

# THE REAL ESTATE REPORT

August 2006

## From the broker's perspective

I have written about buying and selling properties from the perspective of buyers and sellers but not from that of the third leg of the real estate stool, brokers and their agents. This is equally important to buyers and sellers as it will give them an understanding of what is going through their broker/agent's mind if the latter represents them as the listing agent (selling the owner's property) or as the buyer's agent (bringing the buyer to a property listed by another agency).

A broker makes his/her living by selling properties, either as agent for an owner or as agent for a buyer. Brokers receive commissions for their effort to get a seller and a buyer to agree on terms of a sale. When there is a "meeting of the minds," the legal term for an agreement mutually arrived at with respect to price and other contingencies, the real estate agency(s) involved, has technically earned its commission. But, as we will see, the devil is in the details as sales don't often proceed according to Hoyle. What follows is a discussion of how the system may or may not work out in the expected way and how this affects the buyer, seller and real estate agents involved.

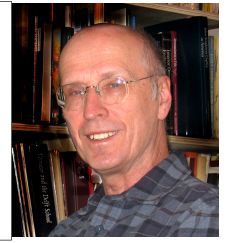
### Thess seller's concerns

When a seller lists his house with an agent and buyers don't show up, how come? The seller's first reaction is to blame the agent for not advertising effectively. Is the agent living up to the agreed terms of a marketing plan? Did the agent list on MLS (multiple listing service)? This is the most effective venue for advertising a property. Is the property shown invitingly in local real estate magazine ads and on the agent's website? For a property which would appeal to weekenders is it advertised in a big city paper and websites? Has an attractive and informative brochure been printed? How is it being distributed?

If these efforts have been made, then the problem is elsewhere. The real estate market may be "off" with fewer buyers responding to ads. Or the curb appeal (appearance, condition, road noise, neighborhood) of the property may be turning off buyers, who often do their own "drive by" before deciding whether to call an agent to schedule a formal "showing."

A seller's concern may reflect difficulty in separating feelings from facts about the property. Rejection of a property by a potential buyer is personally painful to a seller; the seller's immediate reaction is to blame others rather than to improve appearance, condition or price to meet a buyer's expectations. After a period of frustrating buyer disinterest sellers have several choices: list with another agent in the same agency (if personal chemistry has not been the best), list with a different agency and hope

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for a new set of buyers (which is less than likely as all area brokers should know of the property and would already have brought qualified buyers if they had had them), take the property off the market and hope for a better market later (but which way is the buying trend?), make improvements (fixing the most obvious condition issues to improve curb appeal or safety concerns), or change the price (the assumed cure-all, especially for sellers not willing to make other improvements).

Sellers respond to these options in different ways depending on their personal and financial necessities, often making decisions which are not in their best interest. A thoughtful and open exploration of needs and market circumstances with the listing agent is generally more helpful than a seller trying to come to a decision without that advice.

A seller might ask what's going on in the agent or broker's mind? Here are some likely thoughts and concerns: The agent doesn't want to lose a listing which practically guarantees a commission regardless of where the buyer comes from. On the other hand if the seller is difficult to get along with, or has expectations or demands which can't reasonably be met, it may be a lot easier to drop the listing and concentrate on developing a buyer in a co-broke arrangement with another listing agency. The commission may be half as much, but the aggravation is gone.

### The broker's concerns

Meanwhile the listing broker is mindful that he/she has an obligation to the seller to get the property sold by any means within the bounds of ethics, law and agency expense. But a broker has other agency concerns too. Having numerous listings is desirable as it suggests an active and successful agency to present and future sellers. Listings receive the attention of buyers who may become clients. Ads may promote properties but they are just as important for promoting the agency and its individual sales persons. An exclusive listing gives an agency a crack at selling a property to one of its own customers, thus earning the full (unshared) commission. If a member of an MLS, as most are, the broker has an obligation, usually welcome, to let other agencies bring their customers to buy, sharing the commission. In fact most sales are co-broke sales. Better a bird in the hand (a half commission with a co-broke) than two in

the bush (waiting longer to get their own buyer and thereby full commission, but with the possibility of never selling and not serving the seller properly).

Although unethical, one occasionally hears of agencies which are less than cooperative in co-broke situations in order to gain time to sell to

### What is "Agency"?

The terms "agent" and "agency" are the most confusing in the business because they refer to a person, a legal relationship, and an organization. Here are some definitions which should clarify this. A real estate firm is a licensed brokerage agency which may be called, for short, an agency or a brokerage. It is headed by a principal broker who may have one or more salespersons, also called sales agents or just agents. A property owner can list his property for sale with a brokerage agency. When he enters into this contractual relationship he becomes a "principal," that is, a client to whom the brokerage agency becomes the seller's agent, a fiduciary relationship by which the agency represents the interest of the seller, providing him trust and confidence as well as loyalty. The broker may delegate its agency's role as agent for the seller to one of its salespersons, but it still retains the responsibility of agent. If a potential buyer comes to see the listing, that person is a "customer," to whom the broker or his sales person owes honest and fair dealing, but not the loyalty they owe the seller.

