

RESOLUTION 01-03-2017

DIGEST

Real Estate: Prohibits Dual Agency by Individual Real Estate Agents

Amends Civil Code sections 2079.16, 2079.17 and 2079.21 to prohibit real estate agents who are associate licensees from representing both seller and buyer in real estate transactions.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Civil Code sections 2079.16, 2079.17 and 2079.21 to prohibit real estate agents who are associate licensees from representing both seller and buyer in real estate transactions. This resolution should be approved in principle because it maintains independent representation of buyers and sellers of real property while allowing the current practice permitting the same real estate broker to act as “dual agent.”

Current law permits dual agency in real estate transactions provided the buyer and seller are informed of the agency relationships involved and obtain buyer and seller’s consent. (Civ. Code, §§ 2079.14, 2079.16, 2079.17; *Horiike v. Coldwell Banker Residential Brokerage Co.* (2016) 1 Cal.5th 1024, 1030-1031.) Under California law, only licensed real estate *brokers* may act as “agents” in real property transactions. (Bus. & Prof. Code, §§ 10130, 10131.) Real estate brokers may be a corporate brokerage firm, in which case the corporation is the agent. (*Id.*, §§ 10158, 10159, 10211; 2 Miller & Starr, Cal. Real Estate (4th ed. 2016) § 4:17, p. 4-61.) Licensed real estate brokers are often assisted by licensed “real estate salespersons” (associate licensees) who are required to work under the supervision of a licensed real estate broker. (Bus. & Prof. Code, § 10132.)

The problem is that the hierarchy of “real estate broker” and “real estate salesperson” (associate licensee) is often misunderstood by members of the public and is confused by common notions of “agent” versus how California law defines “agent” and the concept of dual agency in relation to real estate transactions. In the vast majority of residential real estate transactions, client contact is with a licensed real estate salesperson and the client considers the real estate salesperson their “agent” in the transaction even though it is actually the broker. Consumers typically presume the real estate salesperson acting on their behalf acts in their best interest and maintains confidences.

This resolution would maintain current practice of allowing a broker to act as a “dual agent” representing both buyer and seller in the transaction while providing a layer of separation to avoid potential conflicts of interest and questions of conflicting loyalties. It would preclude associate licensee “real estate salespersons” from representing both sides of the transaction thereby ensuring a degree of exclusivity in representation consistent with public perception.

The Resolutions Committee notes additional drafting maybe necessary to the proposed language of Section 2079.16 to better clarify the difference between “agent,” “broker,” and “associate licensee” / “real estate salesperson.” Additionally, while precluding the same associate licensee from representing both sides makes sense given the direct contact and communications and potential for appearances of impropriety, the additional requirement of separate office locations should probably be stricken as it presents a barrier to smaller single office brokerage firms while giving an advantage to larger firms that have multiple offices within a given geographic location.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code sections 2079.16, 2019.17 and 2079.21 to read as follows:

1 § 2079.16

2 The disclosure form required by Section 2079.14 shall have Sections 2079.13 to 2079.24,
3 inclusive, excluding this section, printed on the back, and on the front of the disclosure form the
4 following shall appear:

5 **DISCLOSURE REGARDING**
6 **REAL ESTATE AGENCY RELATIONSHIP**
7 (As required by the Civil Code)

8 When you enter into a discussion with a real estate agent regarding a real estate transaction, you
9 should from the outset understand what type of agency relationship or representation you wish to
10 have with the agent in the transaction.

11 **SELLER’S AGENT**

12 A Seller’s agent under a listing agreement with the Seller acts as the agent for the Seller only. A
13 Seller’s agent or a subagent of that agent has the following affirmative obligations:

14 To the Seller:

15 A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller.

16 To the Buyer and the Seller:

17 (a) Diligent exercise of reasonable skill and care in performance of the agent’s duties.

18 (b) A duty of honest and fair dealing and good faith.

19 (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of
20 the property that are not known to, or within the diligent attention and observation of, the parties.

21 An agent is not obligated to reveal to either party any confidential information obtained from the
22 other party that does not involve the affirmative duties set forth above.

23 **BUYER’S AGENT**

24 A selling agent can, with a Buyer’s consent, agree to act as agent for the Buyer only. In these
25 situations, the agent is not the Seller’s agent, even if by agreement the agent may receive
26 compensation for services rendered, either in full or in part from the Seller. An agent acting only
27 for a Buyer has the following affirmative obligations:

28 To the Buyer:

29 A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer.

30 To the Buyer and the Seller:

31 (a) Diligent exercise of reasonable skill and care in performance of the agent’s duties.

32 (b) A duty of honest and fair dealing and good faith.

33 (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of
34 the property that are not known to, or within the diligent attention and observation of, the parties.
35 An agent is not obligated to reveal to either party any confidential information obtained from the
36 other party that does not involve the affirmative duties set forth above.

37 AGENT REPRESENTING BOTH SELLER AND BUYER

38 A real estate agent, ~~either acting directly or through one or more~~ who is an associate licensee,
39 cannot legally be the agent of both the Seller and the Buyer in a transaction, ~~but only with the~~
40 ~~knowledge and consent of both the Seller and the Buyer.~~ However, a real estate agent who is a
41 broker may have two or more persons from different offices legally be the agents of both the
42 Seller and the Buyer in a transaction.

