

# Team Real Estate

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*"Our team is well balanced. We have weaknesses at every position."*

Tommy Prothro - football coach

There are large numbers of REALTORS® who are now practicing as part of real estate teams. Some teams are nothing more than one real estate agent helped by a group of licensed and/or unlicensed assistants. Other teams are composed of two or more real estate agents, each of whom are on more or less an equal footing with one another. Husband and wife teams and family teams are good examples of this second type of team.

The concept of team real estate is still a relatively new one. As a result, many of the questions about what team members can and cannot do remain unanswered. This article will try to clarify the limits and risks of team brokerage by addressing in a question and answer format some of the more commonly raised issues in this area.

**Question #1:** If a real estate team is representing the buyer and seller in the same transaction, do they have to act in a dual agency capacity?

**Answer:** Whether the team acts in a dual agency capacity or a designated agency capacity will depend on the company's agency policy and how the team is organized and does business. Let's look at the examples below to see why this is the case.

**Example:** Mary Smith incorporates under the name of The Mary Smith Team, Inc. Mary has several licensed assistants who help her with her buyer and seller clients. All business, however, is done in the name of The Mary Smith Team, Inc. to insure that the team gets proper Million Dollar Club credit. The Mary Smith Team is the listing agent on a property. None of Mary's licensed assistants are selling or listing agents in their own name. A buyer, who is not working with another real estate agent, becomes very interested in the property. Can Mary have one of her licensed assistants work with the buyer to avoid being a dual agent in the transaction? Mary's company permits the practice of both dual and designated agency.

**Answer:** Mary Smith can have one of her licensed assistants work with the buyer in this transaction. However, if both the buyer and the seller in the transaction are being represented by The Mary Smith Team, a dual agency relationship would still exist between the parties. In this case, The Mary Smith Team is really Mary Smith, an individual licensee, who has organized herself legally as a corporation. Individual licensees are permitted to incorporate under Georgia law. However, the corporation must designate an individual licensed as a salesperson as its qualifying salesperson. The qualifying salesperson is responsible for assuring that the corporation complies with the rules and regulations of the Georgia Real Estate Commission (GREC). Most importantly, the qualifying salesperson is required to be "the only licensee of a corporation" (O.C.G.A. § 43-40-10(c)). Therefore, if The Mary Smith Team, with Mary Smith as its sole shareholder and qualifying licensee, is the selling and listing agent in a transaction, a dual agency relationship would exist, because the same corporate licensee is representing both the buyer and the seller in the transaction.

Now let's see what happens if Mary Smith changes how she does business:

Example: The Mary Smith Team consists of Mary Smith and three licensed assistants. Mary's assistants also act as selling and listing agents on behalf of their broker in transactions independent of The Mary Smith Team. Can Mary assign Joe Jones, one of her licensed assistants, to represent the buyer in a transaction where the selling agent will be Joe Jones rather than The Mary Smith Team?

Answer: This is something of a trick question in that only Mary's broker can assign Joe Jones to represent the buyer. However, if Mary's broker assigns Joe to represent the buyer, and assigns The Mary Smith Team (less Joe) to represent the seller, a designated agency relationship would exist between the parties. In this transaction, however, Joe could not be taking direction from, or otherwise be a part of, The Mary Smith Team. This is because as a designated agent, he would need to be in a position to exclusively represent the interests of his buyer client.

**Question # 2:** Do Realtors® need to disclose they are practicing as part of a real estate team?

Answer: The answer to this question is "yes" in certain situations. Under the Brokerage Relationships in Real Estate Transactions Act ("BRRETA"), brokers, including the brokers' affiliated licensees, are required to disclose to their clients "adverse material facts of which they have actual knowledge." In certain instances, a licensee's participation on a real estate team could be considered an "adverse material fact" that would trigger a disclosure obligation. To see why this could be the case, let's look again at the second example above, where Joe Jones is representing the buyer in the transaction as the selling agent, but in most other transactions is working as a licensed assistant on The Mary Smith Team. Is the fact that Joe normally works for and is paid by the listing agent a potentially material adverse fact relative to the transaction? While the answer to the question can be debated, an argument can be made that such information is material and potentially adverse, in that Joe might not be as aggressive in negotiating on behalf of his client and against the listing agent when the listing agent is his boss in most other real estate transactions. Therefore, to avoid any claims in this area, Joe at a minimum should disclose to the buyer that in most other transactions he is a member of The Mary Smith Team. Moreover, a duty may even exist to explain how being on a team may not be in the client's best interests to insure that there is informed consent to being represented on this basis. This same type of disclosure obligation would also likely exist in any situation where one team member was sharing compensation with other team members who were representing different parties in the transaction.

