

TOP 10 LEGAL HOTLINE AGENCY QUESTIONS

1. REALTOR® has been showing various properties to Buyer as a seller's agent. Buyer becomes interested in property listed with that REALTOR®. Does REALTOR® now have to become a dual agent?

No. If a REALTOR® has been showing various properties to a buyer as a disclosed seller's agent, that REALTOR® can remain a seller's agent even if the buyer becomes interested in property which is listed with REALTOR®'s office. Dual agency applies only if the REALTOR® was working with the buyer as a buyer's agent when the buyer became interested in property listed with that REALTOR®'s office. A listing agent can always deal directly with buyers as customers.

2. REALTOR® was working with Buyer as a buyer's agent. Buyer became interested in property listed with REALTOR®. The listing agreement and buyer-broker agreement provide that in the event of a conflict, REALTOR® shall become a dual agent. Are any new agreements and/or disclosures required?

Yes. When a REALTOR® becomes a dual agent, the buyers and sellers should sign a dual agency agreement. This agreement explains the parameters of a dual agency relationship. Also, whenever there is any change in agency, a new agency disclosure form should be submitted to the buyer and seller for signature. It is essential that the parties know what type of relationship they have with a REALTOR® to help protect the REALTOR® in the case of a claim that the REALTOR® has breached the REALTOR®'s fiduciary duties.

3. REALTORS® Jones and Smith work in the same office. REALTOR® Jones is working with Buyer Brown as a buyer's agent. REALTOR® Smith is working with Buyer Green as a sub-agent of the seller. Both buyers become interested in the same home listed with another office. What is the agency relationship?

REALTOR® Jones and the office remain a buyer's agent for the transaction with Buyer Brown. REALTOR® Smith and the office remain a seller's agent for the transaction with Buyer Green. An office, and even a particular REALTOR® within the office, may maintain different agency relationships with different buyers at the same time for the same piece of property. However, great care must be taken in this type of situation.

The above-scenario, while not a dual agency situation, is a delicate situation. Buyer Brown could claim, for example, that the mere presentation of an offer from Buyer Green constitutes a breach of fiduciary duty owed by virtue of Buyer Brown's agency relationship with the office. Likewise Buyer Brown could claim that REALTOR® Jones has a duty to disclose the details of Buyer Green's offer. To help protect against such claims, we strongly recommend incorporating a provision in buyer's agency contracts that puts a buyer on notice that the company may represent and/or present offers from other buyers that are interested in the same property. There presently is no Michigan case law indicating how this situation may be properly handled.

4. REALTORS® Wilson, Jones and Smith work at the same office. REALTOR® Wilson has a listing for 789 Pine Street. REALTOR® Jones has a buyer-broker agreement with Buyer White. Buyer White became interested in 789 Pine Street, and a dual agency disclosure form was signed by both the Seller and Buyer White. REALTOR® Smith showed 789 Pine Street to Buyer Green who wants to make an offer. REALTOR® Smith is not a buyer's agent for Buyer Green. Can the offer from Buyer Green on 789 Pine Street be presented to the Seller as a seller's agent, or is dual agency required?

The offer can be presented by the listing office as a seller's agent. The listing office cannot act as a dual agent for the Seller and Buyer Green because the office did not have a buyer's agency relationship with Buyer Green. To determine agency, a REALTOR® should look at the relationship between the office, the Seller, and the particular buyer. In this case, the office had an agency relationship with the Seller and not with Buyer Green. Thus, the agency relationship remains that of a seller's agent. The dual agency relationship between the office, the Seller and Buyer White is exclusive to those particular parties for 789 Pine Street.

5. REALTOR® Smith enters into a buyer-broker agreement with Buyer. Buyer makes an offer on 389 Treetop, which is listed with REALTOR® Wilson, an agent at the same office. The sale being in-house, Buyer opts to sign a dual agency agreement. Buyer's offer is rejected and the sale does not materialize. Buyer now becomes interested in 621 Homestead, which is listed with a different company. Is REALTOR® Smith working as a buyer's agent or a dual agent?

