

## **Legal Hotline Q & A**

### **From Get the Facts 04/10/18**

**QUESTION:** We have experienced a significant increase in FSBO/Un-Listed Sale Transactions in our office recently. I am seeking advice in proper training of my Broker's as to Best Practices and compliance with Agency Law.

In an Un-Listed Sale where the Seller is paying a commission to the Selling Broker, who does not have a signed Buyer Agency Agreement with the Buyer, but states to the Buyer and so marks the Agency Disclosure on the P&SA that the Selling Broker represents the Buyer, the Seller also requests representation from the Selling Broker. Not having a Buyer Agency Agreement signed in this scenario is not best practice but it is common in this scenario to have not done so:

1. In order for the Selling Broker to represent the Seller, must a Listing Contract be signed between the Seller and the Selling Broker in order to establish an Agency Relationship?
2. If a listing contract is signed by the now Listing Broker and Seller, is it required as per Law of Agency, Section 2.(1).(c). that in order to also represent the Buyer in this scenario that the now Listing Broker and Buyer must sign a Buyer Agency Agreement in order to also represent the Buyer as a Dual Agent?
3. What if Seller and Buyer sign a Statewide Form 41C as an addendum to the P&SA with no Seller Agency Agreement having been signed with the Broker, may the Selling Broker still commit to representing the Seller by disclosure on page 1 of the P&SA AND still state Buyer representation in the same Agency Disclosure (No Buyer Agency Agreement has been signed)?

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**ANSWER:** In answering this question, it is first important to remind broker what the Agency Law says about creation of agency relationships. If there is no written agency agreement between broker and either party in a transaction, broker represents the buyer. If broker has a written agency agreement with seller, broker

represents seller exclusively unless that same broker also has a written agency agreement with buyer, in which case broker is a dual agent.

Summarized:

no agency agreement = buyer agency

listing agreement only = exclusive seller agency

listing agreement and buyer agency agreement = dual agency.

With respect to broker's questions:

1. In order for the Selling Broker to represent the Seller, must a Listing Contract be signed between the Seller and the Selling Broker in order to establish an Agency Relationship? Yes. If broker's firm has no Agency Agreement with seller by which the broker is appointed as a sub-agent, representing the seller, then broker necessarily represents buyer exclusively. If broker and seller intend for broker to represent seller, broker MUST have a written agency agreement with seller.
2. If a listing contract is signed by the now Listing Broker and Seller, is it required as per Law of Agency, Section 2.(1).(c). that in order to also represent the Buyer in this scenario that the now Listing Broker and Buyer must sign a Buyer Agency Agreement in order to also represent the Buyer as a Dual Agent? Yes. If broker has a signed, written agency agreement with seller, broker represents seller exclusively UNLESS broker also has a signed, written agency agreement with the buyer.
3. What if Seller and Buyer sign a Statewide Form 41C as an addendum to the P&SA with no Seller Agency Agreement having been signed with the Broker, may the Selling Broker still commit to representing the Seller by disclosure on page 1 of the P&SA AND still state Buyer representation in the same Agency Disclosure (No Buyer Agency Agreement has been signed)? No. Form 41C is an agreement to pay compensation. Compensation has nothing to do with agency. If there are no agency agreements signed between broker and either party, then broker represents buyer, exclusively, even if seller and buyer have both signed a Form 41C.

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