

So, What Went Wrong?

Ahhh, the demise of a once proud profession....

THE PAST:

The real estate industry was never as greedy and deceiving as it is today. Back in 1986 – From the NAR, National Association of REALTORS®, Publication (underlining is mine), “Who Is My Client? A REALTORS® Guide to Compliance with the Law of Agency”: “The legal concept of *Agency* with which this booklet is concerned is, however, beyond question the most fundamental of all the legal concepts applicable to the real estate profession and professional. It is the very nature and function of the real estate broker, appraiser and manager to be an agent. The law of agency literally defines the species and gives real estate practitioners their identity.”

So, the real estate industry embraced the concept of true agency and fiduciary duties. Even in 1993 – From the NAR Publication, “Agency Choices, Challenges & Opportunities – Agent’s Guide”: “Agency relationships make up the foundation of the real estate industry. Indeed, one reason why the National Association of REALTORS® (NAR) was formed at the turn of the century was to enhance the professionalism of real estate brokers by recognizing an agency relationship between the broker and her client and educating all parties about the duties imposed by the relationship.”

SO, WHAT HAPPENED?

Why does the term “Agent” no longer mean “fiduciary” or “true legal agency”? It used to as noted by NAR’s publications in 1986 and 1993.

- From the beginning until the mid-1980’s, all real estate licensees represented the seller and the seller was a client and the buyer was a customer.
- Then came the early 1980’s Federal Trade Commission’s survey of real estate consumers revealing that home buyers were being

misled into believing they had a true agent, when legally they didn't.

- Then came individual state agency disclosures talking about real estate agency and forcing real estate licensees to decide and disclose their proposed relationship with the home buyer and home seller.
- Then came the consumer being educated to work with a buyer agent.
- Then came the desire by the traditional agent to market themselves as buyer agents.
- Then came the dilemma for real estate licensees trying to deal with the in-house transaction.
- Then came the dumb-down and watering down of true agency.
- Then came the successful lobbying to change state legislation to allow for the in-house double-dip of commissions under the guise that consumers were still being represented.

WANT FURTHER EVIDENCE?

Take a look at the 2007 Amended – NAR Code of Ethics – “Standard of Practice 1-2” (underlining is mine): “As used in this Code of Ethics, “client” means the person(s) or entity(ies) with whom a REALTOR® or a REALTOR®’S firm has an agency or legally recognized non-agency relationship; “customer” means a party to a real estate transaction who receives information, services, or benefits but has no contractual relationship with the REALTOR® or the REALTOR®’S firm; “prospect” means a purchaser, seller, tenant, or landlord who is not subject to a representation relationship with the REALTOR® or the REALTOR®’S firm; “agent” means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation; and “broker” means a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity. (Adopted 1/95, Amended 1/07)”

THE PROBLEM:

There is a body of law that goes back 200 years called “common law”. It originated in England and was brought over to the US 200+ years ago as the foundation for our own laws. It has been added to over the years through legislative changes and through lawsuit decisions by state and federal courts to provide us with the framework within which we all operate.

Part of the common law has to do with agency and trusts from which real estate representation stems. The most important aspect of this is that “**one can’t serve two masters**”.

A trustee (referred to as the agent/fiduciary) owes “Undivided Loyalty”, and other fiduciary duties, to their principal (referred to as the client). However, the definition of “client” in the NAR Code of Ethics was changed in 2007 to also include, “legally recognized non-agency relationship” with the real estate licensee or firm. To NAR, agent no longer means fiduciary or legal agent but rather simply means a real estate licensee. So, when you hear the term, “real estate agent”, don’t for a minute think that they are a true fiduciary agent per the common law, but rather simply think of them and refer to them as “real estate licensees”.

Real estate agents (licensees) consistently rank very low among various job descriptions right alongside the used car salesperson. The real estate industry is loaded with non-professional, untrained, unethical participants who certainly have brought this ranking down to the level it is. However, I feel that it is more that the entire real estate industry decided to forgo being true agents and decided to become the equivalent of a used car salesperson, using high-pressure sales tactics and deceit as their tools of choice.

Exceptions to the Traditional Real Estate Industry:

Yes, there are exceptions to the traditional real estate industry. There are true fiduciary agents who are dedicated to always operating as true agents for home buyers at all times and in every situation. They are called exclusive buyer agents and single agents. A true exclusive buyer agent represents home buyers only and is with a company that represents buyers only and never represents sellers or takes listings. Single agents are true agents who represent sellers and buyers but never in the same transaction. If a buyer client is interested in buying a seller client’s

property, the buyer is referred out to a true buyer agent with another company so that they continue to receive true fiduciary duties.