

# Are Your Salespeople Secret Agents?

## Prevent undisclosed agency relationships with a written policy and training sessions for your sales force.

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Has a buyer or seller recently asked your salespeople, "Whom do you represent in a real estate transaction?" If not, chances are good that the salespeople in your office will be asked this question soon. Consequently, they should be prepared to turn this question to their advantage and respond competently and convincingly.

Let's drop in on Barbara Brooks, a salesperson with Big Realty, who is at the apartment of John and Sally Cox, discussing available properties with them. The Coxes recently moved into the area and are looking for a home near downtown and the public schools. Barbara carefully gathers the necessary information from the couple. That afternoon, Barbara returns to her office anxious to begin her search for the Coxes' future home.

### THE NEED FOR A POLICY

When Barbara searches her notes, files, and computer, she finds several properties that seem to fit the Coxes' requirements. As she prepares to show them those properties, she remembers that her broker has mentioned a new agency disclosure law and asked her to discuss her working relationship with every prospective buyer and seller. While waiting for the Coxes to arrive, Barbara begins to panic a bit as she tries to organize her thoughts about the role she'll play in helping them buy a home.

If Big City Realty had developed and implemented a formal agency disclosure policy, Barbara would be ready for the Coxes. Having an agency disclosure policy that explains the specific services provided to buyers and sellers enables salespeople to interact more professionally with them. However, few companies currently have a written policy about single agency, dual agency, subagency, and buyer agency.

With more than 25 states enacting or considering agency disclosure laws, though, more managers are recognizing the need to rethink the working relationship between salespeople and the buyers and sellers in each transaction. An official written company policy is needed to avoid accidental or undisclosed dual agencies, which can lead to lawsuits for civil fraud, loss of commission, legally invalid sales transactions, and other consequences. The text should explain the proper relationship of broker to seller, broker to buyer, and bro-

ker to co-broker. That policy statement should become part of your company's written policy manual.

After instituting such a policy, make sure that salespeople understand it and train them to follow it. Remember, a well-trained salesperson displays confidence rather than panic when explaining services to buyers and sellers.

### **AGENCY ISN'T A NEW IDEA**

The concept of agency is far from new and has always governed our relationships with sellers and buyers. New agency disclosure laws don't alter those relationships and thus don't produce any drastic changes in the way we do business. However, we must now carefully and effectively explain our working relationships with sellers and prospective buyers. We must be certain that the buyer and the seller are aware of, and in agreement with, that relationship. Finally, we must make sure that our words and actions suit our role. In short, we must not only choose the role we wish to play but also play the role that we have chosen. The question is not so much, "Whom do I represent?" as it is, "Whom do I want to represent?" or, "Who wants an agency relationship with me?"

Buyers must also determine what kind of relationship they want. Some want and need their own agent; they want an agency relationship. Other buyers, however, need only information and service; they are capable of representing themselves, as they do in most other purchases. Instead of an agency relationship, they want the working relationship of a customer with a salesperson. Often, buyers prefer to work directly with the seller's agent. Listing agents are able to work with such buyers on a customer basis. They can "sell their own listings" without having to become dual agents, provided clear disclosures are made to the buyer.

Under basic agency law, the broker is the agent. Salespeople act on behalf of the broker. Because "the broker owns the listing," it is important for this individual to establish a clear company policy on agency disclosure for all salespeople to follow. Does the broker permit dual agency or not? In a cooperating brokerage situation, is the broker a buyer's agent or a seller's subagent? If an offer is made through a buyer's broker, will the listing broker agree to share a portion of the commission with that person? Evaluate and answer such questions and discuss policy with salespeople before problems arise in practice.

### **SELLERS AND BROKERS**

In developing a company policy on the relationship between seller and broker, consider the following questions and commentary:

**Is the seller aware of the agency relationships being created under the listing contract? Is the seller aware of the role of the broker, the listing salesperson, all salespeople in the listing company, and subagents from other companies?** Sellers have carefully selected the listing broker as their agent but may not clearly understand the role other real estate professionals will play in the transaction, especially a cooperating broker, who may be the seller's subagent through an individual agreement with the listing broker or through the multiple listing service (MLS).

