



When my firm is acting as a dual agent, can I give advice regarding negotiation strategy?

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QUESTION: Several weeks ago, I listed a property for sale. After explaining that our firm does not engage in designated dual agency, but does practice “standard” dual agency, my owner-client signed our listing agreement and authorized us to act as a dual agent. One of the other agents at my firm has a buyer-client who just submitted an offer that is below the listing price. When my client asked me how he should counter, I explained that, in the dual agency context, I could not advise him on his negotiation strategy. My client was unhappy about my refusal to advise him. He now claims that the Real Estate Commission has given him a different opinion about what I can and cannot do. Are there limits on what advice I can give my seller-client in this context?

ANSWER: Absolutely. There is an excellent discussion of this subject in a publication that is available on the Real Estate Commission’s website. It is titled: “Dual and Designated Dual Agency Revisited”. The publication was part of the course materials for the Commission’s 2009-2010 Broker-in-Charge Annual Review Course. Many of the following principles are set forth explicitly in that publication.

An agent (or firm) acting as a dual agent owes the same fiduciary duties to both parties. Because of these identical yet competing fiduciary duties, the agent/firm’s ability to advise and advocate for either client becomes much more limited. In the Commission’s words, unless the firm practices designated dual agency, dual agency “effectively neutralizes agents as to their advocacy roles.” In discussing designated dual agency, the Commission notes that designated agency was designed as “a mechanism for firms practicing disclosed dual agency to restore to their clients some of the representation and advocacy of client interests that is lost with standard dual agency.”

The Commission’s course materials include a list of do’s and don’ts for any agent who acts as a standard dual agent. The first “don’t” reads as follows: “A Broker/Dual Agent May Not... suggest to either party an amount to offer or counteroffer for the property... The broker/standard dual agent must refrain from recommending any course of conduct to one principal which might compromise the bargaining position of his/her other principal.”

If your firm uses the standard Exclusive Right to Sell Listing Agreement (Standard Form 101), you might point out the language in paragraph 17(c)(2) to your client. It reads: “Seller is fully aware of and understands the implications and consequences of Firm’s dual agency role as expressed herein to provide balanced and fair representation of Seller and buyer and to encourage and effect communication between them rather than as an advocate or exclusive agent or representative.”

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