multiple representation and authorize designated agency or multiple representation without designated agency. The agent can simply amend the buyer agency agreement to indicate this change.

Second, the buyer agency agreement may be amended to exclude the particular property. The agent may use a WB-47 Amendment to Buyer Agency Contract to exclude the listed property per lines 11-12 of the WB-36. The agent could then work as an agent of the seller and the buyer would be a customer with regard to the particular listed property. The agent should give the buyer a Broker Disclosure to Customers before beginning negotiations with regard to that property. The agent may be wise to note on the Broker Disclosure to Customers that it pertains to that specific property only. This option would involve a fair amount of paperwork and may be very confusing to the buyer and others.

Third, the agent may politely explain to the buyer that the buyer cannot see that property because the agent's company represents the seller and the agent cannot concurrently provide services to the buyer-client without an authorization to provide brokerage services in a multiple representation relationship.

## Completing Line 1 of the Offer to Purchase

Lines 1-2 of the 2010 Residential Offer to Purchase provide, "LICENSEE DRAFTING THIS OFFER ON \_\_\_\_\_ [DATE] IS (AGENT OF BUYER) (AGENT OF SELLER/LISTING BROKER) (AGENT OF BUYER AND SELLER) STRIKE

ONES NOT APPLICABLE." The new language provides proper choices for the various representation models that came into play on July 1, 2006, when the Agency Law Modernization Act went into effect.

This new language recognizes that the agent drafting the offer may not be licensed as a broker and thus the change to "Licensee." There is a proper selection for the agent drafting the offer to make (by striking the choices that do not apply) for each different representation scenario:

- If the property is listed with another broker and the agent drafting the offer is a buyer's agent under a buyer agency agreement, the agent is the "agent of buyer."
- If the property is listed with another broker and the agent drafting the offer is a subagent of the listing broker, the agent is the "agent of seller/listing broker."
- If the agent drafting the offer is an agent in the same company as the listing agent but there is no buyer agency agreement with the buyer, the agent is the "agent of seller/listing broker."
- If the agent drafting the offer is an agent in the same company as the listing agent, there is a buyer agency agreement with the buyer and the drafting agent has been working with the buyer as a designated agent, the agent is the "agent of buyer."
- If the agent drafting the offer is the listing agent, there is a buyer agency agreement with the buyer and the drafting agent has been working with the buyer as a dual agent, the agent is the "agent of buyer and seller."

If the licensee is the buyer in the offer to purchase, and thus not acting in an agency capacity, the licensee should line out all of lines 1-2 and indicate elsewhere in the offer that he or she is a licensed real estate agent/broker purchasing the property for personal use/investment/speculation/resale, as the case may be.



## Legal Hotline Questions and Answers: Line 1 of the Offer to Purchase

*The agent has listed a property and the sellers allowed multiple representation without designated agency in the listing contract. The agent is also a buyer's agent for the buyer, who also allowed multiple representation without designated agency in the buyer agency contract. When the agent writes an offer for the buyer, does the agent state that he is a "dual agent" or a "buyer's agent?"*

If both clients agree, in writing, to multiple representation without designated agency, the agent may write the offer. In multiple representation without designated agency, the broker/company and its agents may provide brokerage services to each client, but when it comes time to negotiate, they must remain objective and neutral and cannot provide any advice or opinions that place the interests of one client ahead of the other. On the new WB-11, the agent would be "agent of buyer and seller." On any offer to purchase forms that have not yet been updated, it is appropriate for this agent to complete line 1 on the offer to indicate that he is a "dual agent."

*The WB-14 Residential Condominium Offer to Purchase has language that has not been updated. For example, line 1 on the WB-14 states "(agent of the seller)(agent of the buyer)(dual agent)." Can agents use the WB-14 as it is without making changes until the forms are updated?*

The 2000 version of the WB-14 Residential Condominium Offer to Purchase is the current Wisconsin state-approved form. The DRL Real Estate Contractual Forms Advisory Committee is currently working on updating the WB-14. Until the new form is available for use, licensees should use the existing form and modify it as necessary.

The purpose of the disclosure on line 1 of the DRL-approved offer to purchase is to reconfirm the agency status of the agent drafting the offer, in other words, clarifying whom the agent represents in the transaction. Until the DRL-approved offer to purchase forms are updated to reflect the revised agency law provisions, agents must do the best they can with the existing offer forms. Completion of Line 1 is based upon the agency representation of the agent drafting the offer: whose interests does the drafting agent represent?

- **Offer Drafted by Subagent.** The subagent is an agent of the listing broker and also owes limited duties to the seller. Line 1 of the offer may appropriately be completed to indicate that the agent drafting the offer is an "agent of seller."
- **Offer Drafted by Designated Agent.** When a designated agent drafts an offer, that agent and the agent's broker is participating in a designated agency representation relationship, but at the same time the broker has an agency relationship with the other party. If the agent drafting the offer is a designated agent who has a buyer agency agreement with the buyer, that agent is representing the buyer in the same manner that he or she would if that agent was a buyer's agent from a different broker/company. A designated agent representing the buyer may complete line 1 to indicate that he or she is an "agent of buyer."
- **Offer Drafted by Agent in Multiple Representation without Designated Agency.** When an agent in a multiple representation without designated agency drafts the offer, that agent cannot advocate for the buyer or represent the buyer's interests in a manner that places the interests of the buyer ahead of the interests of the seller. This agent may complete line 1 to indicate that he or she is a "dual agent."

## Resources

- June 2006 *Legal Update*, "Revised Agency Law Implementation," at [www.wra.org/LU0606](http://www.wra.org/LU0606).
- Agency Law REALTOR® Resource page at [www.wra.org/agencylaw](http://www.wra.org/agencylaw).
- Forms Update Resource page at [www.wra.org/Legal/forms\\_update.htm](http://www.wra.org/Legal/forms_update.htm).
- *NAR Field Guide to Agency Disclosure* at [www.realtor.org/library/library/fg702](http://www.realtor.org/library/library/fg702).
- "Working with Multiple Representation Transactions" in the October 2008 edition of the *Wisconsin Real Estate Magazine* at [www.news.wra.org/story.asp?a=989](http://www.news.wra.org/story.asp?a=989).

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