



Accredited Buyer's Representative

A program by the
Real Estate Buyer's Agent Council, Inc.
of the National Association of REALTORS®

Student Manual

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Foreword



Welcome to the Real Estate Buyer's Agent Council and the Accredited Buyer's Representative (ABR[®]) designation course. After completing this two-day course and successfully completing the exam, you will earn ABR[®] Candidate status; this is a three-year period during which you must fulfill the elective course and experiential requirements to earn the ABR[®] designation.

This two-day designation course is the cornerstone of the consumer-respected and industry-coveted ABR[®] designation. By completing this course and the other requirements, you will earn the designation that is the benchmark of excellence in buyer representation.

www.rebac.net
800-648-6224
rebac@realtors.org



Accredited Buyer's Representative



Accredited Buyer's Representative Manager

About the Real Estate Buyer's Agent Council, Inc.

The Real Estate Buyer's Agent Council, or REBAC, was founded in 1988 to promote superior skills and services in buyer representation. Purchased by the National Association of REALTORS® in 1996, REBAC's membership now numbers more than 50,000. It is the world's largest organization of real estate professionals concentrating on buyer representation. Members who meet all course and professional experiential requirements are awarded the ABR® (Accredited Buyer's Representative) and/or ABRMSM (Accredited Buyer's Representative Manager) designation which are the only designations of their type recognized by NAR.

ABR® designation course students receive a complimentary one-year REBAC membership.

REBAC Membership Benefits

- ▶ A listing in REBAC's online "Find a Buyer's Representative" directory at www.rebac.net.
- ▶ A subscription to *Today's Buyer's Representative*, REBAC's award-winning monthly newsletter, containing news of events, legislation and education pertinent to real estate professionals working in buyer representation.
- ▶ A subscription to *The Real Estate Professional*, a bi-monthly trade magazine covering the entire spectrum of the real estate industry.
- ▶ REBAC's weekly *HotSheet*, delivered by e-mail and containing concise summaries and links to current articles of interest to buyer representatives.
- ▶ Marketing tools such as REBAC logos for print media, REBAC's consumer-oriented Homebuyer's Toolkit, and marketing brochures that can be customized at REBAC's Online Print Shop.
- ▶ REBAC Day, a full schedule of seminars and networking at the annual NAR National Conference and Expo.
- ▶ A national, consumer-aimed marketing campaign that raises consumer and REALTOR® awareness of the ABR® designation, and also generates consumer calls to REBAC for referrals to buyer representatives.
- ▶ Plus, new benefits and membership enhancements added each year.

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Today's Buyer's Rep

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By Mark Lesswing,
Chief Technology Officer and
Senior Vice President
National Association of REALTORS®

TBR
Today's Buyer's Rep

HotSheet

11/03/2006



PENDING HOMES SALES SHOW LEVELING TREND

Home sales are expected to hold fairly steady in the months ahead, according to the latest reading on pending home sales published by the National Association of REALTORS®.
(Source: NAR) Full Story

REBAC updates company data from NAR's National REALTOR® Database System (NRDS).

Inside TBR

[FIND A BUYER'S REP](#) [REBAC HOME](#) [SITE MAP](#) [ABOUT REBAC](#) [CONTACT US](#) [REBAC HALL OF FAME](#) [TERMS OF USE](#)



Real Estate BUYER'S AGENT C
of the NATIONAL ASSOCIATION OF RE
1-800-648-6224 or (312) 329-1656



National Search

International Search

Quick Link Search

Locate a Buyer's Rep in the United States.

REBAC (The Real Estate BUYER'S AGENT Council of the National Association of REALTORS®) is the world's largest association of real estate professionals whose focus is representing real estate buyers.

Step 1: Complete Required Search Fields

State:

-- AND/OR --

Last Name:

Step 2: Select the geographic data for the area you wish to search - CHOOSE ONLY ONE

Dropdown menus are based on United States Postal Service information and the areas that REBAC members have selected as their market areas. Some areas may not be listed. One selection in this step is required if no Last Name is specified in the step above.

City:

County:

Zip Code: [Find Zip Code](#)

Step 3: Select Optional Search Fields

You may refine your search by filling in any or all of these optional fields.

Neighborhood:

Search for [ABRs](#): Find ABRs Only

Find a Buyer's Rep

Reset Search Criteria

The ABR® Designation – A Market Distinction

The Accredited Buyer's Representative designation is the benchmark of excellence in buyer representation. This coveted designation demonstrates to peers and buyers your commitment to providing outstanding service for real estate buyers. The ABR® designation is both a market distinction and a valuable tool for building a buyer representative business. A designation application can be found on page 166 of this manual.

ABR® Benefits

In addition to REBAC membership benefits, as an ABR® designee you will benefit from:

- ▶ Consumer and industry respect for and recognition of the ABR® designation.
- ▶ Tools to help you promote your business to consumers.
- ▶ Tools to help you promote your business to other real estate professionals.
- ▶ Discounts on products and services for your buyer representative business.
- ▶ Materials to educate you on the trends and factors influencing buyer representation.
- ▶ Opportunities to help your clients find the properties they are looking for.

New Designees

After completion of the designation requirements new designees receive a Certification and Welcome Packet that includes a:

- Letter of recognition
- Designation lapel pin
- Certificate
- Press release for submission to local media

To learn more contact REBAC at:

Phone: 800-648-6224

e-mail: rebac@realtors.org

Web site: <http://www.rebac.net>

4 Steps to the ABR® or ABRMSM Designation

1

Designation Candidacy

The first step to earning the ABR® or ABRMSM designation is to become a candidate by fulfilling the following basic requirements:

- Complete the 2-day ABR® designation course with a passing grade (80%) on the exam *
- REBAC membership (students receive a free one-year membership from REBAC)
- NAR membership



Accredited Buyer's Representative

For agents who want to enhance their skills, and demonstrate their proficiency in serving the special needs of buyers.

Accredited Buyer's Representative Manager

For owners, brokers, and managers whose company service offerings include buyer representation.

2

Education Requirement

Successful completion of one elective course, including a passing grade on the written exam, when applicable.

Education Requirement

Successful completion of the ABRMSM Designation course, including a passing grade on the exam.

3

Experiential Requirement

Submit documentation of 5 completed transactions acting as a buyer's representative. Any transactions closed before or up to three years after completing the ABR® designation course are eligible.

Experiential Requirement

Submit documentation of supervision of 25 completed transactions involving a buyer's representative (transactions personally completed by the candidate are not eligible), or two or more years experience overseeing buyer's representatives.

4

Maintenance Requirement

Maintain your ABR® Designation by keeping your REBAC and NAR Membership up to date.

Maintenance Requirement

Maintain your ABRMSM Designation by keeping your REBAC and NAR membership up-to-date.

Administrative Accredited Buyer's Representative

For real estate professionals who do not actively represent buyers, list, or sell. The transaction verification requirement is waived, however, candidates must submit a letter on company letterhead from the managing broker attesting that the candidate does not actively represent buyers, list, or sell. Administrative ABR® designees who wish to change their status to a standard ABR® designation are required to submit verification of 5 buyer representative transactions.

* ABRMSM candidates have the option to challenge the ABR® exam for a fee of \$295.

ABR® Designation Elective courses

For course dates and locations go to www.CourseCalendar.com

Complete one of these elective courses to earn the ABR® designation

- Successful Buyer Representation in New-Home Sales 
 - Successful Relocation Representation 
 - e-Buyer 
 - Innovative Marketing for Buyer's Reps 
 - Foreclosure: Prevention and Opportunities for Buyer-Clients
 - International Real Estate for Local Markets 
 - e-PRO 
 - Creating Wealth through Residential Real Estate Investment (CRS)
 - Effective Negotiating for Real Estate Professionals (WCR)
 - Harnessing the Power: Skills Based Performance Management (WCR)
 - Land 101: Fundamentals of Land Brokerage (RLI) 
 - Resort and Second-Home Markets 
 - Seniors Real Estate Specialist (SRES) Designation Course 
-  = **Course available online**
-

Take up to 3 Years to Complete Requirements

ABR® candidates have three years (from successful completion of this ABR® designation course) to complete the designation requirements. If the ABR® designation requirements are not completed within three years after successfully completing the designation course, the candidate must begin again and meet all requirements within another three-year period.

When Can You Start Using the ABR® Designation?

Candidates cannot use the ABR® logo or refer to themselves as an ABR®-designated buyer's representative. Only REALTORS® who have met all requirements for the designation and are active members of both REBAC and NAR are permitted to call themselves ABR® designees and use the ABR® logo.

FAQs about the ABR® and ABRMsm designations?

For answers to frequently asked questions about earning the ABR® or ABRMsm designation, refer to page 186 in the reference section of this manual.

Course Goals

The overall goals of the Accredited Buyer's Representative designation course are to:

- ▶ Prepare real estate professionals to represent buyer-clients in real estate transactions and provide the quality of service and degree of fidelity that sellers have customarily enjoyed.
- ▶ Offer ideas and methods for building a buyer representation business.
- ▶ Develop a self-customized tool for conducting a buyer counseling session.

Learning Objectives

Chapter 1: Agency Relationships

- ▶ Identify and describe all of the possible relationships between a buyer-client and a real estate brokerage company.

Chapter 2: Creating Agency Relationships

- ▶ Describe how agency relationships are formed and how buyer's representatives work with clients.
- ▶ Make timely and meaningful agency disclosures to buyers and sellers.
- ▶ Describe the advantages of buyer representation and respond to frequently asked questions about it.
- ▶ Comply with the Code of Ethics of the National Association of REALTORS® in interactions with buyer-clients, customers, sellers, and colleagues.

Chapter 3: Client and Customer Relationships

- ▶ Fulfill fiduciary duties and avoid the consequences of breaching these duties.
- ▶ Recognize situations that create conflicts of interest in agency relationships and create and/or follow procedures to avoid them as well as protect the broker.

Chapter 4: Buyer Service

- ▶ Differentiate between customer- and client-level services.
- ▶ Comply with federal fair housing law as well as do not call, e-mail, or fax regulations.
- ▶ Distinguish between subprime or high-risk mortgage products and predatory or fraudulent lending practices and alert buyers to the potential risks.
- ▶ Develop strategies for finding properties and information about them.

- ▶ Offer a menu of buyer services backed up with a pledge of performance.
- ▶ Convince FSBOs to work with a buyer's representative.

Chapter 5: The Buyer Counseling Session

- ▶ Explain common provisions of a buyer representation agreement and modes of compensation for the buyer representative.
- ▶ Create a presentation package.
- ▶ Conduct a buyer counseling session.
- ▶ Respond to buyers' frequently asked questions, concerns, and special circumstances.
- ▶ Avoid unproductive situations with unmotivated, unqualified, and other types of problem buyers.

Chapter 6: Offers and Negotiations

- ▶ Assist buyers in formulating offers and responding to counter-offers.
- ▶ Present a buyer-client's offer.
- ▶ Identify the factors that are part of a negotiation strategy that produce a beneficial outcome for a buyer-client.

Chapter 7: Building Your Buyer Representation Business

- ▶ Identify and reach out to qualified buyers.
- ▶ Build and maintain your buyer representation business.

1. Agency Relationships

In this chapter

- ▶ Evolution of buyer representation
- ▶ Parties in a real estate transaction
- ▶ Types of relationships between real estate brokerage companies and consumers

What is Buyer Representation?

Buyer representation is the practice of real estate practitioners, brokers and their agents, representing the buyer as a client in the real estate transaction. It is also known as buyer agency or buyer brokerage. The relationship between a buyer’s representative and the buyer-client is legally binding. Although, the relationship is usually formalized by a written agreement it is not required. The buyer’s representative is the agent of the buyer and owes fidelity in all transaction matters to the buyer; in contrast, the seller-representative (listing agent) is the agent of the seller.

<i>Figure 1: Buyer Representation</i>		
	Buyer-Agent	Seller-Agent (listing agent)
Agreement	Buyer representation agreement	Listing agreement
Client	Buyer	Seller
Fiduciary duty to	Buyer	Seller
Negotiates on behalf of	Buyer	Seller

Evolution of Buyer Representation

Until the 1990s, the default position of MLSs, and most state regulations, was seller representation. The real estate professional was assumed to be an agent of the seller in all dealings with buyers. However, this legal configuration of the relationship between buyers and the real estate salespeople who worked with them did not match the realities of the marketplace.

A 1983 Federal Trade Commission (FTC) survey of buyers and sellers found that the public's perception regarding agency relationships was not in fact reality.

- 71% of buyers thought that the "subagent/seller's agent" showing them a property was actually "their" agent.
- 73% of buyers told the agent confidential information, including the final price they would pay for the property.
- 76% of sellers believed that the agent working with the buyer was the "buyer's agent."

Given this dramatic gap between consumers' perceptions and the reality of the marketplace, it was clear that action was necessary. The FTC approached the Association of Real Estate License Law Officials (ARELLO). In turn, ARELLO began discussions with the NATIONAL ASSOCIATION OF REALTORS® about requiring real estate agents to disclose who they represent in transactions.

Elimination of seller subagency

At the time this dialogue began, all companies and their salespeople were offered a "blanket unilateral offer of subagency." Subagency was created as a way to address issues that arose after Multiple Listing Services became widely accepted. When a listing was inserted into a MLS, cooperating selling brokers and their salespeople became the subagents of the seller.

The concept of subagency is this: since the seller pays the commission to the listing agent, who works for the seller, it therefore follows that any agent who brings a buyer into the transaction must also work for the seller. Although after July 1, 1993, the "blanket unilateral offer of subagency" ceased to be the default position in the MLS listing, it caused some problems early on. Many brokers did not want to compensate buyer's representatives, saying, "You can show our listings, but if you sell them, the buyer will have to pay the fee."

Subagency, although still legal in many states, has virtually disappeared from real estate practice because brokerages have ceased offering or accepting it as a matter of office policy; "cooperation and compensation" is offered only to those agents who represent buyers or act in a non-agency capacity in the transaction.