A potential buyer, however, can request this (or another) broker to become his "agent" too, in which case the broker may agree to become the buyer's agent to represent the buyer's interest in finding a property to own. It is analogous to the relationship a broker has to a seller, with the same fiduciary responsibilities. Either client relationship is acknowledged by both parties signing an Agency Disclosure form. Under certain circumstances a broker or his delegated sales person can have a client relationship with both seller and buyer of the same property, called dual agency. It is controversial (there is an inherent conflict of interest involved—how can a broker be loyal to both parties?) yet legal if both parties are fully aware of it and agree to it in writing.

their own customer. For example, a seller's agent may not convey a co-broke offer to the seller in a timely manner, or may not even do anything at all with it in order to favor his own customers -- and a full commission. A buyer's agent may be improperly diverted from a property by a seller's agent who claims that the property has an accepted offer or contract when this is not in fact the case. In both cases the seller, the buyer and the buyer's agent are never likely to know what didn't happen because the listing agent served his own interest ahead of his legal obligation to serve his seller by cooperating with a buyer and his agent. This is unethical and unlawful behavior which should be reported as a complaint to the Board of Realtors or the state licensing authority but usually is not as brokers are reluctant to alienate each other when cooperation on a future sale is desired. Thus we see that brokers and agents have potential conflicts of interest, prompting their boards of realtors to require attendance at regular ethics training classes.

### The sales agent's concerns

Getting listings is as important to sales agents as to their brokerage. For an agent who brings in an exclusive listing, there is the promise of a share of the commission for listing and another share if the agent also finds the buyer. Just as brokerages compete with each other for listings, agents within a brokerage agency also compete for listings. Many potential sellers want to interview more than one agent or agency before listing, only then making a choice on the basis of a variety of factors. Since a property is a major personal possession, it is not surprising to know that sellers often award a listing to a broker or agent they have known well and whom they trust the most. But sometimes this decision is made without full consideration of an agent's or agency's suitability. Basing a decision on personal relationship alone often leads to disappointing seller-agent relationships when unvoiced personal expectations get in the way of professional obligations.

Sellers, unlike agents, have no training to evaluate what is right, practical, ethical and legal. Since so many listings are based on a personal relationship to an agent it is little wonder that agents cultivate social relations with people in their area in hopes of securing a future listing. Sellers would better serve themselves if they knew what to ask before agreeing to a listing. How appropriate is the marketing plan to the listed property and to prospective buyers? Does the agency specialize in the seller's kind of property and in the seller's area? Does the agency possess special knowledge and experience with this kind of property?

With regard to the training of those working in real estate profession, here is a touchy subject. It takes only a week of training to become a sales person and two weeks to become a broker. What other licensed profession can turn out "professionals" in so little time? Becoming a cosmetologist (hairdresser), for example, requires 1,000 hours of education! Obviously, knowledge, capability and effectiveness in real estate come primarily from experience on the job as well as regular continuing education classes. Does the agency have sufficient listings, agents and advertising to create the critical mass necessary to draw attention to it and inspire trust and confidence in buyers and sellers? If the agency is large, is it possible that your listing may get lost in the crowd of agents and clutter of so many listing in ads? What is the agency's selling history, ethical reputation, and established attention to both clients and the details of the process itself? Dependable answers to these questions are hard to find. The Board of Realtors should have on record the reporting of ethical charges against agencies on which it has made judgment. In addition, checking with recent clients of the agency for their personal evaluations is wise. (For reference the agency should supply seller

names and addresses.) Are the agency and its sales persons in good standing with the state real estate licensing authority? An internet search of the authority's website should produce the necessary information.

### The buyer's concerns

I have now discussed some of the issues arising between a seller and a broker or sales agent, but what about the situation in which a buyer seeks out a broker or agent to help him identify, evaluate and purchase a property? This relationship is called "buyer agency" where a broker or sales person acts as the buyer's agent, helping the buyer find a suitable property and negotiate for its purchase with a listing agency representing the seller. There is a co-broke agreement between the two agencies specifying that they split the commission which is usually paid by the seller. This arrangement is of great benefit to a buyer who thereby has his own representative, an agent who owes him sole loyalty, much as a plaintiff and a defendant in a legal matter is each independently represented by his own lawyer. Such independent professional representation is not, however, necessarily the custom in real estate where an agent can even act as a dual agent, representing both parties to a sale.

Frequently a buyer will contact a listing agent to see his listings and in the course of a developing relationship will assume the agent is his "friend," one to confide in and from whom "unconflicted" loyalty and advice can be expected. In fact the agent's loyalty is exclusively to the seller, although honesty is owed to both buyer and seller. It is an ambiguous relationship with potential for disappointment if the agent is not scrupulously honest about his legal and ethical responsibilities to both seller and buyer. The conflict for the agent is that by acting on behalf of both seller and buyer his agency stands to collect the full commission (a strong inducement to get the job done "no matter") rather than split it with another agency acting as buyer's agent in the transaction. It is legally incumbent on the agent to disclose to both seller and buyer for which one he will be acting as agent and to both sign an agency disclosure agreement to that effect. Yet often this does not happen and the buyer is lulled into a false sense of representation. If disclosed and agreed in writing, an agent can enter into a dual agency agreement with seller and buyer, but even this is essentially a conflict of interest. As one prominent broker stated to the US Department of Justice in a hearing on the subject: "Our most important anti-trust issue is Realtors' introduction and promotion into most states of dual agency, which deceives consumers and has vast potential for insider trading by real estate agents." (Fred Meyer, Co-Chair, Real Estate Agents for Real Agency. 9/25/05).

An important benefit to a buyer having his own agent is that such an agent is far more motivated to show his client properties from many agencies instead of just "pushing" his own agency's listings. Most agencies are members of multiple listing services which insist on co-broke cooperation and the agreed splitting of commissions. Although this is a strong financial motivation to encourage buyer agency, it is still very important for buyers to be made aware of the option of buyer agency and to make an effort to take advantage of its advantages.

Dual agency and undisclosed agency are at the heart of many of the real estate industry's major ethical and legal problems. Because present laws are not adequate to protect against conflicts of interest,  *caveat emptor* ("buyer beware") applies. And it is usually the clients who must make themselves aware.