

**House Bill 5719 as enrolled
Public Act 236 of 2000
Second Analysis (6-28-00)**

**Sponsor: Rep. Andrew Richner
House Committee: Family and Civil Law
Senate Committee: Economic Development,
International Trade and Regulatory Affairs**

THE APPARENT PROBLEM:

A real estate licensee can act either as a buyer's or seller's agent. An seller's agent acts on behalf of the seller of real property, assisting the owner of the real property with the marketing and sale of that property. In these cases, the real estate licensee must disclose to the seller any information that the licensee has about the buyer that could help the seller. An licensee who is acting as a buyer's agent assists a would-be buyer to find and get a good price on the right property. A buyer's agent owes a fiduciary duty to the would-be buyer, rather than the seller. As a buyer's agent, the real estate licensee must disclose any information known about the seller that could benefit the buyer. Prior to 1993, although these agency relationships were allowed, a real estate licensee was not required to disclose whether or not he or she was acting as a buyer's or seller's agent to a potential client. Public Act 93 of 1993 required real estate licensees to tell potential clients that the licensee could act on behalf of the buyer or seller and required that the licensee and the client fill out a form indicating whether the licensee would be acting as a seller's or buyer's agent in his or her relationship with that client. The act also provided for dual agency situations, where the licensee would act on behalf of both the seller and the buyer. This type of agency is generally used when a buyer's agent's client wishes to buy a seller's agent's client's house and the two agents work for the same broker. In such a situation, the agents may no longer disclose information to either the buyer or seller and both the seller and buyer must be made aware of the dual agency situation and consent to it in writing.

Under current law, a real estate licensee is required to explain these types of relationships by providing potential buyers or sellers with a disclosure form explaining the nature of the agency relationships and disclosing the type of relationship that the licensee would have with that individual seller or buyer.

Unfortunately, once a situation arises where a potential buyer (with a buyer's agent agreement) expresses an interest in a house that is being marketed by that buyer's agent, his or her co-workers, or the firm for which he or she works, the clients' agency agreements are effectively neutralized. It has been suggested that the situation could be improved by allowing real estate agents to enter into agreements that would require them to continue to act on behalf of a particular client, even when a dual agency situation arises.

THE CONTENT OF THE BILL:

House Bill 5719 would amend the Occupational Code to allow a particular real estate salesperson (also known as an associate broker) to be designated as the agent of an individual client and would specify the nature of such a relationship and the duties of the designated agent with regard to other salespersons employed by the same broker.

Under the bill, a broker and a client could enter into a written "designated agency agreement." A designated agency agreement would name one of the broker's individual salespersons as that particular client's designated agent. The agreement would also have to include the names of any other salespersons who were authorized to act in a supervisory role in the agency relationship ("supervisory brokers"). Generally, a client with a designated agency agreement would not be considered to have an agency relationship with any of his or her designated agent's "affiliated licensees" (the other licensed salespersons who were employed by the same broker as the designated agent).

Two designated agents who were employed by the same broker could represent different parties in the same transaction without being considered dual agents. However, in such a situation, the broker and the named

supervisory brokers in each agreement would be considered disclosed consensual dual agents for that real estate transaction. Further, before an offer to purchase was made or presented, both designated agents would be required to notify their respective clients that they (the buyer and the seller) were being represented by the same broker.

A designated agent's knowledge of confidential information of a client would not be imputed to the other licensed salespersons who were employed by the same broker as the designated agent but did not have an agency relationship with that client. Generally, a designated agent would be barred from disclosing a client's confidential information to any other licensed salespersons or brokers, whether or not that broker or salesperson was affiliated with the agent. However, a designated agent could disclose confidential information to a supervisory broker in order to seek advice or assistance for the client's benefit. A designated agent would not be in breach of his or her duty to a client by failing to disclose information that had been obtained through a present or prior agency relationship.

In addition, the currently required licensee disclosure statement ("Disclosure regarding real estate relationships") would have to include an "affiliated licensee disclosure." This section would be used to indicate the relationship between the client and the affiliated licensees. The disclosure statement would have to contain language specifying that either: "Only the licensee's broker and a named supervisory broker have the same agency relationship as the licensee named below. If the other party in a transaction is represented by an affiliated licensee, then the licensee's broker and all named supervisory brokers shall be considered disclosed consensual dual agents." Or "All affiliated licensees have the same agency relationship as the licensee named below."