Although some brokers may still be initially resistant to buyer representation, often all they need to understand is why they should be open to it. For example, subagency creates an unnatural relationship between a buyer and a salesperson. The salesperson may have worked with a buyer for months, creating a great risk of an implied agency relationship, yet owes fiduciary duties to a seller that the salesperson has never met. An undisclosed dual agency situation can be created if a

brokerage company does not obtain a release of subagency from a seller prior to showing a property to a buyer-client.

Vicarious liability

A related concept that has almost entirely disappeared, because of state legislation disallowing it, is consumer vicarious liability. Vicarious liability means that actions or statements made by agents and subagents are the responsibility of the client. In other words, sellers can be held responsible for the statements and actions of potentially hundreds of real estate licensees they do not know and have never met.

Skill Builder Tip 1: Broker is responsible for acts of salespeople

Subagency and vicarious liability made the broker liable for the actions of other brokers' salespeople, but do not confuse these concepts with brokers' responsibility for the actions of their own agents. Elimination of seller subagency and vicarious liability does not relieve brokers of the responsibility for the statements and actions of salespeople under their supervision.

NAR policy changes

NAR took two actions that transformed the marketplace. First, a national Multiple Listing Service policy was instituted to change the blanket offer to "cooperation and compensation" from "cooperation and subagency." Second, NAR developed a nine-point model regulatory reform that urged state law makers to clarify the default presumption of agency, allow designated agency, clarify licensees' duties in a dual agency situation, and eliminate consumer vicarious liability. For the complete nine-point regulatory reform model, refer to page 190 in the Reference section of this manual.

Some states addressed the marketplace perception gap by adopting a non-agency alternative known as transaction brokerage or facilitation. The concept of this approach is for the licensee to act as a neutral party in handling the transaction; neither the seller nor the buyer is represented. On the surface, this sounds like a simple and fair approach but in practice it is not always clear cut or beneficial for the consumer. Because licensees are not agents of either the buyer or seller they cannot act as advocates; many real estate professionals consider this a barrier to adding value to the transaction. In transaction brokerage states brokers and their agents are assumed to be practicing neutral transaction brokerage unless they have specific written agency agreements with a client, buyer or seller.

Buyer Representation Trends

NAR research shows that since 1999 there has been a growing trend in buyer representation agreements. The total numbers of buyers responding “yes” when asked if they had a representation agreement grew to sixty-four percent in 2006 from forty-seven percent in 1999. It is interesting to note that while the percentage of “no agreement” has remained fairly constant, the percentage of “don’t know” has dramatically decreased to eleven percent in 2006 from twenty-six percent 1999; this is an indication that buyer’s representatives are generally doing a better job of informing clients.

Figure 2: Percentage of Buyers with a Buyer Representation Agreement

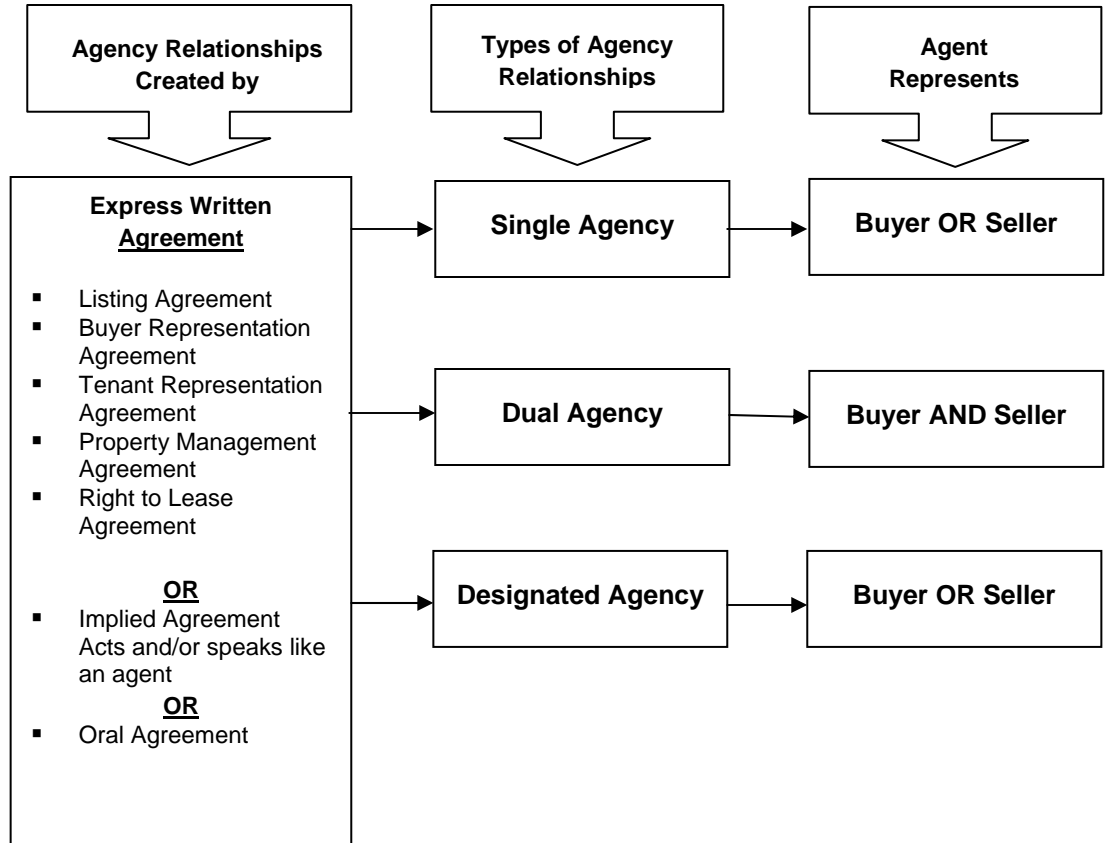
	1999	2000	2001	2002	2003	2004	2005	2006
Yes, written agreement	38%	38%	39%	39%	43%	42%	43%	44%
Yes, oral agreement	9	8	7	8	20	22	20	20
No	27	28	22	22	28	25	26	26
Don't know	26	26	33	33	10	12	12	11
Total “Yes”	47%	46%	46%	47%	63%	64%	63%	64%

Parties in a Real Estate Transaction

- ▶ Client: the party¹ whose interests are to be served by the statements and deeds of an agent. Also known as the principal. The client relationship can exist with or without a written contract according to state law.
- ▶ Broker: A real estate broker or brokerage serves consumers in transactions involving real estate. Most real estate agents work under the supervision of a broker. The term may refer to the business entity or to an individual licensed to run such a business.
- ▶ Agent: A party who is authorized to act in the best interests of a client and is obligated to place the client's interests before those of any other parties, including the agent's own interests, regardless of whether the client is a seller or buyer.
- ▶ Customer: A party with a non-agency relationship with another party in a transaction. For example, the buyer is the customer of the seller's agent; the seller is the customer of the buyer's agent. Duties may be owed to a customer, but not to the extent owed to a client.
- ▶ Transaction Broker: In those states that permit this type of non-agency relationship, the real estate licensee acts in a neutral non-fiduciary capacity for both parties to a transaction. Neither the buyer nor seller is the client of the transaction broker or facilitator, both are customers.
- ▶ Finder: a non-fiduciary whose only function is to introduce, for a finder's fee, the parties involved in a transaction.

¹ The "party" can be an individual, co-owners, a partnership, a corporation, an estate, or other legal entity.

Figure 3: Agency Relationships



Types of Relationships

How you work with consumers—what you can or cannot, should or should not, or must or must not do—depends on the relationship between the brokerage and each consumer. States differ in the types of relationships allowed and your office policy may further define how you are able to work with consumers. The basic types of relationships are:

Agency Relationships

Single Agent

Dual Agent

Designated Agent

Non Agency Relationships

Facilitator

Transaction Broker

Finder



NAR Code of Ethics

Article 1

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 to the client 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 obligated to treat all parties honestly. (Amended 1/01)

Standard of Practice 1-12

When entering into listing contracts, REALTORS® must advise sellers/landlords of:

1. the REALTOR®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities;
2. the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords may represent the interests of buyers/tenants; and
3. any potential for listing brokers to act as disclosed dual agents, e.g. buyer/tenant agents. (Adopted 1/93, Renumbered 1/98, Amended 1/03)

Standard of Practice 1-13

When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:

1. the REALTOR®'s company policies regarding cooperation;
2. the amount of compensation to be paid by the client;
3. the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties;
4. any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g. listing broker, subagent, landlord's agent, etc., and
5. the possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. (Adopted 1/93, Renumbered 1/98, Amended 1/06)

Single agent

The broker works for only one client in a real estate transaction, such as the buyer or the seller, the landlord or the tenant, not both, with primary fiduciary duties to that party only. Some brokerages practice only buyer agency.

Under the “cooperation and compensation” system, when sellers list their property with a listing broker, all of the listing broker’s salespeople are treated as agents of the seller. Likewise, when the buyer establishes an agency relationship with a broker, all of that broker’s salespeople become the agents of the buyer.

Dual and designated agency

Although the delineation between a buyer’s agent and a seller’s agent appears clear-cut, agency matters can and often do become more complicated in the day-to-day operations of a real estate brokerage. Probably the most frequently encountered situation is one in which a buyer-client is interested in a property listed with the same brokerage. If allowed by state regulation, some brokers try to resolve this situation through disclosed dual agency or designated agency which keeps both sides of the transaction within the firm; other brokerages terminate the buyer-representation agreement, or refer the buyer to another broker. Brokerages that offer only buyer agency do not encounter this problem.

If it is allowed in your state (and by your office policy), the possibilities for disclosed dual agency or designated agency should be discussed and disclosed to a buyer during the counseling session and certainly at the time an agency agreement is signed. Both the buyer and the seller who may become a buyer have the right to know how these situations will be handled.



NAR Code of Ethics

Standard of Practice 1-5

REALTORS® may represent the seller/landlord and buyer/tenant in the same transaction only after full disclosure to and with informed consent of both parties. (Adopted 1/93)

- ▶ **Dual Agent:** Working simultaneously with both parties in a real estate transaction, such as buyer and seller, landlord and tenant, is known as dual agency. This situation is inherently conflictual because duties of confidentiality, undivided loyalty, and full disclosure cannot be reconciled between two clients. For example, the duty to one party of confidentiality compromises the duty to the other of full disclosure. However some states allow disclosed dual agency and brokerages do practice it if the buyer and seller consent.

Most commonly, the buyer and seller will be asked to help resolve the conflict by allowing the brokerage company to modify its fiduciary duties. The brokerage must first provide clear and complete written disclosure of all facts and consequences of dual agency, including the impact on the interests of both parties in the transaction. The parties must then provide written informed consent to allow the brokerage to act as a disclosed dual agent. Disclosed dual agency is not legal in Colorado, Florida, and Kansas, and in New Mexico the dual agent is automatically a transaction facilitator. Undisclosed dual agency is illegal. A situation known as implied agency, which will be covered in the next chapter, can inadvertently lead to undisclosed dual agency.

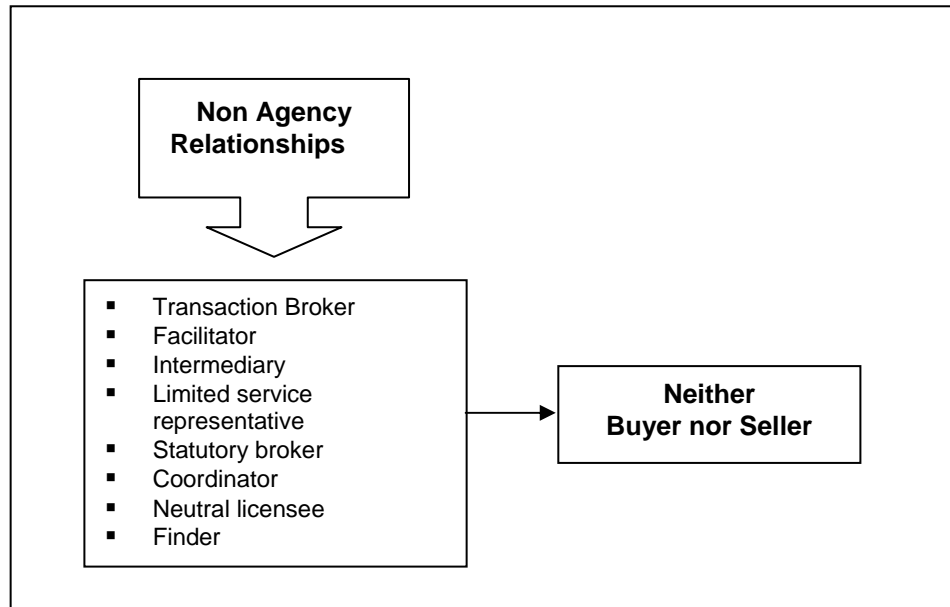
- ▶ **Designated Agent:** All but thirteen states have statutes that specifically relate to designated agency or effectively define and regulate it. These states' regulations allow real estate brokerage companies to designate one licensee in the company to represent the buyer (or tenant) and another licensee to represent the seller (or landlord) in the same transaction. States use different terminology for this relationship, such as "appointed agent." In states that allow designated agency, when a seller lists a property the broker typically appoints the listing agent as the appointed agent of the seller to the exclusion of all other salespeople in the office. Likewise, when a buyer selects the same brokerage company or is interested in an in-house listing, the broker typically selects the agent who secured the buyer as a client to become the appointed agent of the buyer to the exclusion of all other salespeople in that company.

An advantage of designated agency is that no other licensee in the brokerage is regarded as having an agency relationship to represent that client, only the assigned licensee carries the agency responsibility. When the buyer purchases a property listed with the brokerage company, there is designated agency, not dual agency, because both sides in the transaction, seller and buyer, have their own representation. However, designated agency may change the relationship between the broker and agent. The managing broker or designated broker may or may not be considered a dual agent (states vary). In "non-designated agency" transactions, the broker maintains the agency responsibility.

