

## Sample Policy E: "Split Agency," But Never Dual Agency

### SECTION A: GENERAL POLICY ON AGENCY

1) It is the policy of (brokerage name) to represent both sellers and buyers. Affiliated agents shall represent the seller when they list property and shall act as buyer's agents when working with buyers on any property not listed with the agent.

2) When representing a seller, (brokerage name) and its agent owe the seller the duties of loyalty, obedience, confidentiality, accounting and reasonable skill and care in performing our duties, and any other duties contained in our listing agreement. We are required to act solely on behalf of the seller's interest to seek the best price and terms for the seller. Finally, as a seller's agent, we also have a duty to disclose to the seller all material information obtained from the buyer or from any other source.

3) When representing a buyer, (brokerage name) and its agent owe the buyer the duties of loyalty, obedience, confidentiality, accounting and reasonable skill and care in performing their duties and any other duties contained in an agency agreement. The agent and brokerage are required to act solely on behalf of the buyer's interests to seek the best price and terms for the buyer. Finally, a buyer's agent and brokerage also have a duty to disclose to the buyer all material information obtained from the seller or from any other source.

4) In the event a purchaser wishes to buy property listed with his agent, the agent will not represent the buyer. If the agent has already established an agency relationship with the buyer, the agency relationship with the buyer will be terminated and the agent with whom the buyer was working must represent the seller. Language explaining this is contained in our brokerage's buyer agency agreement, as well as our listing agreement. Any confidential information learned about the buyer prior to termination must remain confidential and cannot be disclosed to the seller.

The only instances where the agency relationship with the buyer will not be terminated are those set forth in sections D and E. In these instances dual agency occurs. The agent can act as a dual agent if both the buyer and seller agree. The parties must sign the Agency Disclosure Statement agreeing to this. A dual agent may not disclose any confidential information that would place one party at an advantage over the other party and may not disclose any of the following

information without the informed consent of the party to whom the information pertains: 1) that a buyer is willing to pay more than the price offered; 2) that a seller is willing to accept less than the asking price; 3) motivating factors of either party for buying or selling; or 4) that a party will agree to financing terms other than those offered.

*5) (Choose Option A if brokerage has only one management-level licensee and Option B if brokerage has more than one management-level licensee)*

Option A) On in-company transactions where both buyer and seller are represented by separate, non-management-level licensees, each party will be represented by their respective agent and those agents must not share confidential information with each other.

The brokerage and its management-level licensee are dual agents. In this situation, the brokerage's role is to do the following:

- Objectively supervise the agents involved so they can each fulfill their duties, as outlined above, to each of their clients.
- Assist the parties in an unbiased manner to negotiate a contract.
- Assist the parties in an unbiased manner to fulfill the terms of any contract.

As a dual agent, the brokerage cannot:

- Advocate or negotiate on behalf of either the buyer or seller.
- Disclose confidential information to any party or any other employee or agent of the brokerage.
- Use confidential information of one party to benefit the other party to the transaction.

Option B) On in-company transactions where both buyer and seller are represented by separate licensees, each party will be represented by their respective agent and those agents must not share confidential information with each other.

The brokerage and its management-level licensees who are not personally representing the buyer or seller are dual agents. In this situation, the brokerage's role is to do the following:

- Objectively supervise the agents involved so they can each fulfill their duties, as outlined above, to each of their clients.
- Assist the parties in an unbiased manner to negotiate a contract.
- Assist the parties in an unbiased manner to fulfill the terms of any contract.

As a dual agent, the brokerage cannot:

- Advocate or negotiate on behalf of either the buyer or seller.
- Disclose confidential information to any party or any other employee or agent of the brokerage.
- Use confidential information of one party to benefit the other party to the transaction.

*6) (Choose Option A if brokerage has only one management-level licensee and Option B if brokerage has more than one management-level licensee.)*

Option A) If the management-level licensee represents either the buyer or seller on an in-company transaction, that management-level licensee must act as a dual agent. The other agent in the transaction, who represents the other party is considered to only be the agent of the party he represents. The buyer and seller will acknowledge this relationship on the Agency Disclosure Statement.

Option B) If a management-level licensee either personally represents the buyer or seller or is the buyer or seller in an in-company transaction, the management-level licensee will only represent his client or himself. The buyer and seller will acknowledge this relationship on the Agency Disclosure Statement.

## **SECTION B: MANAGEMENT-LEVEL POSITIONS**

The following positions in the brokerage are considered to be management level: (Name positions or titles that fall under the definition of a management-level licensee.)

