

Dual Agency Disclosure Guide

Who is a dual agent, and to whom does a dual agent owe fiduciary duties?

An agent becomes a dual agent if he or she personally represents both parties to a single transaction. Per the recent case of *Horiike v. Coldwell Banker*, an individual agent is also a dual agent if his or her brokerage represents both sides of a transaction. When agents from the same brokerage are working with different parties to a single transaction, each agent is considered a dual agent, even if each individual agent communicates and works exclusively with a single party. A dual agent owes equal fiduciary duties to both parties to a transaction.

What is the extent of a dual agent's fiduciary duty?

A real estate agent's fiduciary duty to clients requires "the highest good faith and undivided service and loyalty." This can be a difficult standard to navigate for dual agents, whose service and loyalty are inherently divided between two parties with diverging interests. In the case of *Field v. Century 21 Klowden-Forness Realty* the Court stated that an agent's fiduciary duty may require investigation and disclosure of unknown material facts that might be reasonably discovered. Unfortunately, there are no clear and easy guidelines for meeting this obligation. Dual agents must often make difficult decisions in balancing clients' interests. However, dual agents can lessen the likelihood of breaching fiduciary duties by being upfront with their clients about the nature of their duties to each party.

What forms should a dual agent provide to clarify the nature of agency relationships?

Both buyer and seller should be provided with the Disclosure Regarding Real Estate Agency Relationships (C.A.R. Form AD). The AD provides a description of the different types of agency relationships that can exist in a transaction, including dual agency. Both buyer and seller should also be provided with a confirmation of real estate agency relationships (within Paragraph 2B of the RPA or in C.A.R. Form AC). That confirms which types of agency relationships will exist in the specific transaction at hand. If 2B of the RPA is incomplete or completed inaccurately, C.A.R. Form AC may be used.

When both the agency disclosure and the agency confirmation are provided in a dual agency situation, the agent's clients are put on notice that the agent represents both sides and owes each side fiduciary duties. The AD provides basic ground rules for dual agency, stating that a dual agent may not, without express consent, disclose to the buyer that the seller would accept lower price, or to the seller that the buyer would pay more. Parties that receive this disclosure in advance have less of a basis for lawsuits alleging breach of fiduciary duty by a dual agent.

Legislation affecting dual agents.

Assembly Bills 1289 and 2884(2018), effective January 1, 2019, provide that a dual agent may not reveal to either party facts relating to the financial position, motivations, bargaining position or other personal information that may impact price, in addition to the restrictions already mentioned.