

Designated Agency Q & A (as of 12/30/08)

Brokerage Firms choosing to practice agency relationships must choose to practice Designated Agency or Traditional Agency as office policy.

- 1. Q. Are all firms required to practice Designated Agency beginning on January 1, 2009?**
A. No, Designated Agency becomes a business model option effective January 1, 2009. It is up to each firm and principal broker to decide whether or not to switch to Designated Agency. In addition, the switch does not have to take place on January 1, 2009. Your firm could decide at a later date to switch to Designated Agency.
- 2. Q. What is a Designated Agent?**
A. A Designated Agent is a real estate licensee who, with the consent of a party, has been appointed to represent that party in a real estate transaction and who owes that party full fiduciary duties even if another licensee from the same firm represents the other party.
- 3. Q. How does a licensee become a Designated Agent?**
A. The client must consent in writing to the appointment. This consent can be part of the listing or buyer representation agreement.
- 4. Q. May more than one licensee in a firm be appointed as a Designated Agent?**
A. Yes. There is no limit on the number of designated agents for a client. NHAR recommends at least two agents to be designated.
- 5. Q. If covering an open house for a Designated Seller's Agent in my office, what is my relationship to that seller?**
A. The seller is merely a customer to you unless you are appointed as a Designated Agent as well. If you are not a designated agent, you need to provide the necessary agency disclosure forms.
- 6. Q. If covering for a Designated Buyer's Agent in my office, what is my relationship to that buyer in showing property?**
A. The buyer is merely a customer to you unless you are appointed as a Designated Agent as well. If you are not a designated agent, you need to provide the necessary agency disclosure forms.

7. **Q. What is the relationship of the licensees in the same firm who have not been appointed as Designated Agents to a particular client?**
- A. There is no fiduciary or client level relationship to any firm client unless the licensee is a designated agent of that client.
8. **Q. What is the relationship of the licensee to a new prospective buyer who walks into the office?**
- A. It depends on the company policy and the wishes of the buyer. In a Designated Agency Brokerage Firm, the licensee could work with the buyer as a Facilitator (formerly Non Agent) or as a Designated Buyer Agent.
9. **Q. What is the difference between an Agent in a traditional office and a Designated Agent in a Designated Agency office?**
- A. The fiduciary duties are exactly the same. The differences are:
- In a traditional firm when a licensee has a seller client ALL of the licensees become agents of that seller client and when a licensee has a buyer client in the firm ALL the licensees in the firm become agents of that buyer client. All the agents in the firm have the full range of fiduciary duties regardless of whether it is their own client. ALL of the agents are working in the best interest of ALL of the clients within the firm. So whenever a buyer client in the firm wants to buy an “in house” listing, dual agency exists.
 - In a Designated Agency firm, the clients only have representation by the specific agent(s) that has been appointed as their designated agent(s). No other licensee in the firm has any fiduciary duties to that client (with the exception of the Appointing Agent). So when a licensee in a firm is appointed as a Designated Seller Agent, that is the only agent in the firm that has the fiduciary duties with that seller client. If another agent in the office is hired to be a Designated Buyer Agent, that is the only agent in the firm that has the fiduciary duties with that buyer client. If the buyer is interested in an “in house” listing there is no dual agency with the exception of the Appointing Agent if the same Appointing Agent appointed the Designated Seller Agent and the Designated Buyer Agent.
10. **Q. Can a Designated Seller/Landlord’s Agent or a Designated Buyer/Tenant’s Agent ever become a Dual Agent?**
- A. Yes, but only if a single agent wants to represent both parties. Then all the normal dual agency consent rules apply.

