

# Agency and Fiduciary Duties



C.A.R.  
LEGAL  
TOOLS



# Who is a Dual Agent?

- ▶ An individual agent who represents both parties to a real property transaction
- ▶ Each individual agent from a brokerage firm that represents both parties to a transaction
  - ▶ Even if each agent works exclusively with one side



# To Whom Do Agents Owe Fiduciary Duties?

- ▶ Dual agents owe fiduciary duties to both parties in a transaction
- ▶ Neither party's interests may come before the other's
- ▶ Both parties' interests must come before the agent's
- ▶ When agents from the same brokerage are on both sides of the transaction, each agent owes both buyer and seller equal fiduciary duties, regardless of which party they actually work with

# What Are Fiduciary Duties?

- ▶ Common law duties that an agent owes to his or her principal
- ▶ More expansive than the statutory duties that agents owe to clients
- ▶ Require “the highest good faith and undivided service and loyalty.”
- ▶ May require an agent to discover and disclose previously-unknown material facts, and to counsel and advise a client regarding the implications of certain disclosures (*Field v Century 21 Klowlowden-Forness Realty*)

# What Other Agent Duties May Apply?

- ▶ Statutory duty to non-clients and clients alike:
  - ▶ Conduct a reasonably competent and diligent visual inspection of the accessible areas of the property
  - ▶ Disclose to potential purchasers material facts and defects affecting the value and desirability of the property
  - ▶ Agent inspection should reflect honesty, fair dealing and good faith, diligent exercise and reasonable skill and care



# When Clients' Interests Potentially Diverge

- ▶ No clear and easy answers
- ▶ Discuss with broker or office manager
- ▶ Discuss with legal counsel



## What Forms Should Dual Agents Provide to Clients?

- ▶ Disclosure Regarding Real Estate Agency Relationships (C.A.R. Form AD)
- ▶ Confirmation of Real Estate Agency Relationships (C.A.R. Form AC)

NOTE: Paragraph 2B of the RPA contains the required confirmation language. If the RPA is used, a separate AC is not necessary

## C.A.R. Form AD

- ▶ Describes the different types of agency relationships possible in a transaction and their associated duties
- ▶ If no dual agency:
  - ▶ Listing agent provides AD to the seller
  - ▶ Buyer's agent provides AD to the buyer
  - ▶ Buyer's agent also provides AD to the seller (thru 12-31-18; obligation terminates 1-1-19)



## C.A.R. Form AD – Cont'd

- ▶ In dual agency, the agent simply provides an AD form to each party.
  - ▶ AD form states that that a dual agent may not, without express consent, disclose to the buyer that the seller would accept lower price, or to the seller that the buyer would pay more.
- ▶ NOTE: Beginning January 1, 2019 a dual agent will not disclose confidential information regarding:
    - ▶ Financial position
    - ▶ Motivations
    - ▶ Bargaining position or
    - ▶ Personal information that may impact price

# C.A.R. Form AC



**CALIFORNIA ASSOCIATION OF REALTORS®**

**CONFIRMATION OF REAL ESTATE AGENCY RELATIONSHIPS**  
 (As required by the Civil Code)  
 (C.A.R. Form AC, Revised 04/08)

Subject Property Address \_\_\_\_\_

The following agency relationship(s) is/are hereby confirmed for this transaction:

**LISTING AGENT:** \_\_\_\_\_  
(Print Firm Name)

is the agent of (check one):  
 the Seller/Landlord exclusively; or  
 both the Buyer/Tenant and Seller/Landlord

**SELLING AGENT:** \_\_\_\_\_  
(Print Firm Name)

(if not the same as Listing Agent)  
 is the agent of (check one):  
 the Buyer/Tenant exclusively; or  
 the Seller/Landlord exclusively; or  
 both the Buyer/Tenant and Seller/Landlord

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS CONFIRMATION.

Seller/Landlord \_\_\_\_\_ Date \_\_\_\_\_

Seller/Landlord \_\_\_\_\_ Date \_\_\_\_\_

Buyer/Tenant \_\_\_\_\_ Date \_\_\_\_\_

Buyer/Tenant \_\_\_\_\_ Date \_\_\_\_\_

- ▶ States the agency relationships present in a specific transaction
- ▶ May be signed by buyer and seller separately, or on a single form
- ▶ May be included in the RPA or on a separate form

## Why Provide AD and AC Forms?

- ▶ Both the agency disclosure and the agency confirmation are required by statute
- ▶ May reduce a dual agent's exposure to lawsuits by putting clients on notice regarding the nature of dual agency, and what may be disclosed to other party



# Additional Resources

## Quick Guide

## Dual Agency Disclosure Guide

[on.car.org/dual-agency](https://on.car.org/dual-agency)