

Representation

This bulletin explains brokerage representation, designated representation, multiple representation under both forms of representation, and the duties of brokerages, designated representatives, and real estate agents.

Summary

Two forms of representation are permitted. Clients and brokerages may enter into a brokerage representation agreement or a designated representation agreement. Both agreements are with the brokerage. Which form of representation agreement an agent is permitted to use is a decision made by the brokerage. Agents are expected to follow their brokerage's policies.

BROKERAGE REPRESENTATION

Under a brokerage representation agreement, the brokerage and all its agents are bound by the same duties to the client, including representing the best interests of the brokerage's client. Any alteration of the brokerage's duties would apply to all agents within the brokerage.

DESIGNATED REPRESENTATION

Under a designated representation agreement, the designated representative identified in the agreement is responsible for representing the best interests of the client. The brokerage, and other agents employed by the brokerage, must treat the client in an objective and impartial manner.

MULTIPLE REPRESENTATION

Under **brokerage representation**, multiple representation arises in the following two circumstances:

- The brokerage has a seller client and one or more buyer clients in the same trade.
- The brokerage represents more than one competing buyer in the same trade, even if the property is listed by a different brokerage.

Under **designated representation**, multiple representation arises in the following two circumstances:

- The same agent is the designated representative for a seller client and a buyer client in the same trade.
- The same agent is the designated representative for more than one competing buyer in the same trade, even if the property is listed by a different brokerage.

If a brokerage is using **both forms of representation agreements**, multiple representation also arises when the brokerage has more than one client in the same trade and one of the clients is under a brokerage representation agreement.

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Brokerage representation

Brokerage representation means that all of the brokerage's agents are bound by the same duties and obligations as the brokerage. They must promote and protect the best interests of the client. They owe an undivided loyalty to the client.

MULTIPLE REPRESENTATION UNDER BROKERAGE REPRESENTATION

When a brokerage engages in multiple representation under brokerage representation, its loyalty to each of its clients involved in the same trade is divided. The brokerage can no longer promote and protect the best interests of each of its clients in the trade and cannot advocate for the clients' interests in all aspects of the trade.

The alteration of duties and obligations at the brokerage level applies to every agent employed by the brokerage.

This means the brokerage and all its agents must not offer advice on matters such as a price or other terms that would be in only one of their client's best interests to include or to accept. The brokerage and its agents must not offer any advice to one client that is not in the best interests of the other client.

The brokerage and **all its agents** must treat each client in an objective and impartial manner, and not put the interests of one client ahead of the other.

Under brokerage representation, it does not matter if each client is working with a different agent employed by the brokerage or if the clients are all working with the same agent. The services and representation are limited in the same way.

SCENARIO

Lily and Theo work for the same brokerage. Lily is working with the seller and Theo is working with a buyer. Both clients are under brokerage representation agreements. This means the brokerage and all its agents, including Lily and Theo, are representing the seller client and the buyer client.

If Theo's buyer client expresses interest in the property of Lily's seller client, the brokerage is now in multiple representation.

When multiple representation is identified, Theo and Lily must immediately disclose the multiple representation and seek consent from both the seller and buyer to continue.

If one or both of the brokerage's clients do not consent to multiple representation, one of the brokerage's clients must be released to receive full representation with a different brokerage.

If both of the brokerage's clients consent to multiple representation:

- Lily can't provide any advice about the price to accept or about the contents of the terms of the offer.
- Theo can't provide any advice to the buyer about how much to offer or what terms to include in the offer.
- Lily and Theo can't provide any advice that might not be in the best interests of both clients.

Multiple representation is a risky situation for a client who is no longer benefitting from the expertise of their agent. For the clients, the only way to avoid the risk and benefit from full representation is to seek representation from a different brokerage.

It's also a risky situation for agents who are particularly inclined to be helpful. It can be very difficult not to provide advice or continue to advocate for the best interests of the client that the agent has been advising and advocating for up until the multiple representation arose.