11. **Q. What happens in the above situation when the brokerage firm, seller or buyer will not allow Dual Agency?**
A. In this situation the Appointing Agent will appoint a different licensee to be the Designated Agent of one of the parties or refer out one of the parties.
12. **Q. Once a firm decides to practice Designated Agency, can the agents in the firm also practice Traditional Agency?**
A. No.
13. **Q. What is an appointing agent?**
A. The Appointing Agent may be the Principal Broker, the managing broker, or any associate broker authorized by the Principal Broker to appoint designated agents.
14. **Q. Who is authorized to be the Appointing Agent?**
A. The Appointing Agent could be the principal broker or managing broker, but it does not have to be. The principal broker or managing broker may authorize any associate broker within the office to be an Appointing Agent.
15. **Q. Is there only one Appointing Agent in the firm?**
A. No. The number of Appointing Agents is not limited and subject to office policy.
16. **Q. What about imputed knowledge between offices of the same firm?**
A. There is no assumption of imputed knowledge that flows from office to office.
17. **Q. If an Appointing Agent appoints the Designated Seller Agent and a different Designated Buyer Agent for the same property, what is the Appointing Agent's role?**
A. The Appointing Agent and only the Appointing Agent is a disclosed dual agent. Additional client consent is not required.
18. **Q. Can the principal broker authorize an Appointing Agent to appoint Designated Seller Agents and another Appointing Agent to appoint Designated Buyer Agents?**
A. Yes.



19. **Q. Do all Appointing Agents automatically become Dual Agents?**
A. No. An Appointing Agent only becomes a Dual Agent if the Appointing Agent appoints both the designated seller agent and the designated buyer agent in the same transaction.
20. **Q. If I obtain consent to designated agency, in either a listing or buyer agency agreement before a property is identified, must I provide any further notice to my client?**
A. Yes. If the seller and the buyer clients are both represented by licensees within the same firm, further notice that the designated agency occurs is required. This may be done as part of the purchase and sales agreement but, in any case, must be done prior to the execution of the purchase and sale or lease agreement.
21. **Q. What is the Role and Responsibility of the Principal Broker?**
A. The Principal Broker is still responsible for the activities of all licensees within the firm. The Principal Broker is still responsible for creating the office policy, for making sure the office policy is being implemented and is responsible for appointing the appointing agent if the principal broker will not be acting him/herself as the appointing agent. The Principal Broker will also be bound by the duty of confidentiality.
22. **Q. What is the liability of individual licensees in an office that practices Designated Agency? What is the liability of the Appointing Agent? What is the liability of the Principal Broker?**
A. The liability will not be any different than in any existing agency relationships. Disclosures must be given, written consent must be obtained, and notice must be given when designated and/or dual agency occurs and the fiduciary duties must be observed and preserved. Designated Agency is not a panacea.
- The Appointing Agent has no increased liability or supervisory responsibilities. The principal broker is and will remain responsible for the actions of any licensees within the firm.



23. **Q. If I choose Designated Agency for my firm, is there anything different that I must do regarding confidentiality of the clients?**

A. Yes.

You need to create office policies to make sure information is segregated and not provided to agents other than the Designated Agents for a particular transaction. The Principal Broker and Managing Broker must also still have access to all files to perform their supervisory functions. The Principal Broker needs to also establish policies and procedures with respect to supervision of transactions where the Principal Broker or Managing Broker is acting on behalf of one of the parties. In such a case, the Principal Broker or Managing Broker should not have access to any confidential information from the other party.

24. **Q. How do I Transition my Office from Traditional to Designated Agency?**

A. This process must be determined based on the existing practices and procedures of each Firm. To do so, you will need to develop a policy and enact procedures to address the following:

- You will need to determine which licensees have actual knowledge of confidential information about existing clients and either make those licensees designated agents for those clients or create a process to ensure that they are not involved in any transaction involving that client.
- You will need to provide notice to existing clients and the option to change to a designated agency relationship or stay in the current relationship until the existing contract expires.
- You will need to establish procedures to protect confidential information from being obtained by licensees within the office other than the licensees selected to be designated agents for that client.
- You will need to establish an aggressive training program to train your licensees regarding all aspects of designated agency but especially the confidentiality aspect.



Facilitation (Non Agency) Q & A

1. **Q. What is a Facilitator (Non Agent)?**
A. An individual licensee who assists one or more parties during all or a portion of a real estate transaction without being an agent or advocate for the interests of any party to such transaction. Because a licensee who works as a Facilitator does not represent either the seller or the buyer, the Facilitator does not owe fiduciary duties to either party.

2. **Q. How and when does a licensee become a Facilitator?**
A. A licensee would become a Facilitator when the seller/landlord and/or buyer/tenant executes the Disclosure of Brokerage Relationships in accordance with 701.01.

