



State of Wisconsin
DEPARTMENT OF REGULATION AND LICENSING
CORRESPONDENCE / MEMORANDUM

DATE: February 27, 2002
TO: William L. Dusso, Clete Hansen
FROM: William A. Black
SUBJECT: Designated Agency- proposed legislation

Designated Agency

1. The practical effects and benefits of designated agency may result in additional confusion for consumers who may be led to believe that they are receiving services to a greater extent than can actually be provided.

Wisconsin law currently provides a complex framework set forth in Wis. Stats. § 452.133 to delineate the duties of brokers to clients and non-clients.

The duties owed to all parties under Wis. Stats. § 452.133(1) are:

- fair and honest treatment,
- reasonable care and skill,
- disclosure of material adverse facts,
- confidentiality,
- provision of accurate market condition information,
- accounting,
- objective presentation of offers.

To clients, the additional duties owed under Wis. Stats. § 452.133(2) are:

- loyalty,
- disclosure of material information,
- obedience

The duty to disclose adverse material facts often conflicts with the duty of confidentiality, loyalty and obedience, presenting brokers with challenging definitional quandaries regarding whether information is “material”, “adverse”, or reasonably classified as “confidential”.

The practical experience of the department based on the observation of real estate practice under the current scheme is that consumers and brokers alike are often confused as to what duties

are owed to whom and when. The proposed legislation would add another layer of complexity to the current scheme.

2. Wisconsin law currently provides for seller agency, dual agency and buyer agency.

a. Seller agency is the traditional model of real estate sales whereby a person desiring to sell property lists that property with a broker. Other cooperating brokers who work with the listing broker are acting as the agent for the listing broker. This often causes confusion to buyers who wrongly presume a cooperating broker is acting for them.

b. Under dual agency a broker represents both the seller and buyer but cannot place the interests of either the seller or buyer ahead of another. This means that neither client receives undivided loyalty from the broker. The broker cannot advance one party's interest over another. The broker is often merely a facilitator, or scrivener.

In dual agency a broker may not disclose:

1. That a party will accept or pay a certain price for the property.
2. Confidential reasons or motivation for sale or purchase.
3. The effect or desirability of certain terms, ie..financing.

c. A buyer's agent works for a buyer client. The same standard of duty under Wis. Stats. § 452.133(2), is owed to the buyer by the buyer's agent as is owed to the seller by a seller's agent.

3. Designated Agency

Designated agency as proposed will occur when a real estate firm promises both buyer and seller in the same transaction that the firm will fully represent both sides at the same time, and provide each with the duties owed to a client pursuant to Wis. Stats. § 452.133(2), namely; loyalty, disclosure of material information and obedience.

The seller is promised that the firm will negotiate through a designated seller's agent for the highest price and best terms. The buyer is promised that the firm through a designated buyer's agent will negotiate for the lowest price and best terms.

A seller who agrees to designated agency gives up undivided loyalty, which was previously owed by the firm. In addition to the loss of undivided loyalty the access and use of previously disclosed confidential information becomes a potential risk for the seller.

The result of designated agency is that the broker may keep the transaction "in-house" because both designated agents are employees of the broker, and all the fees earned will flow through the broker to distribute as compensation as the broker sees fit.

Under current law which does not allow designated agency a potential buyer seeking buyer agency with the broker would be turned away and would obtain an independent non in-house buyer broker.

4. Review of proposed Wisconsin Designated Agency Legislation

a. Protection of confidential information-

1. [§452.137 (c) (2)(b)1.] Ability to designate the broker as a designated agent places disclosure of confidential information at potential risk.

A broker will initially be receiving confidential information from the seller gained from negotiating a listing contract, (ie..price, terms, special needs) and from the buyer in negotiating a buyer agency contract.

As a practical matter, how could a broker designated as an agent be able to refrain from using or being influenced by confidential information to advise the buyer or seller?

Will consumers need to be protected from the possibility that information which they have disclosed in confidence has shaped the manner in which the other side negotiates with them?

2. [§452.137 (c) (3)(b)] No protection for confidential information gained prior to designating agents.

The proposed legislation does not explicitly state that confidential information gained prior to designation must remain confidential, nor restrict an agent's designation as an agent despite possessing confidential information concerning the opposing client. Information related to financial information of the parties, personal plans and preferences and specific pressures on clients can often be general information in a firm.

3. General security concern for protection of confidential information after designation.

The firm and the designated agents share emails, common data bases, fax machines, copy machines, reception areas, phone message taking and general office interaction. Confidential information tracking and protection will be difficult. A broker is under a duty to protect as confidential any information that the broker knows, "a reasonable party would want to be kept confidential,.." Wis. Stats. § 452.133 (1) (d).

Even with firm safeguards built in to structure employee behavior what is the actual practical risk of either purposeful access or inadvertent disclosure of confidential information?