Designated agency sounds clear-cut in theory, but in actual practice it can be replete with "gray areas." For example, the agents assigned to represent the buyer and seller may not share confidential information about their clients with each other. In small firms, it may be possible to maintain confidentiality, but in large firms with many agents, listings, and buyers, it is difficult for salespeople to know about all of the buyer and seller agency relationships existing within the brokerage and information may leak inadvertently or in casual conversation. For this reason, firms that practice designated agency must establish and strictly observe company policies on handling confidential information; some states offer rules to help guide practitioners. Some firms solve

this problem by adopting a policy to terminate the buyer agency agreement if a buyer is interested in an in-house listing or refer the buyer to another broker; although the brokerage loses the buyer-side of the transaction. Brokerages that offer only buyer agency never face these conflicts. Some agents who practice buyer representation exclusively feel that asking a buyer to accept a designated agency situation compromises the ability to fully serve the buyer's interests.

Figure 4: Non Agency Relationships



Facilitator and transaction broker

Some states allow a real estate licensee to act as a neutral non-fiduciary facilitator who brings transaction parties together without representing either party as a client. A facilitator or transaction broker has a duty to exercise reasonable care, provide an accounting to all parties, and may have additional duties imposed by state statute. Brokerages in these state may use this non-agency relationship for handling in-house sales.

Finder

In common law, a finder is a non-fiduciary whose duties are limited to introducing the parties to a transaction for a finder's fee. The most common example is a referral.

1. Agency Relationships

Figure 5: State Agency Regulations

	Specific Buyer Agency Regulations	No Designated Agency Regulations	Specific Designated Agency Regulations	Disclosed Dual Agency Allowed	Disclosed Dual Agency Not Allowed	Transaction Broker Regulations
ALABAMA		X		X		X Transaction Broker
ALASKA	X		X	X		X Neutral Licensee
ARIZONA	X		X	X		
ARKANSAS	X	X		X		
CALIFORNIA		X		X		
COLORADO	X		X		X	X Transaction Broker
CONNECTICUT	X		X	X		
DELAWARE	X		X	X		
Dist. Of Columbia	X		X	X		
FLORIDA			X		X	X Transaction Broker
GEORGIA	X		X	X		X Transaction Broker
GUAM		X		X		
HAWAII	X	X		X		
IDAHO	X		X	X		
ILLINOIS	X		X	X		
INDIANA	X		X	X		
IOWA	X		X	X		
KANSAS	X		X		X	X Transaction Broker
KENTUCKY	X		X	X		
LOUISIANA	X		X	X		
MAINE	X		X	X		X Transaction Broker
MARYLAND	X		X	X		
MASSACHUSETTS			X	X		
MICHIGAN			X	X		X Transaction Coordinator
MINNESOTA	X	X		X		X Transaction Broker
MISSISSIPPI	X	X		X		
MISSOURI	X		X	X		X Transaction Broker
MONTANA	X		X	X		X Statutory Broker
NEBRASKA	X		X	X		X Transaction Broker
NEVADA	X		X	X		
NEW HAMPSHIRE	X		X	X		
NEW JERSEY	X	X		X		X Transaction Broker
NEW MEXICO			X		X	X Transaction Broker
NEW YORK	X		X	X		
NORTH CAROLINA	X		X	X		
NORTH DAKOTA	X		X	X		
OHIO	X		X	X		
OKLAHOMA		X		X		X Transaction Broker
OREGON	X		X	X		
PENNSYLVANIA	X		X	X		X Transaction Licensee
PUERTO RICO	X	X		X		
RHODE ISLAND		X		X		
SOUTH CAROLINA	X		X	X		
SOUTH DAKOTA	X		X	X		X Transaction Broker
TENNESSEE			X	X		X Transaction Facilitator
TEXAS	X		X	X		X Intermediary
UTAH	X		X	X		
VERMONT	X	X		X		
VIRGIN ISLANDS		X		X		
VIRGINIA	X		X	X		X Limited Service Rep
WASHINGTON	X	X		X		
WEST VIRGINIA	X	X		X		
WISCONSIN			X	X		
WYOMING	X	X		X		X Intermediary

Office Policy

It is very important to know and comply with your brokerage's office policy regarding consumer relationships. This knowledge will help you protect the broker from legal liability as well as start client and customer relationships off on the right foot. The NAR Code of Ethics requires brokerage companies to advise buyers, sellers, and landlords of their general company policy.

“Although having a stated policy on agency is desirable and, in some states mandatory, many companies still do not have one. In such a circumstance, should any agent practice buyer agency and sell an in-house listing, the broker and the firm effectively have a policy of undisclosed dual agency – a very risky policy!”²

Office policy is primarily determined by state licensing law and who the brokerage wants to represent: the buyer or seller, both or, in transaction brokerage states, neither. A brokerage company's written policy should include guidelines for all the types of client and consumer relationships practiced. Because of the differences in statutes, judicial opinions, and regulations from state to state, there are no national standards for office policies. Brokerages must develop their own policies in compliance with state statutes, MLS regulations, and the NAR Code of Ethics and Standards of Practice.

Factors that establish the standard of care for buyer's representatives are:

- State laws and regulations
- Judicial opinions/decisions

Factors that influence the standard of care for buyer's representatives are:

- The NAR Code of Ethics and Standards of Practice
- REBAC, Graduate REALTOR® Institute (GRI), the CRS® designation, the Certified Real Estate Brokerage Manager (CRB) designation, and other education programs
- NAR Board of Directors' policy positions
- Image campaign representations to the public
- Local and regional practices

² Gail Lyons and Don Harlan, *Buyer Agency Today*, 4th Edition, Dearborn Real Estate Education, Chicago, Illinois, 2005, p. 55.

1. Agency Relationships

Figure 6: Know Your Office Policy³

If the office policy is:	You represent:	Advantages	Disadvantages
Exclusive Seller Representation	Only sellers. Agents who work with buyers are agents of the seller	<ul style="list-style-type: none"> ▪ Traditional business model ▪ Minimizes liability from buyer's representatives 	<ul style="list-style-type: none"> ▪ Does not meet buyers' desires for representation ▪ High probability of undisclosed dual agency
Exclusive Buyer Representation	Only buyers. The company does no listing	<ul style="list-style-type: none"> ▪ Minimizes possibility of dual-agency conflict ▪ Promotes more natural relationship with buyers 	<ul style="list-style-type: none"> ▪ Creates limited client base ▪ Introduces compensation issues over who pays the buyer's representative
Seller and Buyer Representation with Designated Agency for In-House Sales	Sellers and buyers. The parties are asked to consent to a designated agency relationship	<ul style="list-style-type: none"> ▪ Reduces possibility of undisclosed dual agency ▪ Allows for maximum number of services to be provided ▪ Keeps both transaction sides in-house 	<ul style="list-style-type: none"> ▪ Difficult to keep client information confidential
Seller and Buyer Representation with Disclosed Dual Agency for In-House Sales	Sellers and buyers. The parties are asked to consent to a dual-agency relationship	<ul style="list-style-type: none"> ▪ Reduces possibility of undisclosed dual agency ▪ Allows for maximum number of services to be provided ▪ Keeps both transaction sides in-house 	<ul style="list-style-type: none"> ▪ Neither buyer nor seller has full representation in dual agency situations ▪ Difficult to keep client information confidential
Single Representation	Sellers or buyers, but not both in the same transaction	<ul style="list-style-type: none"> ▪ Allows for full representation of clients ▪ Allows for maximum number of services to be provided 	<ul style="list-style-type: none"> ▪ May create the need to refer potential clients elsewhere ▪ May be difficult to switch between representing a buyer or seller
Transaction Brokerage	Neither the buyer nor seller	<ul style="list-style-type: none"> ▪ Neutral third party facilitates the transaction ▪ Non adversarial 	<ul style="list-style-type: none"> ▪ Neither buyer nor seller has an advocate ▪ May be difficult to maintain neutrality

³ "Understanding Agency Relationships: Creating a Company Policy on Agency," REALTOR® Magazine Online, www.realtor.org.

Skill Builder Tip 2: Ten tips for creating an agency policy⁴

1. Present a brief opening statement of agency policy.
2. Describe how the policy will be implemented.
3. Define the types of agency relationships that will be practiced.
4. Include a rationale for the company's agency policy.
5. Explain how the licensee treats the consumer in each type of relationship.
6. Indicate what disclosures must be made.
7. Indicate when and to whom disclosures must be made.
8. Include standard forms licensees are required to use.
9. Specify what kind of training the company will provide to licensees.
10. Ask an attorney to review the policy for conformance with state laws.

⁴ "Controlling Transaction Risks," *REALTOR® Magazine Online*, www.realtor.org

Building Blocks

Throughout this course, the Building Block exercises at the end of the chapters will help you develop a customized buyer-counseling session checklist.

- ▶ What are your broker's office policies regarding types of buyer-representation relationships offered?

- ▶ How does the buyer benefit from these types of representation?

2. Creating an Agency Relationship

In this chapter

- ▶ How relationships are formed
- ▶ Agency disclosure
- ▶ How we work with buyers
- ▶ Advantages of buyer representation for the buyer, seller, and agent
- ▶ Buyer representation agreement issues

How Relationships Are Formed

An agency relationship can be created by express or implied agreement. An express agreement can be made in writing or orally; although some states do not recognize the validity of oral agreements. When the licensee acts or speaks like an agent and the consumer relies on those statements and actions, the result is an implied agreement

Express agreements – written and oral

Written agreements include:

- Listing agreement
- Buyer representation agreement
- Tenant representation agreement
- Property management agreement
- Right to lease agreement

Oral agreements include:

- A verbal agreement to represent a buyer
- A cooperating broker accepting a listing broker's offer of subagency in a sale or leasing transaction
- Open listing (licensing laws in some states even require an open listing to be in writing)

Implied agreement

Agency relationships can result unintentionally, accidentally, or inadvertently. Because formalities are not required to create an agency relationship, one can be implied from the conduct of the parties toward each other, regardless of either party's intent or label used to describe the relationship. The conduct of the parties can create an agency relationship even if they have signed an acknowledgment denying the existence of such a relationship.

An implied agency relationship is risky because the duties and obligations of agency arise without the agent's knowledge. In today's real estate transactions, implied agency relationships most often are created when a subagent of a seller, who does not make the proper disclosures, works too closely with a buyer-customer. The buyer may presume from the of the subagent's conduct that the subagent is working on the buyer's behalf. In such a situation, the subagent has created an undisclosed dual agency arrangement that is illegal in all states.



Figure 7: Implied Agency: Court Cases

For more detail on these and other court cases, refer to the Resources section of this manual beginning on page 204.

Menzel v. Morse

In *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985), the Supreme Court of Iowa addressed the issues of negligence and breach of fiduciary duty. The court found that the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® was the standard for determining a broker's negligence. Further, the court held that conduct between the parties can constitute an implied agency relationship with attendant fiduciary duties.

Smith v. Sullivan

In *Smith v. Sullivan*, 419 So. 2d 184 (Miss. 1982), the Supreme Court of Mississippi addressed the issues of implied agency and undisclosed dual agency. The court found that an expired agency contract may be extended by a broker's actions and the principal's acquiescence and, that where implied agency exists, the agent owes all requisite fiduciary duties.

Bauman v. Nutter

In *Bauman v. Nutter*, 328 N.W.2d 354 (Iowa Ct. App. 1982), the Court of Appeals of Iowa addressed the issues of implied agency and specific performance. The court held that an agent-principal relationship may be implied from the parties' words or conduct and the circumstances of a particular case, and that specific performance will be denied to the principal where the agent induces the seller to sign a contract with mistaken terms.



Discussion Question 1: Implied Agency Relationships

1. Can an agency relationship be created if a licensee tells buyers that he will find them the perfect home?

2. Can an agency relationship be created if a customer asks a salesperson questions related to a property and the salesperson and customer had a recent agency relationship that had expired?

3. Can an agency relationship be created by a salesperson actively seeking out a buyer or seller?

4. Can an agency relationship be created by a salesperson agreeing to a buyer's request to "keep an eye out" for a particular property?

Agency Disclosure

NAR's policy recommends that licensees make timely, meaningful, and written agency disclosure so that consumers can make informed choices. Disclosures must be made to both clients and customers.

NAR's policy recommendations are codified into many states' laws on agency disclosure. Specifically, the policy states:

NAR shall encourage state associations to achieve, through legislation or regulation, state-mandated agency disclosure which requires that all licensees provide **timely, meaningful, and written** disclosure to consumers of all possible types of brokerage relationships (e.g. buyer representative, seller representative, disclosed dual agent) – **not** types of listing agreements – available under state law and the most significant implications of choosing one type over another.

	Client	Customer
Timely	Before entering into a..... listing agreement or contract.	Before substantive discussion about real estate needs and financial capabilities.
Meaningful ...	Include all legal forms of agency relationships, even if not offered by brokerage.	Informed consent to disclosed (legal) dual agency or designated agency.
Written	In writing.....	In writing

Timely

Disclosure to clients must take place before a representation agreement or contract is entered into. Disclosure to customers must take place before a licensee enters into substantive discussions about real estate needs and financial capabilities or exchanges any confidential information.



Discussion Question 2: Meeting the Timeliness Requirement

1. How can the timeliness requirement be met when a buyer-customer calls about one of your ads?

2. How can the timeliness requirement be met when you are holding an open house?

3. What type of conflict can result in these two situations?

Meaningful

The disclosure must provide clear written explanation of all legal forms of brokerage relationships with consumers available under state law, even if the brokerage does not, as a matter of office policy, offer all of those options.

Sellers must be advised of the broker's office policies for cooperation with other brokers if such policies could have more than an insubstantial impact on the marketing of the property or the principal's exposure to liability.

For example, sellers should be informed if the listing broker:

- ▶ offers subagency to other brokers and about the legal liability that flows to the seller from subagency relationships.
- ▶ cooperates with buyer representatives.
- ▶ might operate as a disclosed dual agent.

If the broker's policy permits it to function as a disclosed dual agent, the seller should be advised of this before a listing is taken, and preliminary approval should be obtained from the seller stipulating that the seller would consider a request from the agent to function as a dual agent. A broker should not, however, obtain blanket consent from the principal at that time to function as a disclosed dual agent. Informed consent to

Accredited Buyer's Representative

perform as a disclosed dual agent should be obtained from the principal only after a specific buyer, with whom the broker also seeks to establish a dual agency relationship, has been identified. Unless otherwise provided by law, this should take place before the property is shown. If the consent from the seller is oral, it should be confirmed in writing at the time that the purchase offer is submitted.