3. **Q. When acting in the capacity of a Facilitator does a Facilitator need a written contract?**
A. No. However, it is recommended.

4. **Q. What actions can a Facilitator perform?**
A. Actions of the Facilitator could include, depending on office policy:
 - Ministerial Acts
 - Timely disclosing the Facilitator relationship to all parties
 - Presenting all offers in a timely manner
 - Keeping the parties apprised of the transaction status
 - Suggesting the parties obtain expert advice
 - Accounting for all funds
 - Exchanging information between parties
 - Assisting the parties in completing the transaction
 - Disclosing all material defects known by the facilitator about a property
 - Provide, but not analyze, comparative market data

5. **Q. What duties must I satisfy when I am a Facilitator?**
A. Facilitators owe seller and buyer customers the following duties:
 - honesty
 - accounting for funds
 - reasonable care and skill
 - disclosure of material defects of which the licensee has actual knowledge

6. **Q. Does the Facilitator have a duty of confidentiality?**
A. No.

7. **Q. Can the Facilitator decide to maintain confidentiality?**
A. Yes.
8. **Q. Can a Facilitator ever be an advocate for either party?**
A. Not unless the Facilitator's role changes.
9. **Q. Can the Facilitator Relationship ever change?**
A. Yes. The Facilitator can become a buyer's or seller's agent with a written brokerage contract and updated agency disclosure to the other party, as required.
10. **Q. When a licensee is a Facilitator with the buyer and seller and the buyer decides he/she wants representation prior to writing the offer, what relationship does the licensee now have with the seller?**
A. After the execution of the buyer agency agreement, the licensee becomes a Buyer's Agent and the seller remains a Customer and the licensee is no longer practicing as a Facilitator. The licensee owes the fiduciary duties to the Buyer, and owes the seller customer reasonable care and skill, honesty, accounting for funds, and disclosure of material defects of which the licensee has knowledge and agency disclosure in accordance with 701.01, with notice and updated agency disclosure to the other party, as required.
11. **Q. When a licensee is a Facilitator with the buyer and seller and the seller decides he/she wants representation prior to preparation of an offer, what relationship does the licensee now have with the buyer?**
A. After the execution of the seller agency agreement, the licensee becomes a Seller's Agent and the buyer remains a Customer and the licensee is no longer practicing as a Facilitator. The licensee owes the fiduciary duties to the Seller, and owes the buyer customer reasonable care and skill, honesty, accounting for funds, and disclosure of material defects of which the licensee has knowledge and agency disclosure in accordance with 701.01, with notice and updated agency disclosure to the other party, as required.
12. **Q. Can a licensee be a Facilitator for a buyer when showing a property and later change to a Buyer Agent for that same buyer in the purchase/lease of that same property?**
A. Yes. A buyer agency agreement will need to be signed prior to the preparation of the offer along with a new disclosure to the other party.





13. **Q. Can a licensee show one property to a buyer as a Seller's Agent and a different property to the same buyer as a Facilitator?**
A. Yes, because in both cases the licensee owes no fiduciary duties to the buyer. Duties as a Seller's Agent are owed to the seller of the first property only. For both properties, no agency duties are owed to the buyer. Care should be taken to make sure the buyer understands the different roles licensee is taking for each property.
14. **Q. Can a licensee be a Facilitator with a seller and change to a Seller Agent even after an unrepresented buyer views the seller's property with the licensee?**
A. Yes. The seller may hire the licensee to represent him/her by entering into a written seller agency agreement. Written disclosure of the change in status of the Facilitator to a Seller Agent must be given to the buyer and agency disclosure is required in accordance with 701.01.
15. **Q. Can a licensee take a listing to sell property as a Facilitator?**
A. Yes. This contract must outline the responsibilities of all parties.
16. **Q. Can a licensee be a Facilitator on a company listing?**
A. In a firm practicing traditional agency: No, you are already a Seller's Agent. In a firm practicing designated agency: Yes, if permitted by the firm's office policy.
17. **Q. What are the liabilities of licensees practicing as Facilitators?**
A. As always, licensees are responsible for obeying the license laws in the State of New Hampshire. They will also be subject to a reasonable standard of care.

