

UNDERSTANDING BUYER BROKERAGE

By Susan H. Confair

There is an increasing interest in buyer brokerage occurring in real estate transactions as home buyers become more sophisticated and want their own representation. In fact, in a two-year survey of real estate brokers 93% of the respondents (165 firms) indicated that they believe that buyer agency is here to stay. Given the rising interest in buyer brokerage it becomes essential that the members of the real estate industry understand the mechanics of buyer brokerage.

There are three types of agency relationships that may exist in a real estate transaction.

A. A **single agency** relationship is where the broker represents the interest of either the seller or the buyer depending on the agreement between the parties.

B. A **subagency** relationship is created when a broker or sales associate, acting through another broker, becomes the subagent of the seller. Subagency is typically created through multiple listing arrangements whereby a listing agent agrees to share commissions with any broker who sells the primary broker's listing. A subagency also exists between the listing broker and all sales associates and other brokers in the listing broker's office.

C. A **dual agency** relationship results from a person acting as the agent for two or more parties to a transaction. In a dual agency relationship the agent must treat the interest of the buyer and seller equally. This can be difficult as it is impossible to give complete agency representation to both the buyer and seller in the same transaction. Therefore, the dual agency relationship must be disclosed to both the buyer and seller and their informed consent to such relationship must be given in writing.

Simply put, a buyer broker is the broker who represents the buyer, who is not an agent or subagent of a seller, and who is not a dual agent. Buyer brokerage can be viewed as one form of single agency. Just as the seller's agent is employed to obtain the price and sale terms sought by the seller, a buyer's agent is employed to get the best possible price and terms for the buyer. For example, a buyer's agent may negotiate for a smaller deposit, for all closing costs to be paid by the seller, or for those contract terms which are most favorable to the buyer. (see THE BUYER BROKER'S LEVEL OF SERVICES below)

Pennsylvania has a mandatory agency disclosure law at 63 P.S. §455.607(1) which requires that the broker **shall** set forth in all sales agreements or sales contracts a disclosure statement that the broker is the agent of the seller or the broker is the agent of the buyer. The buyer is also to receive a written disclosure of all possible agency relationships available and the most significant implications of choosing one type over another in order to allow the consumer to make an informed choice. (see also CODE OF ETHICS AND STANDARDS OF PRACTICE of the NATIONAL ASSOCIATION OF

REALTORS below)

Individual real estate firms should also have a written company policy to address and outline the agency relationships. This provides the brokers and their sales associates with clear guidelines as to their duties and obligations under the firm's selected agency structure. The policy should also insure that a buyer is informed of whether the agent is a buyer's agent or a seller's agent. Such a policy will make the agent's responsibilities owed to the principal clear so that the agent is sure to be working on behalf of the party which the agent represents.

The amount and means in which the buyer broker is compensated for his/her services will depend upon the agreement that is reached between the parties, as well as, what has been negotiated between the traditional agent and the seller. Some buyer brokers are paid by a flat fee, others on a percentage of the home price or commission from the seller's proceeds.

Justifying that the buyer broker's commission should be paid by the seller is not difficult. What is often forgotten is the fact that the buyer already pays the commission as it is included in the established price the buyer pays for the home. Even though the seller splits the fee between the traditional agent and the buyer broker, the buyer broker is deemed the buyer's agent. Compensation does not determine agency. Agency is created by prior agreements and/or actions of the agent, not compensation.

The National Association of Realtor's multiple listing policy accepts property listings from traditional agents in which the seller offers cooperation, in the form of a commission split to buyer brokers. By cooperating with the buyer broker, the seller and buyer reject any offering of subagency. The buyer broker discloses at the first contact with the traditional agent and the seller that he/she is the agent for the buyer. Most sellers will recognize that compensation for both the traditional (listing) agent and the selling broker (subagent or buyer broker) is part of the purchase price.

As the buyer broker can use the Multiple Listing Service (MLS) he/she must be careful not to become an undisclosed dual agent. A buyer broker must be certain not to show a property listed by another broker who works in the buyer broker's office or to show a property that he or she has previously shown to another potential buyer while acting as an agent or subagent of the seller. Opening oneself up to the possibility of an undisclosed dual agency can lead the broker substantial liabilities.

Full disclosure of the buyer brokerage relationship to all parties involved at the earliest contact is the rule. The buyer must be informed of the possible agency relationships that are available to him/her prior to signing any agreements.