If there was no written designated agency agreement between a client and a broker, the client would be presumed to have an agency relationship with the broker and all of that broker's affiliated licensees. However, an existing listing agreement or a buyer's agency agreement could be amended to establish a designated agency relationship, to change a designated agent, or to change supervisory brokers at any time by way of a written addendum, signed by the parties.

MCL 339.2517

BACKGROUND INFORMATION:

Public Act 93 of 1993 amended the regulations for real estate brokers and real estate agents to require that prospective clients be given written disclosure of the type of agency agreement that the agent would have with the client.

The Occupational Code distinguishes between a real estate broker and a real estate salesperson. A broker is an individual, sole proprietorship, partnership, association, corporation, common law trust, or combination of those entities that, among other things, participates in real estate transactions. A salesperson is a person who is employed either directly or indirectly by a licensed broker to engage in real estate transactions sales. Sometime a salesperson may be referred to as an associate broker. In order to act as a broker or a salesperson, one must be licensed. In order to receive a salesperson's license, a person must file an appropriate application, successfully complete no less than 40 hours of courses on real estate principles, including at least 4 hours of instruction on civil rights law and equal opportunity in housing, and pass an examination. In order to be licensed as a broker, in addition to the requirements for licensing as a salesperson, the applicant must successfully complete no less than 90 hours of courses in real estate, including no less than 9 hours of instruction on civil rights law and equal opportunity in housing. In addition, the code also refers to associate brokers, who are individuals who are licensed as brokers, but are not the acting broker for the firm where they work. The term licensee refers to both licensed salespersons and licensed brokers.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

According to supporters of the legislation, designated agency laws have been adopted in 18 other states. The bill will clarify and uphold the agent/client relationship, instead of requiring a buyer or seller agency agreement to be abrogated whenever the parties to the transaction are both represented by licensees working for the same real estate broker. When a buyer or seller agrees to a dual agency situation, he or she is agreeing to give up the negotiating assistance, advice, and advocacy that

would otherwise have been provided. Many agents and agencies feel that this situation places them in an awkward position of effectively abandoning their client at the time their services are most needed.

By allowing a licensee to agree, up front, to be a client's designated agent, the bill will eliminate the chance that if that client wants to negotiate with the client of another agent who works for the same company, both clients will find themselves unrepresented. Though opponents suggest that the current law on dual agency is adequate, most clients, by the time a dual agency situation arises, have already invested a lot of time with the agent they have chosen. It is rare that a client, when confronted with a dual agency situation, will seek out another agent to finish the deal. At that point most people want to act quickly to complete the sale -- the idea of finding another agent is usually either not considered at all, or considered and quickly rejected. Since most clients will stay with the agent they already have, in spite of a dual agency situation, allowing the agent to continue to act on the client's behalf places the client in a better position by allowing that agent to continue to fully represent that client.

Proponents also argue that imputing knowledge held by one salesperson to another salesperson, even if they work for the same broker, is a fiction that is not supported in most situations. At a time when some real estate agencies have offices nationwide, two agents could work for the same firm, but in entirely different offices within the state. They might never have met one another, nor even know of the other agent's existence prior to finding that he or she was representing the other party in a proposed real estate transaction. To presume that these two agents have knowledge of confidential information about the other's client is unreasonable.

Against:

The bill essentially allows a licensee to represent that he or she is acting on behalf of a particular client when a clear conflict of interest exists. The reason for the existence of the dual agency provisions in current law is to require that clients are informed when a situation arises where their agent can no longer ethically represent them. Buyers and sellers have naturally opposing interests -- a buyer wants to buy the house for the lowest price that the seller will sell it for and the seller wants to sell it for as much as the buyer will pay.

The bill will provide that under a designated agency agreement, when a dual agency situation occurs, the broker and supervisory brokers will automatically be considered disclosed and consented to dual agents, without having to disclose that to the client or get his or her consent.

Allowing the creation of "designated agent agreements" may well help sellers to get better prices (which also works to the advantage of the agents and the broker for which they work), but it will not help buyers. Opponents suggest that the bill is a response to the inroads in the representation of buyers that have been made by agencies that represent only buyers. Buyer's agencies recognize that representing sellers will create a conflict of interest and seek to avoid that risk by not engaging in the sale of real estate. The bill would allow companies that represent sellers to create an illusion that they are able to serve both a buyer and a seller in the same transaction and fully represent and advocate for both clients, in spite of the obvious conflict of interest. Rather than forcing an agent to tell his or her client that a conflict of interest exists, the bill will allow the agent to hide behind a designated agent agreement.

Analyst: W. Flory

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