The buyer's informed consent is also necessary in order to create a disclosed (legal) dual agency relationship. The buyer must understand and agree that his agent may also serve as the agent to the seller in the transaction. The buyer should confirm this understanding and agreement in writing. Disclosed dual agency is a viable alternative, but only if timely, meaningful, and written disclosure is made and all parties consent to this relationship following such disclosure.

Written

NAR recommends that states develop standard disclosure forms that can be mandated for use by all licensees within the state. Furthermore, NAR recommends that disclosure of brokerage relationships should be mandated in residential, commercial/industrial, and property management/leasing transactions. The promulgation and use of standard state forms would provide licensees with the assurance that disclosure is adequate, thereby helping to insulate them from legal challenges based on insufficiency of the disclosure document.



Discussion Question 3: Agency Disclosure – Dual Agency

The Olsen ranch was listed for sale as an open listing. Vail Associates Real Estate found a buyer who also wanted the nearby Rickstrew ranch and asked Vail to find out whether it was available for purchase. Owner Rickstrew refused to deal with Vail and negotiated directly with the buyer instead. The buyer agreed to purchase the Rickstrew ranch contingent on his purchase of the Olsen ranch. Soon after the Olsen sale closed, the buyer closed on the Rickstrew ranch. When the Olsens learned of the transaction, they filed suit, claiming that Vail had engaged in undisclosed dual agency.⁵

What do you think was the trial court's ruling?

⁵ Case adapted from *Don't Risk It: A Broker's Guide to Risk Management*, NATIONAL ASSOCIATION OF REALTORS®, 2000.

How We Work With Buyers

The agency concept when it comes to sellers is well established and understood. On the other hand, when we think of the whole company representing “my buyer,” that concept can seem unfamiliar when there is very little sharing of information about “our buyers.” Both consumers and colleagues may need to be educated on the dynamics of the relationships between buyer’s representatives and buyer-clients.

A buyer’s representative is the advocate of the buyer and can therefore be assertive on behalf of the buyer in negotiating the best terms and price. Seller’s agents, or subagents, can never deliver a level of buyer service equal to that of buyer’s representatives without compromising duties to sellers. On the other hand, buyer’s representatives must be more knowledgeable about the home-buying process from the viewpoint of buyers and may have to educate and guide them, particularly first-time buyers.

There are specific and different services that licensees can perform when working with buyer-customers or buyer-clients.

- ▶ When working with a *buyer-customer* in a single agency relationship, you represent the seller, not the buyer, and you provide customer-level service to the buyer-customer.
- ▶ When working with a *buyer-client*, you represent the buyer, not the sellers of the properties you show to that buyer, and you provide client-level services to the buyer.

Obviously, unlawful acts cannot be performed on behalf of either clients or customers, regardless of who you represent.

Figure 8: Who Is Your Client? Who Is Your Customer?

If you:	Your customer is:	You provide:
Represent the seller.....	The buyer.....	Customer service to the buyer Client service to the seller
Represent the buyer	The seller.....	Customer service to the seller Client service to the buyer
Act as a facilitator or transaction broker	Both buyer and seller	Limited client-level services for both according to your state law

Skill Builder Tip 3: They say they're buyer's reps, but they act like subagents.⁶

Some key things that ill-trained buyer's representatives are **not** doing:

- Reviewing the contract with clients so that they understand they are using the buyer's agent's services exclusively. Even after signing exclusive buyer's agent agreements, some buyers think they can still shop around for other salespeople.
- Adequately representing the buyer. For example, salespeople who sign contracts with buyers and then tell them to go out on their own to look for a house and call their salesperson when they find something they like.
- Performing due diligence. Buyer's agents are not double-checking information obtained through the MLS about the house, nor are they recommending that the buyers obtain a home inspection.
- Giving full loyalty to the buyer. Some buyer's agents still think they have an obligation to the seller, since the fee usually comes from the transaction and not directly from the buyer.

⁶ REALTOR® Magazine Online, www.realtor.org

Figure 9: Comparing How We Work with Buyers and Sellers

Role:	Buyer's Agent	Seller's Agent
Advocacy	For the buyer	For the seller
Market information	Provide information on available properties that meet search criteria and market trends. Present a realistic picture of the current market from a buyer perspective.	Provide information on recently sold properties, market trends, and other listed properties. Present a realistic picture of the current market from a seller perspective.
Offers	Formulate an offer; formulate and evaluate counteroffers.	Evaluate an offer; formulate and evaluate counteroffers.
Negotiations	Obtain best (lowest) price/value, best terms for buyer.	Obtain best (highest) price/value, best terms for seller.
Verify value	Prepare a CMA on a property in order to develop an offer.	Prepare a CMA on a property in order to develop a listing price.
Financing	Counsel on types of mortgages, terms, and financing available; help buyer make an informed decision on financing.	Help seller evaluate terms offered by buyer; help seller determine if seller financing is appropriate.
Property disclosure	Discover as much as possible about a property. Recommend inspections; prepare contract contingencies; advocate that deficiencies be corrected at seller expense.	Make full disclosure of material facts and any other legally required disclosures. Minimize expense and trouble for seller of correcting deficiencies.
Confidentiality	Do not share information about the buyer's circumstances, motivation, or highest price they will pay.	Do not share information about the seller's circumstances, motivation, or lowest price they will accept.
Showings	Make arrangements for buyers to view properties. Accompany buyers to showings and point out pluses and minuses of properties viewed.	Make arrangements with the seller to show the property. Counsel the seller on how to present the property in the best light.
Closing	Assist the buyers in completing necessary steps to closing.	Assist the sellers in completing necessary steps to closing.

Advantages of Buyer Representation

For the buyer

- ▶ An assertive advocate works on behalf of the buyer to obtain the best deal and terms.
- ▶ The buyer's representative can assist the buyer in acquiring and interpreting information about the property and its condition as well as the seller's motivations.
- ▶ A buyer's representative can work with a for-sale-by-owner (FSBO) seller if needed.
- ▶ Buyers can be more knowledgeable about the market and buying process because they have access to market experts.
- ▶ A savvy negotiator is working on behalf of the buyer, helping them determine a realistic offer and develop a negotiation strategy.

For the seller

- ▶ The seller has no liability for the misdeeds or misstatements of buyer's representatives; this is important considering that most lawsuits in real estate are brought by buyers.
- ▶ There is reduced chance that seller's representatives or subagents will slip and disclose confidential information to the buyer.
- ▶ The seller's property can attract a larger pool of potential buyers at no additional expense to the seller.
- ▶ Buyer's representatives represent qualified buyers whose motivation is demonstrated by the representation agreement.
- ▶ The buyer's representatives educate buyers about the market and buying process.
- ▶ For the listing agent, it just makes good business sense. Being open to working with buyer's representatives extends the marketing reach for the property, which can mean a faster sale.

For the buyer's representative

- ▶ Buyer's representative brokerage companies can provide information to their buyers freely, without fear that it will weaken a seller's negotiating position. They can be assertive on behalf of the buyer.
- ▶ Buyer's representation fosters greater buyer loyalty if the representation agreement is exclusive.
- ▶ Buyer's representatives with an exclusive agreement have more control of time and scheduling, eliminating the fear that buyers will go elsewhere if the salesperson is unavailable.

Accredited Buyer's Representative

- ▶ Buyer's representatives experience satisfying client relationships with buyers.
- ▶ The buyer's representative does not have to worry about keeping information about the seller's confidential; buyer's representatives have a duty to inform the buyer of any information they learn about the seller.

For Sale By Owner (FSBO) properties

What are the advantages for a FSBO to work with a buyer representative?

- ▶ The buyer's representative handles many of the services that would otherwise fall to the seller, such as eliminating the need for the seller to help the buyer obtain financing, appraisers, property inspectors, and similar details.
- ▶ Though the FSBO seller may pay a fee to the buyer's representative, it more than likely will be less than a full commission to a listing broker. But whenever you find a FSBO property to show a client, be sure to resolve the issue of compensation before showing the property.

Buyer Representation Issues

When creating a relationship with a buyer, there are five issues that should always be part of the discussion and agreement:

- ▶ **Exclusivity:** This will vary according to state law and company policy. Exclusivity protects the right of the buyer's representative to be compensated when the buyer finds a property. Generally an exclusive agreement is much preferred to a non-exclusive or open agreement.
- ▶ **Purpose:** An expression of the purpose should be specific about the client's requirements, for example a residential, commercial or rental property, or land, without being overly or unnecessarily detailed.
- ▶ **Duration:** How long will the buyer be your client? The primary factor that determines duration is the buyer's time frame. Other factors that may influence this include your marketplace, desired property type, buyer needs, and the like. The agreement should not expire while the purchase is being finalized and closed.
- ▶ **Services:** The description of services should detail the range of duties and tasks you are agreeing to perform as well as what is expected of the buyer-client. Just as important as spelling out what you as a buyer's representative will do, is specifying what you will not do, otherwise known as limiting scope; for example, will you include FSBOs in the property search?
- ▶ **Compensation:** Factors to consider include when, how, how much, and by whom you will be paid. It also includes how you and others will be reimbursed for expenses and services performed on behalf of your buyer-client. Issues that need to be considered include "what ifs" like:
 - MLS-listed property, a FSBO, a broker-exclusive property, a property not MLS-listed?
 - new construction?
 - property seen at an open house with the listing agent, creating a procuring cause scenario?
 - the MLS offer of compensation is more than what your agreement authorizes you to accept, creating an "overage?"
 - the MLS offer of compensation is less than what is defined in your agreement?

These issues, as well as many others that will be covered during the later section on the buyer representation agreement, should be discussed up front with buyer-clients and included in the buyer representation agreement.

When Agency Relationships Change

There are times when an agency relationship must be changed; for example, when buyer-clients are interested in properties listed with their agents or agents' firms.

An agency relationship is changed through the following process:

- ▶ A client must provide informed consent, preferably in writing, to become a customer, and you must agree on how confidential information will be handled.
- ▶ A customer must provide informed consent, preferably in writing, to become a client.
- ▶ If a client and a customer are switching roles, both must agree how you will handle the confidential information of former clients.

Aside from the paperwork process, the interpersonal dimension of changing roles must be considered so that the former client does not become alienated from or adversarial toward the former agent. This difficult situation can be managed by discussing the possibility during the initial steps of forming the agency agreement and describing how the situation will be handled.



NAR Code of Ethics

Article 3

REALTORS®s shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker. (Amended 1/95)

Article 7

In a transaction, REALTORS® shall not accept compensation from more than one party, event if permitted by law, without disclosure to all parties and the informed consent of the REALTOR®s client or clients. (Amended 1/93)

Standard of Practice 16-11

On unlisted property, REALTORS® acting as buyer/tenant representatives or brokers shall disclose that relationship to the seller/landlord at first contact for that buyer/tenant and shall provide written confirmation of such disclosure to the seller/landlord not later than execution of any purchase or lesser agreement. (Amended 1/04)

REALTORS® shall make any request for anticipated compensation from the seller/landlord at first contact (Amended 1/98)

Standard of Practice 16-16

REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation. (Amended 1/04)

Compensation and Agency Relationships

Perhaps the most important and basic principle to remember is that agency relationships are not determined by compensation. In other words, the party paying the fees is not *automatically* the client. However, in the absence of an agreement, it *may* be strong evidence of the intention to create an agency relationship.

There are different modes (methods) of compensation available to buyer's representatives. It is usually in the best interests of your clients to always try to negotiate your fee, so that the seller or seller's broker pays your fee. Ultimately, however, your clients are responsible for your fees. They should be informed that if the seller or seller's broker does not pay your fee, they must do so. Modes of compensation will be discussed in Chapter 5: The Buyer Counseling Session.

3. Client and Customer Relationships

In this chapter

- ▶ Duties to clients and customers
- ▶ Exercising reasonable care and diligence
- ▶ Agency conflicts, dual and disclosed dual agency
- ▶ Implied and imputed knowledge
- ▶ Conflicts of interest
- ▶ Penalties for breach of duties
- ▶ Establishing scope of services

Duties to Clients and Customers

The term fiduciary is defined as “of relating to or involving a confidence or trust.” A fiduciary relationship is defined as “the relationship existing when one person justifiably reposes confidence, faith, and reliance in another whose aid, advice, or protection is sought.” A real estate professional owes fiduciary duties to both a client and a customer. The extent of duty owed to a client surpasses that owed to a customer. For a buyer’s representative, the highest level of fiduciary duty is to the buyer. Some states statutorily define specific duties while other states rely on the traditional common law definition.

Skill Builder Tip 4: Common versus statutory law

Common law is articulated in a judicial decision. Statutory law is created by legislators. Common law assumes all licensees affiliated with a brokerage, including the managing broker, represent all of the broker’s clients in an agency relationship. In the context of agency relationships in real estate transactions statutory law specifically defines the duties of the agent.

A handy method for remembering fiduciary duties owed to clients is the acronym "OLD CAR."



- O** = Obedience
- L** = Loyalty
- D** = Disclosure
- C** = Confidentiality
- A** = Accounting
- R** = Reasonable Care and Diligence

Responsibilities to a client

▶ **Obedience**

The agent is required to act subject to the client's continuous control (following all lawful instructions) but not exceed the scope of authority conferred by the client. That is, do not make decisions for the client.

▶ **Undivided loyalty**

The agent is prohibited from advancing any interests adverse to the client's interest or conducting the client's business in such a way as to benefit a customer, a subagent, the agent or any other party to the detriment of the client's interest.

▶ **Full disclosure**

The agent is required to disclose affirmatively and honestly all information concerning the transaction and property that might affect the client's decisions.

▶ **Confidentiality**

The agent is prohibited from communicating personal information about the client told to or learned by the agent within the scope of employment by the client. Personal information must be kept confidential unless the client releases the agent from this duty. However, the material facts about and defects of a property are not confidential.

▶ **Accounting**

The agent is required to promptly report to the client all money and property received and paid out and, upon request, give an accounting of these actions. This duty also requires the agent to safeguard money and property held on behalf of the client.

