

But Who's Working for Me? Real Estate Buyers, Sellers & Their Agents

(Red Hook, New York-- **Peter Klose, Esq.**) The purchase of a home, whether it's a second home, or a primary residence, can be an emotionally charged, personal, and expensive endeavor. Despite the importance of such decisions, many of us don't appreciate the conflicting roles of the parties to such a transaction. That's right—many times conflicts between and among buyers, sellers, and the people they hire as their representatives sour the transaction. So, how do we make our way to a successful real estate transaction, free of enemies and full of appreciation, both financial and emotional?

To begin with, let's identify some of the potential conflicts that may arise in a residential real estate transaction. Generally, because the seller (Sally) has lived in her home and neighborhood for a substantial period of time, she knows that her home has certain “quirks.” They could be a buried oil tank, lead paint, a proposed coal burning power plant next door, even ghosts (true story). Wanting to retire to Florida, Sally is not motivated to tell the whole story. Indeed, under New York State law, she is not obligated to disclose one quirk, unless not doing so would be tantamount to fraud—in latin, *caveat emptor* (buyer beware). She hires a real estate agent to sell her home.

Arthur, the real estate agent, never lived in the home, but has plenty of knowledge about homes in general, and can spot some of the quirks. As an “agent,” Arthur must act honestly and candidly when he speaks with Sally. By law, he is a “fiduciary,” and if he acts adversely to Sally, his employer, in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct, he is committing a fraud, and must forfeit his right to compensation for services, or could even be charged with a crime. In hiring an agent, Sally should expect that Arthur will tell her if he has any business relationships or knowledge that would prevent him from getting the top dollar in this transaction.

On the other side of the equation, the buyer (we'll call him Bart) has just seen the house of his dreams on the Internet, the newspaper or as he as drove by. He calls the listing agent about the specific property. Arthur, the listing agent, offers to show the house and describes its numerous virtues. Bart knows there might be quirks, but desperately wants to live on Wisteria Lane. Can he rely on the seller's real estate agent to tell him about the all of the quirks? Not really. He must understand that the agent is motivated to sell the house for Sally and try to identify the quirks himself.

The buyer should also understand that the seller's agent's interest in closing a deal may trickle down in other seemingly benign ways—for example, if Bart asks the listing agent to recommend a home inspector. Most listing agents will provide the name of two or three home inspectors that they have “worked with” in the past, meaning the listing agent has probably recommended this particular inspector in prior successful and smooth deals. Since the inspector probably gets a significant number of referrals from the agent, he might be inclined to overlook

certain “quirks” that might change Bart’s decision to buy this property.

Conflicts can arise subtly in other ways as well. For example, let’s assume Sally’s house is in part of a sub-division in which Arthur, the listing agent, has numerous listings, but that Bart was originally interested in another house in that sub-division. He had called the first number he’d seen for a real estate agent—Arthur. Upon receiving the telephone call, Arthur knew that the house Bart was calling about was not one of his own listings. Accordingly, Arthur had a financial interest to steer Bart toward the listed property.

How should Bart protect himself from the often hidden conflicts that can arise when dealing with a listing agent? To begin with, Bart needs to recognize that the agents who list property with the Multiple Listing Service share commissions if other agents bring a seller to the table. Unless the non-listing agent has specifically agreed to work for the buyer in writing, that secondary agent may also be working as a sub-agent of the seller. As a result, the sub-agent remains obligated to get the highest price for the seller. New York State requires the agents involved in the transaction to disclose which party they are working for in writing before they even show the listing. Good real estate agents will explain this clearly, law or no law. Indeed, good real estate agents follow a code of ethics like those promulgated by various trade associations such as the National Association of Realtors (NAR), where the terms “honesty” and “fair dealing” are integral to who the agent is as a professional.

Besides recognizing the potential conflict, our buyer could hire himself an Exclusive Buyer Agent. According to Thomas A. Early, President, National Association of Exclusive Buyer Agents (NAEBA; www.NAEBA.org), “An EBA is a real estate licensee who provides fiduciary level Agency representation to real estate buyers exclusively, and who works for a real estate brokerage which does not represent sellers or list properties for sale. By not listing properties for sale or representing sellers, EBAs can provide their buyer clients with 100% undivided representation, without conflicts of interest.”

With so many online tools for finding property, why would Bart want a buyer's agent? There are a number of advantages. In competitive real estate markets, a buyer’s agent can identify hot properties as soon as they come on the market. A buyer’s agent can work with the buyer to improve the buyer’s appeal as a potential partner in the transaction, presenting her or him as a ready, willing and able buyer equipped with motivation and solid financing. If the buyer doesn’t know the market, a buyer's agent can help him or her understand what a house is really worth, give the inside scoop on schools and pointing out other factors that could affect property values. In any market, a buyer's agent can act as a buffer during the negotiating process and make sure that all of the quirks are uncovered before closing.

Finding a buyer’s agent is not necessarily difficult. One could start with old-fashioned word-of-mouth recommendations from lawyers, friends or family. If you’re moving to a new area, there are numerous free referral systems online which will match buyers to agents. Again, consumers should be aware that many of these sites list agents just for a fee, and perform no investigation, background checks or other review of their credentials. The bottom line:

Interview two or three agents to get a better sense of their experience, knowledge of the area, contacts and personality. Once you have interviewed the agent, understand where their loyalties lie.

Who Pays for a Buyer's Agent?

The commission paid for selling a house is fixed, usually at 5% to 7%, and paid by the seller. Generally, if a listing sub-agent brings a ready, willing and able buyer to the transaction, the seller's agent splits the commission. Sometimes such listing agent might even share the commission with an exclusive buyer's agent. Otherwise, the buyer pays his own Buyer's Agent. Remember; if you do not have your own agent, the seller's agent is motivated to retain the full commission by ignoring your right to hire your own agent. Indeed, some listing agents will flatly refuse to discuss the sale of a property with an exclusive buyer's agent.

In recent years, with the real estate market booming, buyers tend not to be so diligent about finding a local real estate agent that will work exclusively with the buyer to identify the quirks and to negotiate the best deal. There may, however, be a place for a buyer's agent in a real estate transaction. On the other hand, a buyer might also have run into a seller's agent who follows the ethical cannons, deals fairly with the customer seeking to buy a listing, and not need to hire an exclusive buyer's agent. In the end, it comes down to personal and professional relationships between buyers, sellers and the people they hire.

Post Script

Some times truth is stranger than reality. In the "ghost case" mentioned above, the buyer, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists, seen by the defendant seller and members of her family on numerous occasions over the last nine years. Upon learning of the alleged poltergeists, he sued the seller and her real estate broker for failing to disclose that the seller believed that the house was haunted even though she had shared this belief with the general public in through articles published in *Reader's Digest* and the local newspaper.

In granting the buyer the right to get out of the contract, the appeals court ruled: "While I agree with [lower court] that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the *phantasmal reputation* of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff *hasn't a ghost of a chance*, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his down payment."

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