REALTOR® Smith is acting as a buyer's agent for Buyer. The dual agency agreement was an agreement for 389 Treetop only. Since 621 Homestead is not listed with REALTOR® Smith's company, REALTOR® Smith's agency relationships are no longer in conflict. REALTOR® Smith can represent Buyer as a buyer's agent on 621 Homestead.

6. Can a REALTOR® be a buyer's agent without entering into a buyer-broker agreement?

Yes, a REALTOR® can be a buyer's agent without entering into a buyer-broker agreement. However, a buyer's agent without a buyer broker agreement has no legally enforceable right to a commission. In addition to protecting a REALTOR®'s right to a commission, buyer-broker agreements can serve to limit a REALTOR®'s liability. Michigan case law has established limits for liability for listing agents and sub-agents, however whether and to what extent those limitations apply to buyer's agents has yet to be determined. Thus, by specifically addressing the limitations of the agency relationship within the buyer-broker agreement, REALTORS® acting as buyer's agents are able to better protect against potential claims for breach of fiduciary duty.

7. REALTOR® shows 123 Main Street to Buyer Brown as a sub-agent. Buyer Brown buys another home. REALTOR® has a buyer-broker agreement with Buyer Green. Buyer Green now expresses interest in 123 Main Street. Can REALTOR® show the property to Buyer Green as a buyer's agent?

Yes. The agency relationship between the seller and the REALTOR® as sub-agent was limited to the transaction involving Buyer Brown. The REALTOR® can have a different agency relationship with Buyer Green. However, the REALTOR® would have a fiduciary obligation to the seller not to disclose any confidential information learned in the prior sub-agency relationship. To eliminate a potential claim for breach of fiduciary duty by Buyer Green for withholding that information, the REALTOR® should ensure that the buyer-broker agreement contains a provision that any confidential information learned in a prior agency relationship shall remain confidential and shall not be disclosed to the buyer.

8. REALTOR® shows 123 Main to Buyer as a sub-agent. Buyer decides to present an offer on 123 Main, but wants representation by a buyer's agent. Can REALTOR® switch agency relationships?

There is no legal prohibition against switching agency roles, however, REALTORS® should be extremely cautious when doing so. A seller who knows, or suspects, that the REALTOR® learned confidential information while the REALTOR® was acting as a sub-agent will be understandably upset when he learns that the REALTOR® has "switched sides" mid-transaction. At a minimum, REALTORS® should have clauses in their listing contracts and buyer agency contracts stating that they will not disclose confidential information learned in another agency relationship. Even with this language, however, it may be difficult for a REALTOR® to convince a seller that the

REALTOR® did not actually disclose confidential information, especially if the buyer's offer comes in at the seller's "bottom line" price.

9. REALTOR® has a listing agreement for the sale of Gray's home. Gray is in the market for a new home. Can REALTOR® act as a sub-agent when showing property to Gray?

Yes. The agency relationship with Gray for the sale of Gray's home is limited to transactions involving the sale of Gray's home. REALTOR® can enter into any type of agency relationship with Gray regarding homes Gray is interested in purchasing. REALTOR® should keep in mind, however, that any information Gray provides in conjunction with the seller's agency relationship for the sale of Gray's home remains confidential and cannot be disclosed in a sub-agency relationship for the purchase of a home by Gray.

10. REALTOR® is helping a family member find a home. Can REALTOR® be a sub-agent for the seller of the property REALTOR® is showing?

A REALTOR® is not legally prohibited from acting as an agent for a party in a transaction with a relative. However, if the deal goes sour, the REALTOR® may have a hard time convincing that party (and the court) that the REALTOR® was in fact acting in that party's best interest. REALTORS® are advised to hold themselves out as buyer's agents in these circumstances so that the REALTOR®'s fiduciary duties are not in conflict with the REALTOR®'s loyalties.