▶ **Reasonable care and diligence**

The agent is required to protect the client from foreseeable risks or harm and recommend that the client obtain expert advice or assistance when the client's needs are outside the scope of the agent's expertise.

Responsibilities to a customer

While agents' primary obligations are to clients, practitioners also have responsibilities to customers. These are in addition to any duties or responsibilities imposed by state laws and regulations.

▶ **Honesty**

No statement or action can result in fraud or misrepresentation. All laws and regulations pertaining to the transaction must be obeyed including the disclosure of material facts.

▶ **Accounting**

The agent is required to promptly report to the customer any money or property received and paid out and, upon request, provide an accounting of these actions. This duty also requires the agent to safeguard money and property held on behalf of the customer.

▶ **Reasonable skill**

Based on Article 11 of the NAR Code of Ethics, the services that REALTORS® provide to customers should conform to the standards of practice and competence which are reasonably expected in the specific real estate disciplines in which they engage. In other words, agents should not try to provide specialized professional services concerning a type of property or service that is outside their field of competence.

▶ **Agency and material fact disclosures**

Disclosure of agency relationships, including an explanation of the difference between a customer and client relationship, must be made in a timely fashion so that customers can protect their own interests, such as not revealing confidential information. Material facts about properties must be disclosed.

Skill Builder Tip 5: Who's who?

Always remember – agents work for clients and with customers.

What is Reasonable Care and Diligence?

Fiduciary duties to a client require the buyer's representative to exercise reasonable care and diligence to protect the client's interests. Following are some of the things buyer's representatives can do to protect their buyer-clients.

▶ **Obtain a property disclosure**

Include a request for the seller's property condition disclosure form, required in many states, in the purchase agreement. Make sure the buyer reviews and understands it.

▶ **Recommend inspections**

Buyer-clients depend on you to protect their interests. They may also rely on other professionals for advice, such as an inspector, especially upon your recommendation. Some buyers, however, may not take your advice. If a buyer decides against an inspection, be sure to send a letter to the buyer stating that you, acting in your role as buyer's representative, recommended inspections, but your recommendations were refused. It's also a good idea to remind buyers that they are responsible for damage done by the inspector.

▶ **Include approved protective clauses in any purchase offer.**

Explain to buyers the possible approved protective clauses that can be included in a purchase offer so that they can determine which they want to include. Caution them that including too many contingencies and other protective clauses can make an offer less attractive to the seller. An attorney should approve the protective clauses before offering them to a client.

▶ **Prepare a Comparative Market Analysis (CMA)**

A CMA, with an explanation of the results, can help the buyer make a more informed purchase offer.

▶ **Provide home warranty information**

Inform buyers that a home warranty is an option for protecting the purchase. It can be negotiated into the purchase agreement and paid by the seller. Be sure to explain what items the particular home warranty does and does not cover, such as only appliances, heating, cooling.

▶ **Provide lists of other professionals**

When requested, buyer's representatives should provide only a list and allow the client to select the other professional. Commonly requested service referrals are for a home inspector, title company, insurance company, termite or pest inspector, appraiser, and mortgage lender.

▶ **Provide pertinent information about issues that affect the value of the property**

Some aspects of the property may not be immediately apparent but have an important impact on property values. The buyer's representative can help a client make a more informed purchase offer by providing information on factors such as:

- **Lot size:** the dimensions, square footage, and shape of the lot.
- **Zoning:** uses allowed and disallowed by the current zoning category.
- **Additional restrictions:** restrictions in addition to zoning, such as homeowner association covenants.
- **Stigmas:** stigmas such as an alleged haunting or a crime scene.
- **Flood plain:** proximity to a flood plain and age of the flood chart. Positioning of the property on FEMA flood charts has a profound impact on the availability and cost of insurance.
- **Quality of title:** easements and restrictions affect the quality of title. Consider making the purchase agreement contingent on the buyer's review and approval of any easements and restrictions.
- **Schools:** local school performance rating compared to others in the community, area, state, and nation. Even buyers who do not have school-aged children may be interested to know about school ratings because it impacts the resale value of the property.
- **Future development:** plans for future development or construction approved near the property the buyer is considering.

▶ **Advise additional charges**

What additional charges, such as property taxes, impact fees, assessments, local income taxes, or utility charges, will impact the cost of homeownership? Verify this information in writing. Do not rely on information from the seller or the seller's representative. Be sure to tell your buyer-client where you received this information, especially if it came from the seller or seller's representative and was not verified.

▶ **Estimate appreciation**

What is the rate of appreciation for properties in the area?

▶ **Describe traffic**

What are traffic loads and patterns at rush hours and other busy times?

▶ **Ask about special needs**

Does your buyer-client have any special needs or concerns, such as access to medical or recreational facilities, shopping, public transportation, or other needs?

Accredited Buyer's Representative

- ▶ **Stay informed, and inform your buyer-clients, of local issues**
Maintaining a file of newspaper clippings is a good way to keep yourself and your buyer-clients up-to-date on local issues.
- ▶ **Notify your buyer-client about potentially negative influences**
Buyer-clients should be informed of any potential negative influences such as nearby landfills, toxic waste sites, certain manufacturing plants, or sports stadiums (which can cause traffic and parking problems).

Controversy

A breach of a fiduciary duty to the client will frequently benefit the customer to the client's detriment; furthermore, it creates an implied agency relationship with the customer. In case of a controversy, attempt to determine the agency relationships by asking yourself questions such as:

- Did you enter into any express agreements?
- What disclosures were made?
- What consent was given?
- Who directed and controlled your actions?
- Who benefited from your actions?
- Which party (or parties) relied on your actions and representations?
- Whom did the parties to the transaction think you were representing?



Discussion Question 4: Undivided Loyalty to a Client

Mary Byers, a new home builder, hired Sara to represent her in acquiring properties containing a house and at least one sub-dividable lot on which she could build. Sara, a salesperson with Acme Realty, took Mary to a property listed with Titanic Realty. Sara believed the property had as many as four sub-dividable lots.

While showing the property to Mary, the seller, an 84-year old widow, told Sara and Mary that she did not want to move, but her fixed income was not sufficient to meet her living expenses.

Sara did not know if Titanic Realty had discussed alternative solutions with the seller that might enable her to stay in her home. She wondered if she should call Titanic Realty or the seller to find out if anyone had discussed alternative solutions with the seller.

Sara's buyer-client, Mary Byers, wants to make an offer immediately because this is the best deal she has seen in years.

How should Sara proceed?



Discussion Question 5: Disclosure, Reasonable Care and Diligence

Your client is a nurse who tells you she works a double-shift workweek. She wants a house in a “quiet” neighborhood, where she can relax after work and sleep without being disturbed. You find her the perfect “quiet” neighborhood, and she buys a home there. Two weeks after the closing you get a call from your former client, irate because the neighbor’s dog across the street barks all day and night. The nurse cannot sleep and is exhausted all the time to the point where sleep deprivation is affecting her ability to function at work. She is staying a hotel so that she can sleep. Her attorney wants to know where to send the hotel bills and what you are going to do about the situation.

Even if the buyer’s representative did not know about the barking dog problem, can the buyer successfully sue her buyer’s representative for not disclosing that a dog across the street barks all through the night?



Discussion Question 6: Confidentiality

John Byers tells Terry Sellzalot, a salesperson from Acme Realty, that he will offer \$125,000 for a property at 123 Main Street, but will go as high as \$145,000 if necessary.

1. If Terry is John's buyer's representative, should he share John's comment with the seller?

2. What is Terry's duty if he is the seller's representative?

3. If Terry represents John, and Terry also represented a different buyer who previously negotiated with the seller of 123 Main Street should Terry tell John about the previous buyer's negotiations?

4. If Terry represented the seller of 123 Main Street in a previous negotiation, should Terry tell John, who is now Terry's new buyer-client, about those previous negotiations?

Agency Conflicts

Agency conflict is often the result of actions that breach fiduciary duties to a client, or complications due to one or more of three legal issues involving agency relationships:

- ▶ imputed notice
- ▶ imputed knowledge
- ▶ vicarious liability

Imputed..... knowledge	Facts that are assumed to be shared within a brokerage company , including cooperating brokers.
-------------------------------	--

Imputed..... notice	Facts that are assumed to be shared between an agent and the agent's client .
----------------------------	--

Imputed knowledge

As a general rule, the knowledge of one licensee in a real estate brokerage company is *imputed* to be the knowledge of all licensees in the company. In other words, if one licensee in the office knows, it is assumed that all know. State laws vary regarding the details of imputed knowledge.

The burden of actually communicating important information throughout the company, therefore, must be the responsibility of each licensee. Furthermore, the company should have an administrative procedure for communicating information to all agents. If the brokerage has a policy of designated agency, then confidential information about clients should not be shared.

Consider the following scenario which is based on an actual court case.⁷

⁷ Carter v. Gugliuzzi. To learn more go to the Reference section of this manual.



Discussion Question 7: Imputed Knowledge

Nan, an attorney from California, wanted to buy a quaint vacation home in upper Vermont. Bridgett, a new licensee with Sterling Performance Realty, was Nan’s buyer’s representative. Nan wanted a home with lots of land, trees, and, if possible, a pond. Bridgett encouraged Nan to take a look at a great property listed with Mountain Properties Realty. It was perfect! A quaint stone house with window boxes, beautiful thermal window quilts at each window, more than 600 trees and a picturesque pond that even had a beaver dam. Nan purchased the property, but did not do a final walk through or go to the closing. Later, when Nan arrived to spend some time at her new retreat, she found the windows broken out, window quilts ripped from the windows, and window boxes torn off the house as if the house had been burglarized and vandalized. To add insult to injury, she also found that approximately half the trees were felled and that the beaver dam was gone. In short, the grounds looked as if a tornado had blown through.

Upon further investigation, Nan discovered that indeed a “blow down” had come through the area and it was not a “once-in-a-life-time” occurrence; in fact the area was regularly subject to high winds. Neighbors informed her that most of them kept wind gauges on their home so that they would know when to “batten down the hatches.” She contacted Bridgett to ask her why this had not been disclosed to her prior to purchasing the property. Bridgett, who was a new licensee, stated that she had no knowledge of the high winds. But upon checking, Bridgett discovered that her manager had lived there and moved because of the winds. Since Nan believed that this was a material fact that should have been disclosed, Nan sued Bridgett and Sterling Performance Realty for failure to disclose.

1. Was Bridgett liable for the failure to disclose, despite the fact that she was new and had no knowledge of the wind issue?

2. What steps should the manager have taken to ensure that incidents such as this would not happen?

3. Were the seller and the listing broker, Mountain Properties Realty, also guilty of failure to disclose the winds to the buyer and the buyer’s representative?

Imputed notice

The concept of imputed notice holds that informing an agent is the same as informing the agent's client. Information provided to an agent is assumed to be communicated to and binding on the client, even if the agent never conveys the information to the client.

The importance of actually communicating notice to clients, or other involved parties, is especially evident when subsequent decisions are dependent on the notice or when the notice is a disclosure of a material fact.

There are many ways that imputed notice can impact the parties to a transaction, such as:

- ▶ Providing a disclosure to the agent. For example, informing a buyer's representative that the roof leaks is imputed to be noticed to the buyer.
- ▶ Communicating an unconditional acceptance of an offer to the buyer's representative is the same as providing notice to the buyer. This communication converts the offer into a contract. However, contracts for sale of real property must be in writing to be enforceable.
- ▶ Providing timely notice to revoke an offer prior to acceptance, satisfy a contingency on or before a specified date within the parameters of the sales contract, or exercise an option on or before a specified date.
- ▶ Providing notice of a mortgage loan approval.

Vicarious liability

Vicarious liability is very state-specific. It has been modified or even eliminated in about half of the states. Even if you work in a state where vicarious liability has been eliminated, it is important to understand the legal concept.

Simply put, it means that actions or statements made by agents are the responsibility of the client. In other words, if an agent makes a misstatement, the client may be held legally responsible for damages resulting from that misstatement. Vicarious liability is based on the concept that clients should not benefit from the fraudulent, negligent, or innocent misrepresentations of the agent or subagent.

The following are some of the implications and risks of vicarious liability:

- ▶ The agent acts on behalf of the client, therefore, the client is bound by the agent's or subagent's actions and statements within the scope of the agency relationship.
- ▶ Anything that the agent or subagent says or does to further the objectives of the client is assumed to be done with the knowledge and approval of the client (based on the duty of obedience).

3. Client and Customer Relationships

- ▶ The agent's or subagent's actions or statements are attributed to the client even if the client is unaware of these actions.
- ▶ The client's liability exists whether or not the agent's or subagent's actions and statements are fraudulent, negligent or innocent.

Because an agent should not expose the client to liability without their knowledge and consent, the agent must obtain consent to offer subagency to other brokerage companies. In addition, the agent should disclose the potential for vicarious liability for the actions and statements of an agent or subagent prior to obtaining the client's consent.

Recognizing Conflicts of Interest in Fiduciary Relationships

Although agency conflict was covered in Chapter 1, the following examples and exercises illustrate conflicts of interest in various agency relationships in the context of fiduciary duties to clients and customers. Keep in mind that some specific state laws could have an impact on these situations.

Single agency

Single agency does not usually present conflicts of interest. However, events can transpire to create them. For example, in the course of making a presentation a licensee might learn information about a buyer or seller that could later create a conflict with that party. Be sure to tell consumers not to disclose information they do not want readily known until after you have an agreement with them. Two buyer-clients pursuing the same property also creates a conflict, because the duty of confidentiality to one precludes the duty of disclosure to the other.

Disclosed dual agency

Disclosed dual agency occurs when the same brokerage company acts as the agent to both or opposite parties (in designated agency states) or the same agent represents both or opposite parties. A brokerage company cannot fulfill all fiduciary duties to both parties. A brokerage company cannot have undivided loyalty to both or opposite parties, and the duty of confidentiality to one client is in conflict with the duty of full disclosure to the other.