An example of the minimum type of disclosure that Joe should try to get the buyer to sign to disclose his relationship with The Mary Smith Team is set forth below:

\_\_\_\_\_ [Buyer] acknowledges that in other real estate transactions Joe Jones (a) is a licensed assistant of The Mary Smith Team Inc., the corporate real estate agent who is the listing agent in this transaction, and (b) is paid for his efforts on behalf of the team. [Depending on the level of sophistication of the client, you may need to do more.]

A more general disclosure that can be used when one agent on a team is representing the buyer and another agent on the team is representing the seller is as follows:

\_\_\_\_\_ [Buyer] [Seller] acknowledges that the real estate agent with whom he/she is working is part of a real estate team composed of \_\_\_\_\_ and \_\_\_\_\_ and that the following team member: \_\_\_\_\_ will be the real estate agent working with the [Buyer] [Seller] in this transaction. The real estate team will share any real

estate commissions paid to any of the team members by the broker for \_\_\_\_\_ [firm].

**Question # 3:** My wife has been designated by our broker to represent the buyer in a real estate transaction and I have been designated to represent the seller. My wife and I work together as a real estate team. What duties do we have to preserve the confidences of our respective clients?

**Answer:** First, the potential for a conflict in this case is sufficiently great to cause me to recommend against this type of practice. However, in a strict legal sense, you and your wife would owe the same duties that all designated agents owe to their clients to preserve confidential information. Specifically, designated agents owe a general duty to keep confidential all information received during the course of the brokerage engagement which is made confidential by an express request or instruction from their buyer or seller client.

All GAR listing and buyer brokerage agreements include a written instruction from the client not to disclose any information that could adversely affect the client's negotiating position. Therefore, each designated agent would be required to follow this directive and any other specific instructions received from the client during the engagement regarding confidential information. The only exception to this rule is for information otherwise required to be disclosed by law such as, for example, the existence of a latent defect.

While the legal duties of a husband and wife team, each acting as designated agents, are no greater than for any other designated agent, husband and wife teams may, as a practical matter, need to be even more careful to avoid the inadvertent disclosure of confidential information since their actions may be more highly scrutinized by their respective clients than the actions of other designated agents. In light of this potential, if husband and wife teams are acting as designated agents on the opposite sides of a real estate transactions, they may be well-advised to try not to receive confidential information in the first instance to avoid the possibility of an inadvertent disclosure of confidential information.

**Question # 4:** Our real estate team mostly represents the sellers in real estate transactions. One of our team members would like to now work with buyers on our listings. Can we specify when we take a listing that the buyer agent on our team is not representing the seller to avoid any dual agency problems down the road?

**Answer:** The answer to this question is "no." BRRETA does not permit a broker or a real estate team to designate an agent not to represent either the buyer or the seller in a transaction.

When a broker takes a listing on a property, and is representing the seller, the broker and all of the broker's agents are representing the seller. For an agent to be designated not to represent either the buyer or seller would be inconsistent with this existing agency relationship. Under Georgia law, the broker can later designate one of his or her agents to exclusively represent the buyer where the agent would be a designated agent rather than a dual agent. The broker therefore can assign a member of a real estate team to be the designated agent for buyers. However, since the agent was previously the agent for the seller prior to becoming a designated agent for the buyer, the buyer's agent would have to timely disclose this at the time the brokerage engagement was entered into with the buyers.

**Question # 5:** I am a licensed salesperson. I have a real estate team consisting of myself and two licensed assistants. What legal agreements do I need to have with my licensed assistants under Georgia law?

**Answer:** There are three written agreements that should be entered into. The first is an agreement between the licensee and his or her licensed assistant specifying the scope of the duties the assistant will be performing on behalf of the licensee. The second is an agreement between the broker and the licensee seeking to hire the assistant outlining the duties that the assistant will be performing and the compensation arrangement between the licensee and the assistant. The third is an agreement between the licensed assistant and the broker addressing these same issues.