## **SECTION C: APPOINTMENT OF LICENSEES**

In the event an agent wants another agent in the brokerage to represent his client, that client must agree in writing to this agent being appointed to represent him. Such written appointments must be maintained in the brokerage file. *(Here the broker should specify how appointments will be handled. A client can authorize his agent to make appointments in the agency agreement or appointments can be authorized by the client when needed on an appointment of agent form.)*

## **SECTION D: WORKING WITH RELATIVES, BUSINESS ASSOCIATES, ETC.**

1) If a person with whom an agent has a personal, family or business relationship wants to sell property, the agent shall act as a listing agent representing that person. In the event a buyer who is represented by the listing agent wants to buy this property, the nature of the listing agent's relationship with the seller must be

disclosed to the buyer and the agency relationship with the buyer must be terminated. The agent shall not disclose to the seller any confidential information learned about the buyer during their relationship.

2) If any other agent in our brokerage or a cooperating brokerage represents the buyer, the buyer's agent must be notified of the relationship and the relationship must be disclosed in writing prior to entering into the purchase contract. *(Note: This is required by Article 4 of the National Association of REALTORS® Code of Ethics.)*

3) If a person with whom an agent has a personal, family or business relationship wants to purchase property, the agent shall act as a buyer's agent and represent the buyer. If the buyer purchases property not listed with their agent, any family, business or personal relationship must be disclosed to the listing agent or if there is none to the seller and disclosed on the purchase contract. *(This is required by Article 4 of the National Association of REALTORS® Code of Ethics.)*

4) In the event the purchaser wants to buy property listed with their agent, due to the relationship that exists between the buyer and agent, the agency relationship with the buyer shall not be terminated in this limited circumstance. Instead, the agent must act as a dual agent. The nature of the agent's relationship with the buyer must be disclosed to the seller before the seller consents to the dual agency and it must be disclosed as a "material relationship" on the Agency Disclosure Statement.

5) If an agent has a personal, family or business relationship with another agent involved in a transaction, that fact must be disclosed to the parties. This disclosure must be made prior to a contract being entered into. *(Here brokers may want to indicate that agents are required to notify them that such a situation exists so the broker can determine if any policy change is necessary.)*

#### **SECTION E: AGENTS BUYING OR SELLING THEIR OWN PROPERTY**

*(Note: License law does not require licensees to list or buy property through their brokerage, but this requirement can be imposed by the brokerage. This must be addressed in the policy. Below is sample language if it is to be handled through the brokerage.)*

1) Agents selling their own property must list it with (brokerage name) and act as their own listing agent.

a) If the agent's property is shown to a buyer represented by another brokerage or another agent in (brokerage name), that buyer's agent shall be notified of the fact that the listing agent is also the seller and this must be noted on any subsequent contract that is entered into.

b) If a buyer contacts the listing agent directly, that buyer shall be treated as a customer and told the property is owned by the listing agent and this must be disclosed in any subsequent purchase contract. The buyer shall be given the Agency Disclosure Statement indicating that the listing agent represents the seller. If the buyer wants representation, he will be referred to another agent in the brokerage who can represent him.

c) If the listing agent already has an agency relationship with a buyer who now wants to buy property owned by the agent, it must be disclosed that the listing agent is the owner and the agency relationship with the buyer must be terminated.

2) Agents buying property for themselves must also handle these transactions through the brokerage and act as a buyer's agent.

a) If the property the agent wishes to see is listed with another brokerage, the listing brokerage must be notified at first contact of the fact the licensee is acting for himself. On any offer the agent makes, it must indicate that he is a licensed agent with (brokerage name) and submit an Agency Disclosure Statement indicating that he is a buyer's agent.

b) If the property the agent desires to purchase is listed with him, the circumstances must be disclosed to the seller immediately and the seller must consent to the agent acting as a dual agent. The Agency Disclosure Statement must be given to the seller before any offer to purchase is presented to the seller. The fact that the buyer is a licensed agent with (brokerage name) must be disclosed on the Agency Disclosure Statement as a "material relationship."

c) If the property the agent wants to see is listed with another agent in (brokerage name), the agent must immediately inform the listing agent of the fact that he is interested in buying the property for himself. The listing agent shall not share any confidential information with the buyer/agent unless expressly authorized by the seller. If the buyer/agent wishes to make an offer to purchase, he shall indicate on the offer that he is a licensed agent with (brokerage name)

and submit an Agency Disclosure Statement indicating that he is acting as a buyer's agent.

d) If the property an agent is interested in seeing for his own possible purchase is not listed (a FSBO), then the agent shall notify the seller at first contact that he is a buyer's agent representing himself. The agent shall also disclose any intent to seek compensation from the seller. The agent shall not have the seller sign a listing agreement. In the event the agent wishes to purchase this property, the fact that he is a licensed agent with (brokerage name) shall be noted on the offer and an Agency Disclosure Statement indicating the agent is acting as a buyer's agent shall be delivered with the offer.