Both clients may agree to modify the brokerage company's fiduciary duties to eliminate the duties of undivided loyalty and full disclosure. In dual agency, both clients, seller and buyer, must agree to reduced levels of service and waive the fiduciary duties of exclusive confidentiality (to one party only), undivided loyalty, and also the duty of full disclosure (other than material facts) in order for the brokerage company or agent to act as a dual agent. This must occur early enough for the parties to protect their own interests.

Disclosed dual agency does not exist in a few states and the default position may be a facilitator or intermediary relationship. Regardless of state statutes, undisclosed dual agency is always illegal.

Skill Builder Tip 6: Handling buyer/seller conflicts in disclosed dual agency

If a conflict arises in a disclosed dual agency situation and it is one that was not specifically addressed in the dual agency disclosure, follow these five steps:

- Report the conflict to the broker.
- Decide if the company's attorney should be consulted.
- Send a letter to both clients. Describe the conflict, suggest a resolution, and request a meeting with all parties.
- If an agreement cannot be reached at the meeting, give one party or both the opportunity to terminate the agency agreement. If one party chooses to terminate, the brokerage company may be accused of disclosing the terminating party's confidential information to the remaining client. If both parties choose to terminate, the brokerage company may still be able to receive referral fees.
- Create and maintain a company policy to define this conflict on the dual agency disclosure form so this situation will not cause problems in future transactions.



Discussion Question 8: Personal information

Sara, a salesperson with Acme Realty, goes on a listing appointment to discuss representing Sue Sellers in the sale of her property. At the appointment, Sara learns Sue's financial position, her motivation to sell and her future plans. Sara **does not** get the listing and Sue lists with Titanic Realty instead. Two weeks later, Sara realizes that Sue's property may be appropriate for a buyer-client.

1. If Sara's buyer-client chooses to negotiate with Titanic Realty's seller, can Sara fulfill her duty of full disclosure to the buyer?

2. If Paul, also with Acme Realty, takes a buyer-client to see Sue's property without knowing about Sara's interview with Sue and the information she gave, would Acme Realty have a conflict?

3. In order for Acme Realty to avoid this situation in the future, what policy should be established?



Discussion Question 9: Two Clients, Same Brokerage

Two buyer's representatives from different offices of the same firm have different buyer-clients who both want to make offers on the same listing. Sara, who works out of Acme Realty's Briarwood office, takes her buyer-client to see a property. Paul, who works out of Acme's Pinetree office, takes his buyer-client to see the same property. Both clients want to make an offer to purchase the property.

1. How should Acme Realty proceed if the brokerage practices designated agency?

2. How should Acme Realty proceed if the brokerage does not practice designated agency?



Discussion Question 10: Dual Agency Conflicts of Interest

Which of the following situations create a dual agency situation or might require the buyer's representative to default to a facilitator or intermediary relationship? Why there is a conflict?

1. Sara, who works in the Briarwood office of Acme Realty, has entered into a buyer representation agreement with a buyer. Tom, a salesperson in the Pinetree office of Acme Realty, has entered into a listing contract with a seller.

2. Sara, who works in the Briarwood office of Acme Realty, has entered into a buyer representation agreement with a buyer. Tom, a salesperson in the Pinetree office of Acme Realty, has entered into a listing agreement with a seller. Sara sets an appointment for her buyer to see Tom's seller's property.

3. Sara, a salesperson with Acme Realty, takes a customer to see an in-house listing.

4. Acme Realty incorporates dual agency disclosure deep within the buyer representation and listing agreements. Technical legal text is used to identify all areas of representation. Jim, working for Acme Realty has a buyer sign the agreement. Jim begins to show properties to his new client, including his own listings without explaining the details of the agreement.

5. Sara shows her own listing to a buyer-client.



Discussion Question 11: Dual Agency and Serving the Client

Amanda has a client who listed her property for \$259,900. There was an accepted offer for \$235,000 that did not close due to buyer financing problems. Amanda now has a buyer-client who wants to make a \$245,000 offer on the property.

1. Can Amanda advise her buyer-client to make an offer of \$235,000?

2. The same buyer-client told Amanda that he would like to make an offer of \$240,000, but is willing to go as high as \$255,000. Can Amanda share this information with her seller-clients?



NAR Code of Ethics

Standard of Practice 16-13

Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospective purchasers, sellers, tenants or landlords ("prospects"), REALTORS® shall ask prospects whether they are a party to any exclusive representation agreement. REALTORS® shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects' exclusive representatives or at the direction of prospects.
Standard of Practice 16-13 (Adopted 1/93, Amended 1/04)

Limiting Scope of Services

It is important for a buyer's representative to define the limits of the services that will be performed on behalf of the client. For example, if the property search will be limited to those properties listed by the MLS, and exclude FSBOs, this should be reflected in the agency agreement. "Buyer's representatives have a fiduciary duty to search for all available properties, just as the listing agent has a duty to work with all potential buyers, unless the agency agreement says otherwise. Keep in mind that there's no need for buyers to show actual loss in a breach-of-fiduciary-duty case; if a breach took place, you can lose your commission or worse."⁸

Penalties for Breach of Fiduciary Duties

The consequences of failing to fulfill the duties of loyalty, obedience, reasonable care and diligence, confidentiality, disclosure, and accounting, can be quite severe. State licensing laws define the threshold of illegal conduct and penalties. In addition, the NAR Code of Ethics defines ethical business practices and consequences for failure to comply. Following are some of the penalties that states and courts may impose for breach of fiduciary duties.

▶ **Forfeiture of commission**

The agent must return all compensation paid in the contested transaction. In most states, the client is not required to prove damages.

▶ **Actual damages**

This is the out-of-pocket cost, such as attorney's fees, that the claimant has incurred.

▶ **Punitive damages**

These are damages imposed by the court as punishment for the offender and are in addition to actual damages suffered by the claimant. Punitive damages are generally not covered by errors and omissions insurance.

▶ **Other damages**

Depending on the state, agents may even be liable for damages, such as mental and emotional distress.

▶ **Loss of real estate license**

Egregious violations of the law and repeat offenses may lead to loss of the real estate license.

In addition to state licensing penalties, there may be consequences for violation of NAR's Code of Ethics. These penalties can range from a reprimand to loss of membership and loss of access to MLS services.

⁸ Oliver Frasca, "Spell Out Your Search Terms," *REALTOR® Magazine Online*, July 1, 2001, www.realtor.org. See page 180 in the reference section for full text.

Building Blocks

The exercise for this chapter focuses on explaining fiduciary duties for both clients and customers, as well as explaining how conflict of interests might be handled.

- ▶ How might you explain to a buyer handling of confidential information before an agreement is signed? After an agreement is signed?

- ▶ How would you explain conflicts of interest that might arise and how they will be handled?

3. Client and Customer Relationships

- ▶ What fiduciary duties can you perform for a buyer-client? Why is this to the client's advantage?

4. Buyer Service

In this chapter

- ▶ Services buyers want
- ▶ Distinguishing between client and customer service
- ▶ Buyer needs assessment
- ▶ Finding properties
- ▶ FSBO properties
- ▶ Negotiations as a buyer service
- ▶ Effective follow through
- ▶ High risk and subprime mortgage lending
- ▶ Recognizing predatory and fraudulent lending practices
- ▶ Fair housing law and the buyer's representative



Discussion Question 12: Services Buyers and Seller Want

Based on your experience, what are most important services that agents provide for buyers and sellers?

Buyers

1. _____
2. _____
3. _____

Sellers

1. _____
2. _____
3. _____

Services Buyers and Sellers Want⁹

Buyers want help....

- ▶ Finding the right home to purchase (50%)
- ▶ Negotiating the terms of the sale (13%)
- ▶ Help determining what comparable homes were selling for (10%)

Sellers want help...

- ▶ Selling the property within a set time frame (25%)
- ▶ Finding a buyer (22%)
- ▶ Marketing the home to potential buyers (16%)

⁹ *The 2006 NAR Profile of Home Buyers and Sellers*, NATIONAL ASSOCIATION OF REALTORS®.

Figure 10: What Buyers Most Want¹⁰

Services	All Buyers	First-Time	Repeat
Finding the right home to purchase	50%	45%	53%
Negotiating the terms of the sale	13%	13%	13%
Telling you what comparable homes are selling for	10%	8%	11%
Negotiating the price	9%	9%	8%
Assisting with the paperwork	8%	9%	9%
Assisting in determining how much house a buyer can afford	5%	9%	3%
Help arrange financing	3%	4%	2%

Figure 11: What Sellers Most Want¹¹

Services	
Help sell the home with specific timeframe	25%
Help find a buyer for the home	22%
Help seller market home to potential buyers	16%
Help price home competitively	16%
Help find ways to fix up home to sell it for more	10%
Help with negotiation and dealing with buyers	4%
Help with paperwork, inspections, preparing for settlement	3%
Help see homes available for seller to purchase	1%

First-time home buyers were more likely to want their agent to help them determine an affordable price range and arrange financing, while repeat buyers were more interested in the agent's help in pricing comparable homes in the area in which they are looking.

¹⁰ 2006 Profile of Home Buyers and Sellers, NATIONAL ASSOCIATION OF REALTORS®

¹¹ Ibid.

Buyer Services Provided in a Real Estate Transaction

Whether client-level, customer-level, or facilitator/transaction broker, most buyer representation services are provided within the context of the following five stages of the real estate transaction:

1. Needs assessment
2. Property selection
3. Viewing properties
4. Negotiating
5. Follow-through

Buyers can access an increasing number of consumer resources, like online listings, to find properties. Buyers can accomplish, or perceive that they can, much of the first two stages (needs assessment and property selection) on their own. Therefore, buyer's representatives must identify and emphasize the additional services and expertise they can offer to clients.

Needs Assessment

Needs assessment is the process of determining and evaluating the needs, wants, and desires of the client or customer. Needs assessment is an important process, because most of the services you will provide will be based on this information-gathering session. The needs assessment should provide a clear picture of your buyer's needs and wants, not what you *think* the buyer needs and wants. Always keep in mind the distinctions between client-level and customer-level services.

Figure 12: Buyer Needs Assessment

If the buyer is a client

- Pay full attention to the buyer's needs
- Tell the buyer all that you learn about sellers
- Keep information about the buyer confidential
- Focus on expanding the range of choices to satisfy buyer's needs

If the buyer is a customer

- Maintain loyalty to the seller's needs
- Tell the seller all that you learn about buyers
- Keep information about the seller confidential
- Focus on the seller-client's property

The complete form for "Determining the Level of Service Desired" can be found in the appendix.

Needs assessment with a buyer-client

- **Pay full attention to the buyer's needs.** If a buyer is a client, the buyer's representative can devote full attention to the buyer's needs, including financing, motivation, timing, and the like. There is no obligation to match the buyer with the properties listed for seller-clients.
- **Buyer can talk freely.** The duty of confidentiality enables buyer-clients to provide information without fear of harming their negotiating position.
- **Suggest alternative solutions.** The duty of undivided loyalty enables buyer's representatives to suggest alternative solutions to the buyer's needs, thus increasing the pool of suitable properties.

Needs assessment with a buyer-customer

- **Maintain loyalty to the seller's needs.** If the buyer-customer contacts a brokerage about an in-company listing, the listing agent's duty of undivided loyalty to the seller obligates them to keep the buyer focused on the property inquired about; unless the buyer cannot afford the property or rejects it.
- **Tell the seller all that you learn.** The duty of full disclosure to the seller-client means the agent must tell the seller any information learned about the buyer that might help the seller's negotiating position.
- **Focus on the seller-client's property.** Because it is in the seller's best interest for appropriate properties for a buyer to be in short supply, the seller's representative should emphasize the uniqueness of the seller-client's property.

Property Selection

The second stage of a real estate transaction is finding properties. Buyer's representatives have few or no boundaries in finding properties for clients. According to *The 2006 NAR Profile of Home Buyers and Sellers*, finding the right property is a service that home buyers value. By contrast, when representing the seller and working with buyer-customers, the agent must concentrate on the needs of the seller-client and focus the buyer's attention on the seller's property.

Figure 13: Property Selection

If the buyer is a client

- Find the best property for the buyer-client
- Promote the buyer's search
- First opportunity to view new listings
- Make all properties available and viewable; the sale price is negotiable

If the buyer is a customer

- Get the best offer for the seller-client
- Limit properties to listed properties only
- View new listings after buyer-clients
- Show only properties listed within buyer's affordability range.

Property selection for a buyer-client

- **Find the best property for the buyer-client.** A buyer-client's representative has access to the entire market and is not limited to properties that have been listed for sale. FSBOs, lender-owned properties, and the like are all possibilities. The brokerage company should maintain current information about these properties so that buyer-clients can have a broader selection.
- **"Leave no stone unturned."** If necessary, a buyer's representative can promote the buyer's search for an appropriate property through "property wanted" promotions to seller's representatives and directly to owners of properties that may be of interest to the buyer.
- **First opportunity to view new listings.** Based on the duty of undivided loyalty, buyer-clients should be notified of new listings and provided with the opportunity to view these properties before buyer-customers are notified.
- **All properties are available.** Property selection is not limited by the seller's list price. A buyer-client may be able to negotiate the sales price down into the range of affordability.

Property selection for a buyer-customer

- **Get the best offer for the seller.** A seller-client's representative may be limited to selecting properties for which the broker is either the representative or subagent for the seller.
- **Limit properties to listed properties only.** A seller's representative who works for a buyer by expanding a buyer's search may be creating an implied agency relationship. Taking actions on behalf of a buyer, such as placing "property wanted" ads or contacting the owners of properties not listed for sale, can result in an undisclosed dual agency situation with that buyer.
- **View new listings after buyer-clients.** This lower level of fiduciary responsibility to buyer-customers demands that buyer-clients should be given the opportunity to view new listings before buyer-customers are notified of them.
- **Show properties listed at a price the buyer-customer can afford.** Unless a seller-client agrees otherwise, buyer-customers should only be shown properties priced within the buyer's range of affordability, as determined by a mortgage pre-qualification or other objective measure. If a seller-client's representative shows properties that are listed at prices higher than the buyer-customer can afford, that action might imply that the seller-client would accept a below-list price offer.

