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Real Estate Matters

Representing both buyer and seller: a conflict of interest?

by Michael Repka

Although the practice is completely legal and widely accepted in California, it seems impossible for one real estate agent to zealously represent both the buyer and the seller in the same transaction, even when the situation is properly disclosed. Simply too much conflict of interest exists. Nevertheless, many agents salivate at the thought of getting twice the commission from the same transaction, and many clients accept this practice, not realizing how much more other agents' clients might have been willing to pay.

In practice, some agents even offer a commission discount if the sellers pick their offers. This is a violation of the rules that apply to Realtors® if not properly disclosed to other interested buyers in advance, which is rarely done. A good attorney would cringe at the notion of representing both the plaintiff and the defendant on the same case, yet many real estate agents represent both sides without even blinking an eye.

Fundamentally, there are three problems with "double-ending" a deal. First, a good agent knows a lot about the client's situation and has access to much confidential information. Second, an agent cannot possibly fight for the highest price for the seller while also arguing the lowest price for the buyer. Third, there is a risk that a listing agent will not do everything possible to bring in competing offers when that agent already has a buyer.

The underlying conflict stems from the commission model that is widely used in the real estate industry. Most agents successfully close only a limited number of transactions per year, but they are paid extremely well when they do make a sale. Thus, the difference between two transactions and three transactions has a material impact on an agent's annual income. You must also consider much of the first sales commission goes towards an agent's business expenses, such as monthly fees to the affiliated office, dues to MLS and Realtor® associations, and advertising to get new clients. Do the math and you will see why so many agents are willing to represent both the buyer and seller.

A less obvious problem occurs when a listing agent finds a buyer, and then gets a friend to write up the offer, often taking a large, and generally undisclosed, referral fee. In many ways, this is an even worse set-up because the sellers do not know they should be on guard.

One of the problems that makes it hard to fix the flawed dual-agency situation in California is the definition of dual agency itself. Any transaction in which the listing agent and the buyer's agent are licensed under the same managing broker is classified as dual agency. This may be overly broad because, in most offices, the agents are independent contractors who operate with very little interaction. Put another way, independent agents in a particular office compete against each other in the same way they compete against agents who pay to be affiliated with another office. Generally, there is no financial incentive for an agent to accept an offer from another agent in the same office unless the listing agent referred the client. However, there is a large incentive for unethical conduct when an agent receives commission (or a referral fee) if their own client gets the home.

Most agents are good people, but the commission-based model creates the temptation to put their finger on the scale. By way of example, assume a home has been on the market for a few weeks. Three somewhat interested parties circle the opportunity, then one party decides to submit an offer. A good agent would inform every interested party to stir up some competition, and generate a higher price, but those calls may never be made by a listing agent who is submitting an offer for a personal client.

Short of lobbying to get the law changed, there are a few ways wise clients can protect themselves:

Make sure you get a copy of every offer that is submitted, including the buyer's agent's name and contact info, along with any correspondence.

Ask that any offers submitted in person are also emailed so there is an electronic record.

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Ask for the name and phone number of every agent who downloaded the disclosures.

Request a log of the listing agent's follow-up with all interested agents.

Require written disclosure of any commission, referral fees or other financial incentives to the listing agent based on the acceptance of any particular offer.

Generally, sellers get the short end of the stick when it comes to dual representation, which may cause buyers to conclude they will have a competitive advantage if working with the listing agents. Initially, this sentiment is logical, but you must ask yourself, "Do I really want to trust this agent to help me when I am attracted to the agent just because I think this agent might mess over their other client?"

The best approach here is to find a good agent who understands your needs and your financial goals. Trust this agent's counsel, yet never forsake vigilance.

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