43 In a dual agency situation, the agent/broker has the following affirmative obligations to both the
44 Seller and the Buyer:

45 (a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the
46 Seller or the Buyer.

47 (b) Other duties to the Seller and the Buyer as stated above in their respective sections.

48 In representing both Seller and Buyer, the agent may not, without the express permission of the
49 respective party, disclose to the other party that the Seller will accept a price less than the listing
50 price or that the Buyer will pay a price greater than the price offered.

51 The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the
52 responsibility to protect his or her own interests. You should carefully read all agreements to
53 assure that they adequately express your understanding of the transaction. A real estate agent is a
54 person qualified to advise about real estate. If legal or tax advice is desired, consult a competent
55 professional.

56 Throughout your real property transaction you may receive more than one disclosure form,
57 depending upon the number of agents assisting in the transaction. The law requires each agent
58 with whom you have more than a casual relationship to present you with this disclosure form.
59 You should read its contents each time it is presented to you, considering the relationship
60 between you and the real estate agent in your specific transaction.

61 This disclosure form includes the provisions of Sections 2079.13 to 2079.24, inclusive, of the
62 Civil Code set forth on the reverse hereof. Read it carefully.

Agent(date)	Buyer/Seller(date)
	(Signature)
Associate Licensee(date)	Buyer/Seller(date)
(Signature)	(Signature)

63
64 § 2079.17

65 (a) As soon as practicable, the selling agent who is an associate licensee shall disclose to
66 the buyer and seller whether the selling agent is acting in the real property transaction
67 exclusively as the buyer's agent, or exclusively as the seller's agent, ~~or as a dual agent~~

68 ~~representing both the buyer and the seller,~~ and the broker for the selling agent shall disclose to
69 the buyer and seller whether the selling broker is acting in the real property transaction
70 exclusively as the supervising broker for the buyer, seller or as a dual agent representing both the
71 buyer and the seller. This relationship shall be confirmed in the contract to purchase and sell real
72 property or in a separate writing executed or acknowledged by the seller, the buyer, and the
73 selling agent prior to or coincident with execution of that contract by the buyer and the seller,
74 respectively.

75 (b) As soon as practicable, the listing agent shall disclose to the seller ~~whether that the~~
76 listing agent is acting in the real property transaction exclusively as the seller's agent, ~~or as a~~
77 ~~dual agent representing both the buyer and seller.~~ This relationship shall be confirmed in the
78 contract to purchase and sell real property or in a separate writing executed or acknowledged by
79 the seller and the listing agent prior to or coincident with the execution of that contract by the
80 seller.

81 (c) The confirmation required by subdivisions (a) and (b) shall be in the following form:

(Name of Listing Agent) _____ is the agent of (check one):
<input checked="" type="checkbox"/> the seller exclusively; or
<input type="checkbox"/> both the buyer and seller.
_____ (Name of Selling Agent if not the same as the Listing Agent) _____ is the agent of (check one):
<input type="checkbox"/> the buyer exclusively; or
<input type="checkbox"/> the seller exclusively; or
<input type="checkbox"/> both the buyer and seller.

82 (d) The disclosures and confirmation required by this section shall be in addition to the
83 disclosure required by Section 2079.14.

84
85 § 2079.21

86 No agent who is an individual licensee may be a dual agent in any real property
87 transaction; provided, however, that a supervising broker may allow two individual licensees
88 from different offices to act as agents for the buyer and seller in a real property transaction. A
89 dual agent shall not disclose to the buyer that the seller is willing to sell the property at a price
90 less than the listing price, without the express written consent of the seller. A dual agent shall not
91 disclose to the seller that the buyer is willing to pay a price greater than the offering price,
92 without the express written consent of the buyer.

93 This section does not alter in any way the duty or responsibility of a dual agent to any
94 principal with respect to confidential information other than price.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: For the last 40 years, dual agency by real estate agents has been permitted by California law. However, this law is outdated and has been supported by various real estate interests in order to gain a larger percentage of the market share of buyers and sellers. This does their clients a disservice. By definition, a dual agent cannot represent and look out for the best interests of their client when representing a buyer and seller. If an attorney cannot represent both sides of a transaction, why should a realtor? A dual agent cannot advise their buyer how much they think a seller will take in making an offer or counteroffer because that would breach his duty to the seller to get the best and highest price. In effect, the agent is comprised and cannot provide effective representation to his client. This irony was noted by the California Supreme Court in 2016 when it held that the listing agent in a dual agency had a fiduciary duty to the buyer due to having the same broker, even though the buyers agent was a different individual. (Horiike v. Coldwell Banker Residential Brokerage Company (2016) 1 Cal.5th 1024.)

The Solution: This resolution prohibits dual agency by individual real estate agents known as associate licensees. This will give better protection to consumers who hire real estate agents to represent their interests and stop real estate agents from bullying people into signing off on disclosures because it is legal and “everyone does it.” This does not prohibit dual representation by the same broker as long as the parties are represented by two separate agents in different offices so that the larger brokerages (such as Keller Williams, Pacific Sotheby’s, etc.) can still offer a wide selection of homes to their buyers without worrying about being conflicted out.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION:

None known.

AUTHOR AND PERMANENT CONTACT: Melissa L. Bustarde, Esq., Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.