**Will the seller authorize the use of cooperating brokers as subagents? Will the listing broker counsel the seller to offer subagency on a blanket basis, a limited basis, or not at all?** If the seller wants to use subagents to market the property, this authorization should be specified in the listing agreement. Listing brokers should inform sellers of the pros and cons of using subagents. They should also explain that the MLS is structured as a blanket unilateral offer of subagency that participating brokers may accept or reject.

**Will the seller consent to the listing broker's sharing commissions with the buyer's agents?**

Sellers should understand that the listing broker will share commissions with subagents. Sellers should also consider the likelihood that offers might be presented through a buyer's agent. Typically, in residential transactions, the buyer's broker is paid from the sales proceeds with the consent of the seller and the listing broker. That point should be discussed at the listing presentation, not deferred until the offer is presented.

**How will we handle the presentation of offers through a buyer's broker? Will the company give buyers' brokers the same access to properties as subagents?** It is increasingly likely that buyers will retain their own agent to help in locating and negotiating a purchase. Some brokers have simply allowed buyers' brokers the same access as subagents, with lockbox privileges. Other brokers have restricted access, insisting on accompanying the buyer's broker personally. Still others have refused access. The listing brokers have been fearful that if unaccompanied, the buyer and buyer's broker might develop erroneous impressions of the property.

However, refusing access is not a good policy to adopt from a legal standpoint. Turning away a qualified potential buyer may breach the listing broker's legal responsibility. In any case, the company policy should state whether any distinctions are made when dealing with buyers' brokers.

**Will we engage in dual agency? If so, under what circumstances and with what kind of disclosures?** Although dual agency is not prohibited, it should be avoided whenever possible. As stated previously, listing brokers can still sell their own listings without having to represent the buyer as a dual agent. The excellent pamphlet *Who Is My Client? I* (NATIONAL ASSOCIATION OF REALTORS®, 1986) explains why dual agency is considered inadvisable:

[Dual agency is] a totally inappropriate agency relationship for real estate brokers to create as a matter of general business practice. The disclosures and consents necessary to make a dual agency lawful are so comprehensive and specific that a typical real estate broker cannot undertake them as a matter of routine.

## **BUYERS AND BROKERS**

Policies that revolve around the relationship between buyer and broker raise the following questions:

**Will we continue to sell our own listings and treat the buyer as a customer? If so, how and when will we handle disclosure of this working relationship to the buyer?** There is no reason that a listing broker cannot deal directly with a buyer and provide the helpful service most customers have come to expect. To lessen the likelihood that a buyer might assume that the helpful salesperson is also the buyer's agent, the salesperson should clearly disclose his status as the seller's agent. This disclosure must take place early in the discussions with the buyer, before the buyer begins to reveal confidential bargaining information.

Some salespeople hand the buyer a company brochure that briefly outlines the role the listing broker and salesperson will play in working with interested buyers. The brochure facilitates the discussion of agency but does not take the place of any agency disclosure required by state law. At the same time as the disclosure discussion, salespeople can describe the types of services they will provide to the buyer.

**When our company is acting as the cooperating broker, will our salesperson be the subagent of the seller or the agent of the buyer?** Agency is a consensual relationship. To be the seller's subagent, a broker must accept the seller's offer of subagency. As a subagent, the cooperating broker owes the seller the same fiduciary duties as does the listing broker.

To be a buyer's agent, the broker must obtain the buyer's consent to the agency relationship. The buyer's agent must inform the listing broker that the buyer's broker has not accepted the offer of subagency and is not the subagent of the seller. The multiple listing service (MLS) rules permit the sharing of fees with a buyer's agent provided all parties consent.

**Should we adopt a single-agency policy? When is dual agency appropriate?** Under the single-agency concept, a broker will represent either the seller or the buyer, never both in the same transaction. Single-agency brokers can sell their own listings but only to buyers who are customers.

If single-agency brokers also take on buyer clients, they must decide what they will do if a buyer client is interested in one of their listings. Some brokers would confer with the buyer and the seller and agree with them to renounce one of the agency relationships in that particular transaction. Other brokers would attempt to obtain a consent letter from both seller and buyer client authorizing the dual agency and detailing what the role and duties of the broker will be as a dual representative.

**Will we pursue buyer brokerage as a policy? And will we require written exclusive buyer brokerage contracts? Will we accept fees from the buyer, seller, or both? Will we use a flat fee, hourly fee, or contingent fee?** Very few brokers make a living solely as buyer's agents, though many brokers do take on some buyer clients in addition to their regular brokerage practice. A short-form buyer agency agreement is often used because buyers are not accustomed to signing comprehensive listing agreements.