Skill Builder Tip 7: Importance of property inspection

Buyer-clients should have a clear understanding of the condition of the properties they are interested in buying. Recommend separate inspections such as environmental, heating and cooling, roofing, well water, plumbing, on-site sewage system, foundation inspections, and others as appropriate. Another important step is to obtain a C.L.U.E. loss-history report (see page 193) because its findings will impact the cost and availability of property insurance.

Viewing Properties

The third stage of a real estate transaction is viewing properties, which can be complicated. Buyer's representatives have an obligation to their buyer-clients to provide service and advice. Buyer-clients should also clearly understand that they are the decision makers though they may rely on the advice of the buyer's representative.

Figure 14: Viewing Properties

If the buyer is a client

- Okay to give advice with facts
- Educate the buyer
- Okay to compare competing properties

If the buyer is a customer

- Just the material facts
 - Protect the seller
 - Cannot help the buyer compare competing properties
-

Viewing properties with a buyer-client

- **Okay to give advice accompanied by facts.** The buyer's representative can help buyer-clients make an objective evaluation of a property, including both positive and negative aspects of issues that are not material facts, to the extent that the licensee has knowledge of or expertise in the issue.
- **Educate the buyer.** Buyer's representatives can help buyer-clients make an objective comparison of competing properties.

Viewing properties with a buyer-customer

- **Just the facts.** Material facts about the property must be disclosed to the buyer-customer. Any negative aspects of the property that are not material facts must only be addressed if the buyer asks about a particular aspect of the property which the licensee knows is a problem. In other words, no concealment.
- **Protect the seller.** The seller-client's representative cannot assist the buyer-customer in comparing competing properties.

Skill Builder Tip 8: Notify buyer of external conditions

Disclose in writing, to both buyer-customers and buyer-clients, material facts such as proposed zoning changes, proposed highway construction, planned residential, commercial or industrial construction, and the like.

Skill Builder Tip 9: REALTOR® safety: a year-round priority¹²

Follow these 10 tips to minimize your risks while showing property.

1. Instead of meeting new clients at the property, ask them to stop by your office and complete a Prospect Identification Form. Gather information on each, including their car's make and license number, a copy of their driver's license, and references.
2. While the client is in the office, introduce them to one or more of your colleagues. A would-be assailant does not like to be noticed, knowing a person could pick him or her out of a police lineup.
3. Always let a colleague, friend, or family member know where you are going and when you expect to return. Give that person the name and phone number of the client you are meeting.
4. Try to call the office once an hour to let people know where you are.
5. Establish a voice distress code, a secret word or phrase that is not commonly used but can be worked into any conversation for cases where you feel that you are in danger. Use this if the person you are with can overhear the conversation, but you don't want to alarm them. The distress code could be something as simple as "Hi, this is Jane. I'm at [address]. Could you e-mail me the red file?" The distress code should be used if you are uneasy, but do not feel you are in danger. If you are in immediate danger, stop the car and leave the area, or jump out of the car at the next stop. Do not hesitate to call 911.
6. Preview the property and don't go into a neighborhood that you perceive as unsafe. Be familiar with the area so you know the location of the nearest police station. Drive there immediately if you feel you are in danger.
7. Carry only non-valuable business items (except for your cell phone), and do not wear expensive jewelry or watches, or appear to be carrying large sums of money. Lock your purse in your car trunk before you arrive.
8. Park at the curb in front of the property rather than in the driveway. You will attract much more attention running and screaming to the curb area. It is much easier to escape in your vehicle if you don't have to back out of a driveway. Besides, parked in a driveway, another vehicle could purposefully or accidentally trap you.
9. In showing a property, always leave the front door open wide while you and the client are inside. As you enter each room, stand near the door.
10. When you show a home, always let the prospect walk ahead of you. Direct them; don't lead them. Say, for example, "The kitchen is on your left," and gesture for them to go ahead of you.

¹² *Realty Times*, REALTOR® Magazine Online, Mesa, AZ Police Department, REALTOR® Magazine, Louisiana REALTORS® Association, Washington Real Estate Safety Council, City of Albuquerque, NM. NATIONAL ASSOCIATION OF REALTORS® 2006 REALTOR® Safety Week Kit.

Negotiating the Purchase and Sales Agreement

According to *The 2006 NAR Profile of Home Buyers and Sellers*, negotiating the purchase agreement is one of the top services that home buyers want from a real estate professional. Buyer-client representatives have an obligation to provide service in this stage and offer their best efforts to get the property of choice for buyer-clients at the best price possible. However, there is no legal obligation to actually get the property the buyer wants.

Figure 15: Negotiating the Purchase and Sales Agreement

If the buyer is a client

- Give advice with facts
- Negotiate on behalf of buyer-client
- Strengthen the buyer-client's negotiating position
- Share all information about seller
- Provide price counseling
- Negotiate approved purchase agreement to safeguard buyer-clients
- Suggest financing alternatives that may be in buyer-client's best interests
- Continue services to buyer-client during negotiations

If the buyer is a customer

- Disclose only material facts
 - Negotiation on behalf of seller-client
 - Strengthen the seller-client's negotiating position
 - Share all information about buyer
 - Volunteer a CMA for the buyer only if it supports the seller-client's listing price
 - Negotiate approved purchase agreement protective clauses to safeguard the seller-client
 - Suggest buyer financing alternatives that benefit the seller's interests
 - Continue services to seller-client during negotiations
-

Negotiating the purchase and sales agreement for a buyer-client

- **Strategize with the buyer.** Plan negotiating strategy with buyer-clients. Suggest strategies, tactics and techniques that will strengthen the buyer-client's negotiating position.
- **Negotiate on behalf of the buyer-client.** Once the strategy has been formulated, the agent may implement it on the buyer's behalf, always keeping in mind that the client is the decision maker.

- **Strengthen the buyer-client's negotiating position.** With any previous client's consent, tell the new buyer-client about the details of unsuccessful negotiations in the past.
- **Share all information about the seller with the buyer.** Unless the buyer-client agrees otherwise (as in a disclosed dual agency situation agreed to by both parties) any information about the seller that could aid the buyer-client's position must be disclosed.
- **Price.** Provide price counseling, such as information about similar properties that have sold recently or are currently on the market.
- **Contract.** Suggest approved protective clauses for the purchase agreement to safeguard the buyer-client's interests. However, be careful not to engage in unauthorized practice of law.
- **Financing.** Suggest financing alternatives that would be advantageous for the buyer-client.
- **Continue services to the buyer-client during negotiations.** During the negotiation for a property, enhance the buyer's negotiating position by continuing to search for other appropriate properties.

Negotiating the purchase and sales agreement with a buyer-customer

- **Disclose only material facts.** Material facts about the property can be disclosed to the buyer-customer. Any negative aspects of the property that are not material facts should not be addressed unless the buyer asks a direct question about them.
- **Negotiate on behalf of the seller-client.** Suggest strategies, tactics, and techniques that will strengthen the seller-client's negotiating position.
- **Maintain the strength of the seller-client's negotiating position.** Any information about the seller-client that could aid the buyer-customer's negotiating position must remain confidential. Unless the seller-client agrees otherwise, do not reveal details about the seller-client, such as selling motivation, financial position, or previous negotiations.
- **Share all information about the buyer with the seller-client.** Unless the seller-client agrees otherwise (as in a disclosed dual agency situation agreed to by both parties) any information about the buyer-customer that could aid the seller-client's negotiating position must be disclosed to the seller-client.
- **Price.** Volunteer a CMA for the buyer-customer only if it supports the seller's listing price and negotiating position.
- **Contract.** Attempt to negotiate approved protective clauses in the purchase agreement that protect the seller-client. However, be careful not to engage in unauthorized practice of law.

Accredited Buyer's Representative

- **Financing.** Suggest financing alternatives to the buyer-customer in order to benefit and protect the seller's interests.
- **Continue services to the seller-client during negotiations.** While negotiating any offer, continue to market the seller-client's property in an attempt to obtain a better competing offer.

Follow-through After the Purchase Agreement

The fifth stage of a real estate transaction concerns follow-through after the purchase contract has been negotiated and agreed upon. This stage involves resolving any outstanding issues or problems that could prevent a successful conclusion to the transaction. Overlooking this final stage could cause the deal to fall apart!

Figure 16: Follow-Through after the Purchase Agreement

If the buyer is a client

- Attempt to solve problems to the buyer-client's advantage and satisfaction

If the buyer is a customer

- Attempt to solve problems to the seller-client's advantage and satisfaction

Follow-through for a buyer-client

- Endeavor to solve problems to the buyer-client's satisfaction. Keep the buyer-client and seller, and seller's representative informed of progress toward closing.

Follow-through for a buyer-customer

- Endeavor to solve problems to the seller-client's satisfaction. Keep the seller-client, buyer-customer, and buyer's representative informed of progress toward closing.

Exercise: Is the Buyer a Client or a Customer?

If you perform these actions, are you treating the buyer like a client or a customer? Note that “other” could include acting as a dual agent, or a transaction broker/facilitator.

		Client	Customer	Other
1.	Showing the buyer a FSBO property.			
2.	Declining to provide a CMA or assist a FSBO with pricing.			
3.	Disclosing material facts about a seller’s property to a buyer.			
4.	Providing information, upon request, to a buyer regarding the scholastic performance of the students in a particular school or area.			
5.	When writing an offer, you suggest that the buyer: make a minimum deposit, perhaps a promissory note; put the deposit in an interest-bearing account with the interest paid to the buyer and with the stipulation that if the buyer defaults, forfeiture of the deposit is the seller’s sole remedy; and stipulate that the buyer’s representative who wrote the offer present it to the seller and the seller’s agent.			
6.	Obtaining a commission agreement with a FSBO to pay a buyer’s representative’s fee on behalf of the buyer.			

Accredited Buyer's Representative

		Client	Customer	Other
7.	Informing a buyer that the listing price is \$185,000 and the seller has turned down three offers between \$155,000 and \$165,000.			
8.	Recommending that buyers who want to run a hair-styling business from the home they are planning to purchase investigate all potential restrictions.			
9.	Assisting the buyer in making an objective comparison of competing properties.			
10.	Continuing to show properties to a buyer during the time the buyer is negotiating to purchase a property.			
11.	Placing "Property Wanted" ads to find appropriate properties for a buyer, as well as calling owners in a subdivision to find out if anyone wants to sell.			
12.	Informing a buyer that the seller's representative indicated the seller will accept less than list price.			



Discussion Question 13: Special Considerations

What special considerations would you need to take into account when working with the following buyers?

1. Yourself

2. A buyer who requires anonymity

3. A close friend or relative

4. A present or past client

5. A first-time buyer

6. An out-of-town buyer or corporate transferee

7. A present or past business associate

Providing Lists of Other Professionals

Other professionals may be able to assist your buyer-clients with specific needs. Buyer's representatives should provide only a list and not a recommendation. The client should select the other professional.

Commonly referred services are:

- Home inspector
- Title company
- Attorney
- Insurance agent
- Termite/insect inspector
- Appraiser
- Mortgage lender

A list of referrals is always better than a single company. Make it clear that the buyer can also choose a vendor that is not on the list. Disclose any agreements with vendors. For more information on making referrals to other service providers, read "Making Prudent Referrals to Experts" on page 175 in the reference section of this manual.



NAR Code of Ethics

Article 6

REALTORS® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client's knowledge and consent.

When recommending real estate products or services, REALTORS® shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate referrals fees, the REALTOR® or REALTOR®'S firm may receive as a direct result of such recommendation. (Amended 1/99)

Skill Builder Tip 10: Do not overstep

Do not overstep your boundaries as a buyer's representative to provide legal advice. In most states, real estate licensees may fill in the blanks of standard forms and contracts, but alterations to the pre-approved contract or pre-approved protective clauses should be reviewed by an attorney.

Finding Properties

Because home buyers rate property selection as the most important service, finding properties for buyer-clients is one of the most important aspects of a buyer's representative's job. The more comprehensive your search, the greater the number of suitable properties you will find to show.

Resources to find properties

The MLS is the obvious resource for finding properties, but not the only one. A more intense search needs to go beyond MLS listings. Tap into as many resources as you can and be sure your buyer-clients know about the range of resources you will search to find properties.

- ▶ **Fax broadcast or e-mail list.** Sending these out to other brokerage companies and mortgage lenders (for properties in foreclosures) could uncover properties not listed in the MLS. Be sure to comply with fax and e-mail regulations.
- ▶ **Personal/telephone/mail solicitation.** Focus on your buyer-client's desired neighborhoods. But always be aware of and comply with all applicable laws, such as the federal Do Not Call regulations and any local restrictions on solicitation.
- ▶ **Internet.** Search both aggregate Web sites and specific broker and agent sites.
- ▶ **FSBO publications.** If used in your area, these are good sources of properties not found in the MLS.
- ▶ **FSBO file.** Your brokerage company should keep track of FSBOs in your area. Always attempt to resolve commission issues before showing any FSBO property.
- ▶ **FHA/VA foreclosures.** Do not overlook foreclosures of properties financed by government loan programs.
- ▶ **Auctions.** For information on property auctions, see the article on niche marketing (page 196) in the reference section of this manual.
- ▶ **New Construction.** A new housing development in the planning stages may be just what your buyer-clients are looking for.
- ▶ **Networking.** Maintain an e-mail list of the top listers and producers in your area. They may have a potential seller who has not yet signed a listing agreement, but would be interested to hear about possible buyers.