**Question # 6:** Does working as part of a real estate team create greater potential legal liability for a real estate agent than working alone?

**Answer:** While this question is somewhat subjective, the answer is, in all likelihood, "yes." The area of greatest potential exposure for a real estate agent is probably in supervising licensed and unlicensed assistants. Let's look at the following example to see why this is the case.

**Example:** A licensed assistant on The Mary Smith Team fails to timely present an offer to a seller. As a result, the sellers end up taking an offer for less money on their property. When the sellers learn that there was a second offer, they file a complaint with the GREC and a lawsuit for damages. What potential liability does the real estate agent have in this situation for the actions of the agent's licensed assistant?

**Answer:** The failure to timely present all offers is a violation of our license law. The key question is whether the violation is the responsibility of The Mary Smith Team, the licensed assistant or their broker. The answer to this question is that all three have exposure to being sanctioned by the GREC for failing to timely present an offer. This is because Substantive Regulation 520-1-.40(1) of the GREC specifically provides that "Whenever a licensee who is affiliated with a broker engages support personnel to assist the affiliated licensee in the conduct of the real estate brokerage business, both the firm and the affiliated licensee are responsible for the acts of the support personnel."

The Mary Smith Team can also be sanctioned under the theory that the failure to timely deliver the offer was the fault of The Mary Smith Team. Each corporate licensee is required under Georgia law to have a qualifying salesperson who is responsible for ensuring compliance with the rules and regulations of the GREC. Violations "subject the license of the qualifying salespersons to sanction" (O.C.G.A. §43-40-10(c)). Since Mary Smith is the qualifying license of The Mary Smith Team she would therefore be subject to being sanctioned.

Interestingly, with respect to violations of the rules and regulations of the GREC, the legal exposure of an agent for the actions of a licensed assistant is greater than the legal exposure of a broker for the actions of an affiliated licensee. This is because Georgia law shields brokers from liability for violations of the rules and regulations of the GREC committed by their affiliated licensees if the broker can demonstrate that he or she (1) had reasonable procedures in place for supervising the affiliated licensee and (2) did not participate in or ratify the violation (O.C.G.A. §43-40-18(b)). There are no similar provisions in the law to protect a real estate agent for the actions of his or her licensed or unlicensed assistant.

In addition to liability at the GREC, a real estate agent also faces potential civil liability for damages resulting from the actions of a licensed or unlicensed assistant. This is because, in a legal sense, it was the team that was performing the work on behalf of a real estate broker rather than the licensed or unlicensed assistant.

Real estate agents may even have potential exposure for acts of intentional wrongdoing on the part of a licensed or unlicensed assistant. For example, let's say that an unlicensed assistant illegally converts an earnest money check that the real estate agent for whom she works has given to deliver to the agent's broker. Could the agent employing the assistant be held responsible for this theft?

The answer to this question depends on the nature of the legal relationship between the agent and the licensed or unlicensed assistant. As a general principle of law, a person is not responsible for the actions of a second person working on his or her behalf if the second person is working in an independent contractor capacity. Since most licensed and unlicensed assistants are independent contractors, the real estate agent should be able to argue that he or she should not be held legally responsible for the theft by the assistant. However, merely stating in a contract that an assistant is an independent contractor does not necessarily make it so. Courts use fairly elaborate tests to try to determine whether a worker is acting as an employee or as an independent contractor. Unlike independent contractors, employers are normally responsible for the tortious acts of their employees performed within the scope of their employment. The test of whether a person is acting as an employee or an independent contractor is a function of the degree to which the time, manner and method of their work is controlled by the person for whom they are working. The greater the control, the greater the likelihood a court will find an employer/employee relationship to exist.

While there may be greater legal risks involved in practicing with a team, there can also be significantly greater financial rewards. Obviously, team members can leverage themselves through the use of assistants to handle more work than they might otherwise be able to handle and achieve higher levels of profitability. Still, team real estate is something that brokers should not give their licensees blanket approval to practice, but should instead be carefully thought out, and in many instances limits should be placed on the practice to minimize potential legal liability to the company.