CODE OF ETHICS AND STANDARDS OF PRACTICE
of the NATIONAL ASSOCIATION OF REALTORS

The following are the specific Articles of the Code of Ethics and Standard of Practice which govern Buyer Brokerage:

ARTICLE 7. When representing a **buyer**, seller, landlord, tenant, or other client as an agent, REALTORS pledge themselves to protect and promote the interests of their client. This obligation of absolute fidelity to the client's interests is primary, but it does not relieve REALTORS of their obligation to treat all parties honestly. When serving a **buyer**, seller, landlord, tenant or other party in a non-agency capacity, REALTORS remain obliged to treat all parties honestly. (Amended 11/92)

* **Standard of Practice 7-1(c).** REALTORS acting as agents of **buyers/tenants** shall submit to **buyers/tenants** all offers and counter-offers until acceptance but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing. REALTORS acting as agents of **buyers/tenants** shall recommend that **buyers/tenants** obtain the advice of legal counsel if there is a question as to whether a pre-existing contract has been terminated. (Adopted 11/92)

* **Standard of Practice 7-2.** REALTORS, when seeking to become a **buyer/tenant** representative, shall not mislead **buyer** or **tenants** as to savings or other benefits that might be realized through use of the REALTOR'S services. (Amended 11/92)

ARTICLE 9, Standard of Practice 9-10(b). When entering into contracts to represent **buyers/tenants**, REALTORS must advise potential clients of:

- 1) the REALTOR'S general company policy regarding cooperation with other firms; and
- 2) any potential for the **buyer/tenant** representative to act as a disclosed dual agent, e.g. listing broker, subagent, landlord's agent, etc. (Adopted 11/92)

ARTICLE 21, Standard of Practice 21-2. REALTORS acting as subagents or as **buyer/tenant** agents, shall not attempt to extend a listing broker's offer of cooperation and/or compensation to other brokers without the consent of the listing broker. (Adopted 11/92)

* **Standard of Practice 21-12.** REALTORS, acting as agents of **buyers** or **tenants**, shall disclose that relationship to the seller\landlord's agent at first contact and shall provide written confirmation of that disclosure to the seller\landlord's agent not later than execution of a purchase agreement or lease. (Cross-reference Article 7.) (Amended 11/92)

THE BUYER BROKER'S LEVEL OF SERVICES

1. RESPONSIBILITIES: Provide fairness and honesty to seller, but owe a greater responsibility to buyer, including duty of skill and care to promote and safeguard buyer's

best interest.

2. EARNEST MONEY EARNED: Suggest the minimum amount, perhaps a note; put money in interest-bearing account; suggest that forfeiture of earnest money be the sole remedy if buyer defaults.

3. SELLER FINANCING: Suggest terms in best interest of buyer, such a low down payment, deferred interest, long maturity dates, no due-on-sale clause, long grace period, nonrecourse.

4. DISCLOSURE: Disclose to buyer such pertinent facts (which might not be able to disclose if subagent of seller) such as: (1) seller near bankruptcy or foreclosure, (2) property overpriced, (3) other properties available at a better buy, (4) negative features, such as poor traffic control, (5) construction of chemical plant down street that may affect property value.

5. NON-DISCLOSURE: Refrain from disclosing to seller such facts regarding buyer's position as fact that buyer has options on three adjoining parcels. No duty to disclose name of buyer or that broker is loaning money to make down payment.

6. PROPERTY CONDITION: Require that seller sign property condition statement and confirm representations of condition; require soil, roof, termite inspections, if appropriate; look for negative features and use them to negotiate better price and terms.

7. DOCUMENTS: Research and explain significant portions of important documents affecting transaction, such as prepayment penalties, subordination, right of first refusal, refer buyer to expert advisors when appropriate.

8. NEGOTIATION: Use negotiating strategy and bargaining talents in buyer's best interest.

9. SHOWING: Search for best properties for buyer to inspect, widening marketplace to "For Sale Buy Owners", lender owned, probate sales and unlisted property. View property at different times to find negative features such as evening noise, afternoon sun, traffic congestion.

10. PROPERTY GOALS: Counsel buyer as to developing accurate objectives; may find that buyer who wants apartment building might be better with duplex at half the price, or that buyer looking for vacant lot would benefit more from an investment in improved property.

11. OFFERS: Help buyer prepare strongest offer, can suggest buyer prepare two offers and have broker submit lower offer first without revealing fact of second offer.

12. POSSESSION DATES: Consider what is best for buyer in terms of moving in, storage, favorable risk of loss provision if fire destroys property prior to closing.

13. DEFAULT: Suggest Seller's remedy be limited to retention of deposit money; consider having the seller pay buyer's expenses and cancellation charge if seller defaults.

14. BIDDING: Cannot bid for own account against buyer client.

15. EFFICIENCY: Work at an "exclusive listing" efficiency realizing that broker's role is to assist buyer in locating and acquiring best property.

16. APPRAISAL: Suggest an independent appraisal be used to negotiate lower price offer, review seller's comparables from buyer's perspective.

17. BONUS: Can receive incentive fee for negotiating reduction in listed price.

18. TERMINATION: Legal and ethical implications of agency relationship and certain duties may continue even after clearly documented termination.

(Definitions provided from Agency Relationships, by John Reilly, 1987)