Designated representation

Under designated representation, the agreement is also with the brokerage. The difference is that the agreement identifies one or more agents as the "designated representative" for the client.

The "designated representative" is the agent that will provide representation to the client. Put another way, the designated representative is the agent responsible for promoting and protecting the best interests of that client.

The designated representative is also responsible for protecting the confidential information of the client. This means confidential information, such as the client's motivation to buy or sell and their financial circumstances, must not be shared with any agent who is not a designated representative for the client.

The brokerage, and all other agents employed by the brokerage, are neutral parties. In addition to other duties under the legislation, the brokerage has specific responsibilities under designated representation.

1. The brokerage must protect each client's confidential information. This includes ensuring that a designated representative does not disclose the client's confidential information to any other agent employed by the brokerage or other person, unless the client provides written consent, or the disclosure is required by law.
2. The brokerage must treat the interests of clients that have entered into designated representation agreements in an objective and impartial manner.
3. The brokerage is still responsible for supervising every designated representative to ensure they fulfill their duties under the designated representation agreement.
4. In the event that a designated representative is not able to represent a client, the brokerage must designate a different agent employed by the brokerage to be the designated representative for the client, if the client agrees to the new arrangement.

Designated representation is distinctly different from brokerage representation, where the brokerage and all of its agents are representing the client under the brokerage representation agreement.

Who receives and has access to confidential client information, such as the client's motivation to sell or buy, is also an important distinction between the two types of representation. Under designated representation, the designated representative is the only agent who is permitted to have access to the client's confidential information.

MULTIPLE REPRESENTATION UNDER DESIGNATED REPRESENTATION

If each of the brokerage's clients are under designated representation agreements, **multiple representation will only arise when the same designated representative** is representing more than one client in the same trade.

Brokerage policies

Agents should make sure they are aware of and follow any brokerage policies related to multiple representation. While permitted by law, some brokerages prohibit the same agent, or designated representative under this form of representation, from representing a seller and a buyer in the same trade to protect the brokerage and its agents from potential litigation.

When the brokerage has multiple clients in the same trade, but each client is represented by a different designated representative, the designated representatives are able to continue to actively represent the interests of their respective clients. This is not multiple representation, and no disclosure or consent is required.

Scenario

Raj and Matthew work for the same brokerage. Raj is the designated representative for the seller. Matthew is the designated representative for the buyer.

Matthew's buyer client expresses an interest in Raj's seller client's property. Because each client is represented by a different designated representative, it is not multiple representation. There is no change in the services or representation that Raj and Matthew can provide to their respective clients.

Raj and Matthew can continue to promote and protect the best interests of their respective clients in the trade. Raj can advise his seller client on the price to accept, the terms to include in the APS and other matters. Matthew can continue to advocate for his buyer's interests, advising the buyer on the amount to offer and the terms to include in the offer.

Brokerage and designated representation

The legislation does not prohibit a brokerage from using both forms of representation agreements, but caution is advised.

RECO advises against using more than one form of representation agreement. Brokerages will find it easier to determine when multiple representation arises if all clients are under the same type of representation agreement.

The brokerage's clients will benefit most when the brokerage is using only one form of agreement, as it provides more clarity for the brokerage, its agents, and its clients. It is less likely multiple representation will arise when a brokerage adopts designated representation.

MULTIPLE REPRESENTATION UNDER BROKERAGE AND DESIGNATED REPRESENTATION

When a brokerage has multiple clients in a trade and one of the clients is under a brokerage representation agreement and the other client is under a designated representation agreement, this is multiple representation.

Brokerage representation, by its nature, captures all of the brokerage's agents. Therefore, the designated representative is also captured by the brokerage representation agreement with the other client.

The brokerage and the designated representative are no longer able to actively represent their respective clients. This is no different than multiple representation under brokerage representation, aside from the details of the required disclosures.

More about designated representation

Can there be more than one designated representative?

The designated representation agreement may identify more than one designated representative.