## **SECTION F: CONFIDENTIAL INFORMATION**

*(Note: The procedures outlined below are merely an example of how to address confidentiality issues. Brokers are free to modify these, or adopt other procedures.)*

Agents in (brokerage name) can act as buyer or seller agents. Our brokerage does not permit one agent to represent both the buyer and seller in the same transaction but does permit the buyer and seller to be represented by two agents in the brokerage. If this occurs, each agent has separate duties to their respective client. Therefore, it is necessary for steps to be taken to protect the confidential information of the buyer from being disclosed to another agent in our brokerage who could be representing the seller, and vice versa.

**1) Office files.** Each agent shall maintain in his file cabinet all documents relating to a client he represents. Correspondence, offers, addendums, inspection reports and the like shall not be kept on desks or left out where they could be viewed by other agents. Agents shall keep their file cabinets locked when they are not in the office. The (broker/manager) shall have a key to the agent's file cabinet in the event it is necessary for the (broker /manager) to access the file. The agent shall place in the general office file only those documents that are non-confidential such as listing information.

**2) Computerized records and messages.** All computer documents maintained by agents shall be password-protected so that other agents in the brokerage cannot retrieve or view this information. Agents shall not share their passwords with one another for any reason.

**3) Office meetings and discussions.** Agents shall not share confidential information regarding their clients at office meetings or discuss such information

with others in the office unless the client specifically permits such disclosure. If the client so authorizes, this authorization should be noted by the agent in his file. Confidential information includes, but is not limited to, a client's motivation to purchase or sell, a client's financial information, the amount of any offer or counter-offer that a client has made or is considering making or the amount of any pending contract. Office meetings involving such confidential information shall take place in private, so as not to be overheard by others.

**4) Facsimile transmissions.** When faxing documents that contain confidential information such as offers and counter-offers, agents must not leave the original documents on the fax machine where they could be viewed by others. Incoming faxes shall only be retrieved by (name individuals such as the office manager or receptionist). The fax shall then be hand-delivered to the agent, if the agent is in the office, or sealed in an envelope and placed in the agent's mailbox. Clients and cooperating agents shall be directed not to fax you confidential information during non-working hours unless it is confirmed that you will be there to retrieve it.

**5) Telephone and inter-office messages and conversations.** Telephone and inter-office messages that contain confidential information shall be hand-delivered in writing to the appropriate agent or placed in an envelope on either the agent's desk or in his mailbox. Conversations between agents, with management-level licensees or other staff concerning clients shall be held in private if the conversation involves confidential information.

**6) Meetings and conversations with clients.** All meetings with clients shall take place in (*brokers should denote a private meeting room or other similar space within the office*). Telephone conversations with clients that involve confidential information shall take place only in the agent's office. (*If the agent does not have a private office, the brokerage shall designate some location within the office where the agent could have a private telephone conversation.*) Agents shall not utilize the speaker phone when having conversations of a confidential nature, unless the conversations take place in a closed office.

## **SECTION G: DUAL AGENCY**

1) The only instance in which an agent shall act as a dual agent is where the agent is personally buying property they have listed or a buyer/client with whom the agent has a personal, business or family relationship, is purchasing property the agent has listed.

a) *(Include this section only if your brokerage has only one management-level licensee.)* (Management-level licensee position or title) will be a dual agent when they represent a buyer or seller on an in-company transaction.

2) Agents acting as a dual agent in those situations shall disclose to the parties all relevant information necessary for them to make an informed decision about whether to consent to the dual agency. This would include, but not limited to, the nature of the relationship the agents have with a party to the transaction or the fact that they are a party to the transaction. This must be disclosed on the Agency Disclosure Statement. If this information later changes, this change must be provided in writing to the parties as soon as possible and they must be given an opportunity to revoke their consent to the dual agency.

3) In the event a party refuses to consent to the dual agency, or seeks to terminate any agency relationship as a result of the proposed dual agency, (broker/manager) shall be notified immediately. If the client's consent cannot be obtained, (brokerage name) and its agents cannot act as dual agents. The (broker/manager) shall attempt to obtain the objecting party's consent to another agent in the (brokerage name) being appointed to represent him. If this cannot be agreed upon, the (broker/manager) shall, depending on the circumstances and wishes of the parties, determine which relationship shall be terminated.

