

Commentary

THE BROKER AS YOUR AGENT AND THE BROKER'S FIDUCIARY RESPONSIBILITIES

by Arthur Mazirow

The real estate broker is a fiduciary and as such owes the highest standard of obligation to the broker's principal. This means that the agent is obligated to represent the principal with undivided loyalty, to preserve the principal's confidences and to promptly disclose to the principal any material matters bearing upon the subject of the representation.

The most visible and commonplace situation in which we see the application of the broker's fiduciary obligation is when the broker acts on behalf of a seller. The fiduciary obligation of the broker comes into effect as soon as the broker starts acting on the seller's behalf. At that point, the broker has become the agent of the seller.

The fiduciary obligation of the broker to the seller includes a duty to disclose material facts to the seller concerning the transaction. Illustrations of the application of that aspect of the fiduciary obligation are cases which held that the broker must disclose to the seller the fact that the purchaser was the broker's spouse, a relative of the broker or an entity owned or controlled by the broker or in which the broker had a significant interest. Still, other cases are on record that held that the broker must disclose to the seller all facts affecting the desirability of the sale, the possibility of obtaining a higher price later and ways of increasing the value of the property; all offers for the property, whether written or oral and whether or not an offer has been accepted; and the identity of the buyer if the broker has reason to believe it would be material to the seller.

The point is that the broker as agent must disclose to its principal all material facts and obviously the factual variations have no limitations.

Even though a listing real estate broker may not have a fiduciary obligation to a **buyer** of property, the courts take the view that the broker owes a substantial duty to the buyer of the property. The broker must inform the buyer of all facts materially affecting the value or desirability of the property that are known to the broker. Further, the broker is obligated to conduct a reasonably competent and diligent inspection of the property and to tell the buyer any adverse information concerning the property discovered in the course of that investigation. If the broker does not discover a defect in the property that a reasonably competent inspection would disclose, the broker will be liable to the buyer for failing to discover and disclose that defect.

In a Wisconsin case, a cooperating broker was held liable for transmitting erroneous information regarding lot size to a buyer, even though the information was provided by the seller. The court said that reasonable investigation would have led to discovery of the error.

In a California case, a broker was held liable to the buyer for negligent misrepresentation for transmitting the seller's and the seller's accountant's statements of income and expenses, which differed from each other, without investigating or explaining the discrepancies between the statements.

The obligations of the real estate broker have become so extensive that perhaps the only way to rationalize the court holding the broker liable is to say that the broker is going to be liable for public policy reasons. Because of the license granted, it appears that the real estate brokerage industry has assumed the nature of a public trust.

KOREK LAND COMPANY, INC.

14545 ERWIN ST. • VAN NUYS, CA 91411 • (818) 787-3077 • FAX (818) 787-9677

www.korekland.com • korekland@earthlink.net

Written by Arthur Mazirow, a partner in the law firm of Buchalter, Nemer, Fields & Younger in Los Angeles.

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