The designated representative is prohibited from sharing confidential client information. Where two or more agents routinely share confidential client information, each of the agents should be identified as designated representatives under the agreement.

For example, an agent has another agent working as an assistant, sometimes referred to in the industry as a “licensed assistant”. Confidential client information is shared between the two agents. In this situation, the designated representation agreement should identify both agents as the designated representatives for the client. This would permit the sharing of information to continue.

Another situation where this might be necessary is in relation to “teams”. While teams aren’t recognized under the legislation, the same rules would apply. All agents who might have access to or might discuss the client’s confidential information should be identified as designated representatives under the agreement.

Brokerages should consider policies to address these types of situations if they choose to adopt designated representation. Likewise, agents should ensure they are following any brokerage policies.

Where agreements identify more than one designated representative, additional monitoring is required to ensure that multiple representation is identified and addressed appropriately.

If I am the designated representative, who can take care of my client if I am away on vacation or get ill?

The brokerage, in consultation with the client, can designate another agent within the brokerage to act on the client’s behalf for the period of time you are away or otherwise unavailable. Alternatively, the designated representation agreement could name more than one designated representative at the time the agreement is entered into. All designated representatives named in the agreement are bound by the same duties, regardless of whether or not they are providing services to the client.

If I am the designated representative, and I move to a different brokerage, does the client move with me?

The designated representation agreement is with the brokerage, not the designated representative. The brokerage would designate a different representative, subject to the client’s consent.

What does the brokerage need to do if it wants to transition to designated representation?

Brokerages will need to establish written policies and procedures related to information barriers that support the introduction of designated representation, the protection of confidential client information, and other matters, such as whether or not a backup designated representative is identified in the agreement or addressed when required.

Brokerages will need to make sure that all of their agents, and other brokerage employees, are using the right type of representation agreement, understand how confidential client information must be protected, and are aware of any other brokerage requirements related to designated representation.

Where possible, brokerages who want to operate under designated representation should consider having their existing clients enter into designated representation agreements to avoid any confusion. For many brokerages, this will be easier than having to monitor which form of representation each client is under and in which circumstances multiple representation arises.

I am a broker of record. One of our agents is the designated representative for the buyer and asks me for advice regarding the contents of the offer. Another one of our agents is the designated representative for the seller. What can I do to help the buyer's agent?

As the broker of record, you must remain neutral. You must not give advice to the buyer's designated representative that may be detrimental to the seller client of the other designated representative. In addition, you must not have access to or allow the designated representative to share any confidential client information with you.

In this case, you could review the offer and provide advice that does not put the interests of the buyer ahead of the interests of the seller. You can explain how the law applies to the situation. If there are brokerage guidelines or policies related to the content of offers, you can refer the agent to those materials.

The advice you are able to provide in this situation is similar to the advice you would be able to provide if the seller and buyer were under brokerage representation agreements and the brokerage was in multiple representation.

I am a broker of record who also trades in real estate. What do I do if I am the designated representative for one of the parties to a trade and one of our agents is the designated representative for another party to the same trade?

In this case, your role is to promote and protect the best interests of your client as their designated representative. As a result, the brokerage's responsibility for supervising the other designated representative to ensure they fulfill their duties would have to be assumed by another experienced agent in the brokerage. However, the broker of record continues to be responsible for ensuring the brokerage complies with the legislation.

Brokerages may want to review their management structure and policies to ensure they can address these situations when they arise.

Does the brokerage still have access to client information?

The brokerage still has access to the client's information with respect to the representation agreement and what is required for brokerage record-keeping. This will include the client's personal information, protected by other legislation.

The information the brokerage must not have access to is the confidential client information, such as the client's motivation to buy or sell, the minimum amount a seller will accept, or the maximum amount a buyer can offer. The designated representative must not share this information with any agent or other person employed by the brokerage.

Related information

Bulletin No. 2.3 Representation agreements

Bulletin No. 3.2 Multiple representation