There are several ways to handle fees. As noted previously, the most common practice in residential real estate is for the buyer's broker to be paid from the sales proceeds with the consent of the seller and the listing broker. The payment of the fee does not determine agency conclusively, thus the seller or the listing broker could pay the buyer's broker through an authorized fee split. In the listing agreement, the seller could authorize the listing broker to split fees with a subagent or a buyer's agent. A contingent fee means that the fee will be paid only if the desired result is achieved.

**How do we handle procuring cause disputes when a buyer's agent is involved?** Most procuring cause issues in commission disputes involve two brokers working for, and being paid by, the seller. When a listing broker or a seller's subagent works with a prospective buyer who later retains a buyer's agent, the usual standards do not apply. The issue is no longer which one of the seller's agents produced the sale; it is more a matter of contract as to which agent is entitled to what commission.

The listing agreement could provide that if the listing broker procures the buyer but the buyer later elects to retain an agent, the listing broker will share fees on a lesser percentage than if the buyer's agent had introduced that buyer to the property.

## **FEAR OF DISCLOSURE**

If salespeople are going to handle these questions successfully, they must first overcome the basic fear that any change in sales techniques will only confuse buyers and sellers. Rather, salespeople must believe that they can be more successful and more professional by clarifying their role in the real estate transaction and explaining what services they can offer.

Additional policy-making will be needed to determine the company's role in marketing development projects, its stand regarding salespeople's buying for their own accounts especially if the desired purchase is already a company listing-and its position on handling representation of a buyer of a for-

sale-by-owner or other unlisted properties in such a way as to avoid undisclosed dual agency.

## **ROLE-PLAYING**

Once you have defined the policies, even tentatively, you must train your sales force to handle the required disclosures smoothly. That will not be accomplished overnight, as an old joke reminds us: A musician was stopped on a street in New York City by a tourist who asked, "How do I get to Carnegie Hall?" "Practice," the musician replied, "practice, practice, practice."

Videotapes of common situations are helpful practice aids. You can rehearse relevant situations in a sales training session, with everyone contributing ideas. That will help prepare salespeople to go out into the real world and try their new methods on actual sellers and buyers.

Salespeople need to practice dialogue and timing. Try to develop sample dialogue for your salespeople to use in different situations. For example, in a for-sale-by-owner situation, a buyer's broker might consider the following approach instead of the more common one of attempting to acquire a listing from the owner.

"Good morning, Mr. Owner. I am Barbara, a salesperson with Big City Realty. I am not here to ask for a listing on your home. The reason for my call is to see whether your property might fit the needs of a buyer client of mine. My buyer has agreed to pay my commission, and you will not have to pay me a commission. I am the agent for the buyer, and I will not be your agent. You will not have to list your property or publicly advertise it for sale. My buyer is ready, willing, and able to pay a fair price. If you are willing to sell for a fair price and terms, perhaps we can discuss this further."

When a salesperson who is acting as subagent of various sellers is showing some MLS-listed properties to a prospective purchaser, his script might read like this:

"Ms. Buyer, please understand that my company and I represent the sellers of these houses. Don't tell me anything you wouldn't say to a seller himself. Rest assured, though, that I can and will give you all the information you need to make an informed decision: general market information, financing alternatives, and so on. You are a valued customer, and it will be a pleasure to assist you in negotiating an offer and seeing it through to a successful closing."

Obviously, you'll want to modify this kind of statement so that it sounds natural, depending on whom you're talking to, but make sure the facts come through loud and clear.

## **TAKE A POSITIVE APPROACH**

Agency disclosure is just one part of a continuing trend toward protecting the consumer. To respond to the increasing demand for more disclosure, some of the more innovative companies are building new and exciting marketing programs and approaches around disclosure. Many are adopting clearly defined policies and developing attractive brochures that satisfy disclosure laws and promote the company's professionalism.

When salespeople like Barbara have a written policy to follow, some good coaching, and a lot of practice, they'll be ready for almost any sales situation involving agency disclosure.

Expecting more from salespeople goes hand in hand with raising their prestige in the eyes of buyers and sellers and the community to that professional level we'd like to enjoy. Thinking more clearly about the loyalty we're obligated to give our clients will result in their according more loyalty to us in return.

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