#### **SECTION H: CHANGING AGENCY RELATIONSHIPS**

Agents who represent the seller shall not change that relationship. If an agent represents a buyer and that buyer is interested in purchasing property listed with that agent, the buyer shall be reminded of our policy to only represent sellers in this situation. In the event the buyer wants to make an offer on that property the buyer's consent to terminate the agency relationship must be obtained in writing. The listing agent must notify the seller of the fact this buyer was previously represented by them. *(Note: Here the broker should specify the form he wants agents to use to obtain the buyer's consent to terminate the agency relationship.)*

#### **SECTION I: POLICY ON COOPERATION AND COMPENSATION**

1) It is the policy of (brokerage name) to cooperate with all other brokerages on an equal and consistent basis. This means (brokerage name) and its agents will make its listings available to other brokerages to show, provide information that is not confidential, and present all offers written by other brokerages in a timely and objective manner. *(Note: If a brokerage does not offer such cooperation to all brokerages on an equal and consistent basis, the broker must indicate that fact.)*

2) Unless the seller does not authorize it, (brokerage name) will offer compensation to the following other brokerages: *(Here the broker must indicate whether they will offer compensation to subagents only, to buyer brokers only, to both or neither. The broker should also indicate what compensation the brokerage will offer such brokerages.)*

3) (Brokerage name) does reserve the right, in some instances, to vary the compensation it offers to other brokerages, whether as subagency or buyer agency compensation. Therefore, the compensation it offers cooperating brokers may not always be equal or consistent.

4) When acting as a buyer's agent, (brokerage name) also accepts compensation offered by the listing broker through the multiple listing service. *(The broker also should indicate here how he wants to handle the situation where the property is a FSBO, is not in the MLS, compensation is not offered to buyer brokers, or the compensation offered is deemed to be insufficient.)*

*The following two sections are not required to be included in your brokerage company policy but may be helpful to your agents to understand the procedures you want them to follow and to assure compliance with license law requirements.*

## **SECTION J: GENERAL LISTING PROCEDURES**

1) When securing a listing, explain to the seller that you, the brokerage and management-level licensees will represent him.

2) Explain to the seller our brokerage policy of also representing buyers. Disclose the fact that if you have a buyer/client that wants to purchase his property, the agency relationship with the buyer will be terminated, but no confidential information that was learned prior to termination can be disclosed. Point out the language in our brokerage's listing agreement that discusses this.

3) Explain the instances where you and the brokerage would be a dual agent. Use the "Consumer Guide to Agency Relationships" to help explain your role as a dual agent. Explain how the transaction will be handled if the buyer is represented by another agent in our brokerage.

4) Have the seller sign and date acknowledging receipt of the "Consumer Guide to Agency Relationships."

5) The agent shall have the seller check on the listing agreement whether he authorizes (brokerage name) to offer subagency and/or compensation to buyer brokerages. Have the seller sign and date the listing agreement.

6) Unless exempt, on property built before 1978, have the seller complete the lead-based paint disclosure and acknowledgement form, sign and date it.

7) Unless exempt, on residential property, have the seller complete the residential property disclosure form, sign and date it.

### **SECTION K: GENERAL PROCEDURES WHEN REPRESENTING BUYERS**

1) When establishing an agency relationship with a buyer, explain that you, the brokerage and management-level licensees will represent the buyer on all properties except those you have listed.

2) Explain to the buyer that you also take listings, and therefore represent those sellers. Review the fact that unless you have a personal, family or business relationship with the buyer, if the buyer wants to purchase property you have listed, you will terminate the agency relationship with the buyer and represent only the seller. Reassure the buyer that no confidential information learned during your agency relationship will be disclosed. Point out the language in the buyer agency agreement that discusses this.

3) If you have a personal, family or business relationship with the buyer, explain that you will be a dual agent if he buys your listing, and how it will work if he buys property listed with another agent in our brokerage.

4) The buyer must be provided with the "Consumer Guide to Agency Relationships" before the earliest of the following events:

- Showing the buyer property;
- Pre-qualifying the buyer;
- Asking the buyer for specific information about his financial ability to purchase property;
- Discussing an offer; or
- Submitting an offer.

5) Have the buyer sign and date acknowledging receipt of the "Consumer Guide to Agency Relationships."

6) Have the buyer sign our buyer agency agreement.

7) When you contact other brokerages about their listings, immediately disclose the fact that you are a buyer's agent. Do the same on FSBO's and disclose to the seller any intent to seek compensation from the seller.

8) On residential properties, give the buyer the residential property disclosure form, the lead-based paint disclosure and acknowledgement form, and the EPA lead paint pamphlet, if required. These must be given to the buyer and signed before an offer is written.

9) Prior to writing an offer, give the buyer an Agency Disclosure Statement and have him sign it. Deliver a copy of the Agency Disclosure Statement the buyer signed along with the offer.

10) If the buyer wishes to purchase property you have listed, and you have no personal, family or business relationship with the buyer, you must terminate the relationship with the buyer. Follow the procedures set forth in section H on changing an agency relationship.

11) If you have a personal, family or business relationship with the buyer, or are buying the property for yourself, follow the procedures in sections E and F respectively.