Will this consequence of designated agency lead to potential consumer confusion and distrust?

Will the practical interaction of coworkers and staff hinder the protection of confidential information when adverse interests are being represented from the same office or firm?

Is it sufficient protection in the proposed legislation to simply declare a presumption of non-disclosure in the firm between agents?

5. The duty of loyalty.

a. The “in-house” dilemma of coworkers and bosses.

In a brokerage firm each designated agent is a coworker of the other and an employee of their boss, the broker. The coworkers therefore have an ongoing personal and professional relationship that existed prior to and which will continue after the designated agency transaction.

Economically, the two designated agents know, and the broker knows, that 1) they will all get paid from the broker’s commission if the transaction is successful, 2) the agents and broker’s fees all are contingent on the transaction being successful, and 3) too vigorous of representation could lead to the transaction not being successful. The three parties will need to continue to work collegially with each other after the transaction concludes either successfully or unsuccessfully.

Will there be subtle pressure on all participants to preserve a common economic gain among persons with whom they share an ongoing working personal and professional relationship?

b. The effect on commissions may be material.

Should in-house distribution of commissions be disclosed versus a buyer agency split outside the firm?

Should both the seller and the buyer be able to judge whether the distribution of commissions differs depending upon if they agree to in-house designated agency, and whether such a difference benefits them?

6. “Full agency services” representation versus the risk of potential client confusion and compromise of confidential information.

A major benefit claimed for designated agency is that the buyer represented by the in-house designated agent will now benefit from “full agency services” imposed by Wis. Stats. § 452.133 (2).

This means that under designated agency a firm can now do what it previously could not do, namely represent a seller and buyer simultaneously. However, the buyer representation

offered by the firm does not and cannot differ from that available currently to a buyer who retains an independent buyer's agent not affiliated with the firm.

At its best, designated agency will only offer what the buyer always had available outside the firm, namely a duty of loyalty owed to the buyer by an independent buyer's broker. However, as previously discussed the additional two results of designated agency are that it may place the buyer's and seller's confidential information at risk and may undercut the duty of loyalty in the interest of successfully concluding a sale.

One major difference between designated agency and dual agency is that under designated agency the in-house buyer's agent may now suggest a price and terms to a buyer; as opposed to dual agency where the firm acts merely as a transactional facilitator for both the buyer and seller. Therefore, the in-house buyer's agent should theoretically have no other special advantage over an outside buyer's agent, unless confidential information were to be compromised.

Will consumers (especially buyers) wrongfully conclude that participating in designated agency provides an advantage not currently available and will they recognize the additional inherent risks associated?

a. Seller risk versus reward with designated agency.

Prior to the designation of agents a seller actually has a designated agent, namely, the broker who listed the seller's property. Therefore to the seller it may not matter whether a buyer uses a broker's designated buyer's agent, or a buyer's agent outside the firm. The seller merely wants the best price and best terms of sale.

However, after designation of a buyer and seller agent, the seller does face a different business relationship with a broker, namely an employee of the broker essentially working against the seller (ie..the buyer's agent). Will the seller now be concerned whether confidential information is being accessed or used by the designated agent against the seller? Also, with two employees of the broker as agents in the sale, will the seller be concerned with collusion to successfully conclude a transaction?

Should the seller be informed of these potential risks of designated agency?

b. Buyer benefit with designated agency.

The buyer is subject to the same risks as a seller regarding the duty of loyalty and the use of confidential information in the designated agency context. So the buyer will likely wonder what is the benefit?

What a buyer really wants to know is how much money the seller will take for a piece of property and on what terms. However, the designated buyer's agent cannot obtain this

information from the firm in any manner if it is confidential. This duty of confidentiality also assumes the buyer's agent never knew confidential information of the seller in the first instance. If the buyer's agent has this information already, the agent should be replaced, because such information is not to be used. Therefore, the one advantage that the buyer may wish to have, i.e., inside information, the buyer shouldn't and won't have.

To ethically determine a reasonable sales price, a buyer's agent may run a list of comparable sales in the area or do other research. In suggesting a price or terms therefore, the designated buyer's agent must either base the suggestion on confidential information, which is improper, or suggest offering the buyer's best price, which any agent could do currently, or suggesting some other price based upon currently available research, which any agent could do currently.

As a result, during the give and take between the seller's and buyer's agents in a firm, will the negotiation process likely result in what essentially is available currently under dual agency, namely, a sales facilitation between coworker agents?

This question arises because if both agents act ethically regarding confidential information, negotiations should be blind with neither side having an unfair advantage.

Should the buyer be informed that designated agency offers no advantage over retaining an independent outside buyer's agent?

Should the buyer be informed of risks to the duty of loyalty and use of confidential information?