Pledge of Performance¹³

Because I am committed to preparing you to be an educated buyer, I will:

- . . . give you the most vital information on available homes
- . . . keep you aware of changes in the real estate market
- . . . arrange a tour of areas, schools and key points of interest
- . . . provide neighborhood information on municipal services, schools, churches, etc.
- . . . check applicable zoning and building restrictions
- . . . disclose all known facts about properties I show you
- . . . collect pertinent data on values, taxes, utility costs, etc.
- . . . point out strengths and weaknesses of all properties you choose to view
- . . . explain forms, contracts, escrow and settlement procedures
- . . . discuss loan qualification and processing

Because I am committed to helping you save time, I will:

- . . . provide ready access to all MLS listed properties
- . . . assist you as needed on all unlisted properties
- . . . help you select for viewing only those homes that fit your needs
- . . . show you homes only in the price range most suited to your finances
- . . . provide you a list of qualified attorneys, home inspectors or other service providers
- . . . arrange for necessary property inspections

Because I am committed to helping you find the best value, I will:

- . . . prepare studies of property values in chosen areas
- . . . perform a market analysis on chosen properties
- . . . discuss financing alternatives
- . . . see that you get a complete estimate of all costs involved
- . . . advise on offers on properties
- . . . write and present your purchase agreement to the seller
- . . . negotiate on your behalf

Because I am committed to you - my buyer - I will do all of this - plus:

- . . . keep your personal information confidential at all times
- . . . stay in touch with you from the day you start your search until the day you move in
- . . . coordinate all aspects of the sale and closing
- . . . be reimbursed with a commission only when we have a successfully closed transaction

Contact Information

Office phone _____ Mobile _____

Fax _____ E-mail _____

Web Site: _____

Agent Signature _____ Date _____

¹³ Courtesy of Lynn Madison, Lynn Madison Seminars, Inc. lynn@lynnmadison.com

Working with FSBOs

Despite the difficulties of selling on their own, twelve percent of sellers chose the FSBO route, according to NAR's *2006 Profile of Home Buyers and Sellers*. This is down from about eighteen percent nine years ago. More telling than the decline is the fact that five percent sold their homes to someone they knew prior to the transaction. This means that only seven percent of these sales are arm's-length FSBO transactions.

If your property search includes FSBO properties, the first challenge is to find them. Some sources for finding FSBOs include newspaper ads, Web sites, and yard signs. The buyer's representative might start a search by driving around the neighborhoods of interest and looking for FSBO signs. The next and perhaps greatest challenge is overcoming FSBO objections. Make sure the encounter with the seller starts off on the right footing by informing the seller that you have an interested and qualified buyer and you are not looking to list the home. Some other common objections are:

- ▶ "I want or need every cent from the sale and cannot afford or am not willing to pay a real estate commission.
If the agreed scope of services includes a search of FSBO properties, it is important to discuss compensation issues up front, or certainly before showing the property. A FSBO may be willing to pay a commission to an agent who presents an interested and qualified buyer. On the other hand, if the buyer is compensating you do not make this an issue with the seller.
- ▶ "I'm sure I'll have a buyer in no time. Three people have already looked at the house."
Ask how many of those people have come back a second time. One of the problems with showing a house is that there are a lot of browsers who just like to see other people's homes. Assure the seller that you have an interested and qualified buyer.
- ▶ "What do I need you for? I can put up a sign in my yard just like you would and show my own property."
Many FSBOs are not aware of the risks of dealing with complete strangers during an open house or showing. Let them know that you have security procedures in place to verify the identity of prospective buyers and to ensure the safety of the owners and their property during showings.
- ▶ "I've sold property before and I know what needs to be done."
Many FSBOs think that once the purchase agreement is signed, their work is over. Develop a list of the tasks that must be completed before closing, including home inspection, termite inspection, title insurance, building permits for improvements, and so forth. Sellers may decide the involvement of a professional is a good idea once they see what it takes to complete the deal.

Skill Builder Tip 11: 10 steps to a successful FSBO transaction¹⁴

1. Prepare your buyer-client in advance.
2. Contact the owner (disclose that you are a buyer's representative).
3. If the buyer is compensating you do not make your compensation an issue with the FSBO.
4. What if you are excluded from the viewing? Discuss this possibility in the counseling session with your client.
5. Review state-specific disclosure laws.
6. Secure all public information about the property and prepare a CMA for your client.
7. Do not provide advice or guidance to the owner.
8. Discuss negotiating strategies and options with your client.
9. Keep the negotiation on price as simple and straightforward as possible.
10. Facilitate the inspection process. If things work out, follow up and follow through as you would with any other transaction.

¹⁴ Adorna Carroll, "10 Steps to a Successful FSBO Transaction," *Today's Buyer's Rep*, Real Estate BUYER'S AGENT Council, Inc., August 2003, p. 4-5.

Foreclosures

Foreclosure is the forced sale of a piece of real estate to repay a debt. Indebtedness may be in the form of a mortgage, unpaid property taxes, builder and mechanic liens, or even delinquent income taxes. In some circumstances, the sale may result from property seizure and forfeiture on account of criminal activities.

There are several myths about foreclosure properties such as: there is a lot of money to be made buying foreclosures on the courthouse steps; lenders are so eager to dispose of real estate owned (REO) properties that they will make “killer deals” for buyers and pay generous fees to buyer representatives; or that lenders are eager to initiate foreclosures when borrowers default on mortgages.

The realities are that the biggest “wins” are likely found in pre-foreclosure, before the lender files the foreclosure action; although trying to go directly to an unlisted pre-foreclosure seller to make a deal for a buyer-client is neither easy nor particularly advisable. Lending institutions do not want to maintain an inventory of foreclosed real estate because they are not in the property management business and the expense of maintaining these properties will likely not be recouped. For the most part, mortgage lenders use national outsource asset management companies (OAMCs) to recycle foreclosure properties. If a lender controls REO properties on a local basis, they may be offered first to the lender’s Board of Directors and then to preferred in-house clients. Although a few transaction fees may be waived for the buyer of an REO, most lenders do little to reduce the interest rate or offer any other long-term money-saving loan concessions. Real estate agents are seldom offered, and may have difficulty negotiating, a reasonable co-operation fee. There are limited property disclosures when it comes to foreclosure properties. In some states sellers are relieved from disclosure obligations, which means they have no duty to disclose defects. Properties are sold “as-is” and often need considerable repair. Some examples of property problems include: “guttled” properties; missing appliances, cabinets, wiring, siding, and plumbing; electricity disconnected; structural damage; and missing or broken fixtures.

Auction

The auction method is an expeditious way to dispose of foreclosure properties. Few states require an auctioneer’s license to auction real estate; however many states do require a real estate broker’s license to organize and supervise the sale of property at auction, although not necessarily for “calling” it.

Sheriff’s sale

A sheriff’s sale entails sale of a property by the sheriff under authority of a court judgment in order to satisfy an unpaid obligation. The sales are

usually listed among the legal notices in the local newspaper. The scheduled sale of a particular property is published for a specific number of weeks prior to the sheriff's sale. Other information sources are the local legal news, county recorder's office, or county Web sites. Because properties offered at a sheriff's sale are often still occupied by the owners or tenants, it may be necessary for the buyer to initiate a legal action to evict the occupants.

Short sale

A short sale occurs when property is sold for less than the amount of money owed, including a commission to be deducted from seller's proceeds. A short sale is risky because of the unknown "baggage" that can come along, such as convincing the previous property owner to move out or paying off delinquent charges for water and utilities.

Judgment liens

The purchase of a judgment lien is initiated by contacting the creditor who holds the lien. Judgment liens are often published in the local newspaper, under legal notices, or may be listed by the county or municipal auditor's office or by the clerk of courts. The purchaser receives an assignment of the lien which is filed with the clerk of courts. A common judgment lien is a property tax lien sold at a public auction conducted by the auditor's office. Consult with your local county or municipal tax auditor to learn how auctions are handled. Your local lien depositor can advise how lien assignments are handled in your state

REO

REO is an acronym for "real estate owned" and refers to property that is owned by a lending institution as a result of a borrower's default and a subsequent foreclosure action. REOs may be listed in the local Multiple Listing Service, published in your local newspaper, or advertised on foreclosure Web sites. A good method for staying informed about the local REO market and future listings is to network with local REO specialists.

Foreclosures are a specialized market and not every buyer is a candidate for this type of purchase. Some "red flags" include:

- "wanna-be" investors
- contingencies such as the sale of another residence
- impatience with the time needed to wait out the months of delay until completion of the sheriff's deed
- lack of realization that properties are sold "as-is"
- lack of resources for repair and rehab of the property

New Home Construction

If your scope of work as a buyer's representative will include new home construction, there are some important factors you need to be aware of. Finding properties can be a challenge because new home construction is often not listed on the MLS. Make it a point to get acquainted with new home construction developments and builders in the area so that when a buyer-client expresses interest in a newly constructed home you will be prepared with market knowledge. Builders and their sales representatives will be more open to working with you as a buyer's representative, and paying a commission, if you are knowledgeable about their product and the construction process; in other words, if you demonstrate the ability to add value by helping the purchaser through the process.

Skill Builder Tip 12: New homes

If your client is interested in new construction, make sure the client does not view homes without you. Why?

Registration of the buyer-client is often the key to whether or not you will be compensated as a buyer's representative. This is why it is so important that you accompany buyer-clients when they visit new home models; you and/or your buyer-client must indicate to the builder's sales representative that you are the buyer's representative. The builder will probably have policies regarding payment of commissions to buyer's representatives and you should find this out before showing the property. When you accompany your buyer-client to view new homes observe the "etiquette" as you would when working with a seller's listing agent. Start by asking permission from the onsite sales representative to view the home. Share what you know about the buyer's needs and wants, but let the sales representative "do the selling." After viewing the property, debrief your buyer-client but not in the presence of the sales representative. Follow up with the sales representative to communicate your buyer-client's decision.

In addition to the issue of finding and viewing new home construction, there are some elements to the process that differ significantly from the process of purchasing an existing home.

Financing

New home purchase may involve two phases of financing. Construction loans are timed to coincide with phases in construction, with funds disbursed in increments that gradually increase the principle. The construction loan is retired by a regular mortgage. Because construction loans are short term, they generally carry higher interest rates and costs than home mortgage loans.

Buyer involvement

The buyer must be prepared for active involvement in the construction, such as making design and customization decisions and monitoring and inspecting the house as it is being built.

Contract and closing

Builders usually have their own contracts, which buyer-clients will be expected to sign. The contract will include details on construction phases, completion, acceptance, and the like. Builders commonly expect to specify where the closing will occur and what title company will be involved.

Sales representative

New home developments usually have onsite sales representatives who work with buyers. Generally, the sales representative is compensated by a commission or salary plus bonus. It is important to understand the role of this representative and foster a good working relationship. A major part of purchasing the new home is deciding which customization options to include and evaluating their cost-benefit for future resale. It is the job of the sales representative to supply information on customization options and pricing.

Pricing and negotiations

As a rule of thumb, pricing for new home construction is tight. The home is usually priced on a narrow cost-plus-profit margin basis that allows little room for price negotiations. Negotiations on terms and options will likely be more effective than on price.

How can the buyer's representative help a buyer-client?

- advise on builders and subdivisions
- educate buyers on the processes
- help define needs and preferences
- advise on options and resale value
- schedule and conduct showings and visits
- help evaluate properties
- negotiate some terms
- help understand contract documents
- monitor construction progress
- maintain paper trail
- provide referrals for independent inspections
- assist at closing

Risk Reduction and Management

One of the best ways to avoid a lawsuit is to meet the expectations of your buyer-clients. One of the best ways to do that is to manage the expectations of your buyer-clients, making sure that what they expect is what you said that you would provide. To ensure that their expectations are in line with the services you will provide, you should maintain thorough communication through the entire process.

- Avoid making promises you cannot keep or do not intend to keep.
- Keep your presentation realistic.
- Balance your presentation by explaining your service limitations.
- Inform buyer-clients of your efforts on their behalf.
- Keep buyer-clients informed of negative developments as well as positive ones to avoid sudden surprises.
- Do not “fuzz” the truth.

Skill Builder Tip 13: Maintain a paper trail

Create and maintain a paper trail for interactions with clients and customers by developing good record keeping habits. Document the transaction with copies of agreements, memos, e-mails, and notes about conversations with clients, customers, other agents, and service providers. If your actions are questioned, a good paper trail could be your best defense in a dispute or lawsuit.

Make “look-ups” easy by using the same file names and structure for both hard copy and digital files.

Your office policy will dictate provisions in the buyer representation agreement. Therefore it is very important that you know and understand your company’s buyer representation agreement and know the scope of services you can provide. You must work within the parameters of the agreement in order to protect the broker.

Skill Builder Tip 14: “Do Not” regulations

Do you know that:

- It is unlawful to call any residential telephone number on the national list with a “telephone solicitation.” Some states maintain lists, which are not integrated into the federal list.
- It is unlawful to send fax advertisements to clients, prospects, or even other real estate professionals without first obtaining the intended fax recipient’s written consent.
- All commercial e-mails must include a legitimate return e-mail, physical postal address, and clear and conspicuous notice of the recipient's opportunity to opt-out.

For up to date information and links to federal Web sites, go to “Field Guide to Do Not Call, Do Not Fax, and Do Not E-mail Laws” at www.realtor.org.

Subprime, Predatory, and High Risk Lending – What Buyer’s Representatives Need to Know¹⁵

Although the outcomes may be the same, loss of equity and homeownership, there are distinctions between subprime lending, predatory lending, and mortgage fraud. Subprime lending involves higher risks with attendant higher costs and fees that unfortunately sometimes cross the line into predatory practices. Predatory lending involves abusive practices that are not in violation of the letter of the law but do prey on the uninformed, financially-inexperienced, and cash-poor. Mortgage fraud involves blatantly illegal practices. In actuality though, some instances of predatory lending practices are so extreme as to blur the line between legal and fraudulent loan practices. Statistically, predatory lending is more common than mortgage fraud, but both are pernicious problems that fuel the increasing number of foreclosures.

Subprime loans

Subprime mortgage loans are for borrowers whose credit histories or income levels do not enable them to qualify for regular, or “prime”, interest rates. Because of the increased risks associated with these loans, lenders typically charge higher fees and interest rates. The good news is that subprime lending has made mortgage financing and home ownership a possibility for a portion of the market that would be otherwise shut out and there are reputable lenders who offer both prime and subprime mortgage loans. The bad news is that the practices of some subprime lenders are predatory.

Mortgage fraud

Mortgage fraud is deliberate criminal activity. Slow markets frustrate sellers and increase the temptation to turn a blind eye to fraud. The “lenders” who are involved in fraudulent practices may fabricate and falsify information such as income and employment verification or forge signatures on loan documents and property titles. Other fraudulent practices involve ignoring the right of rescission time period for a deed filing, financing based on inflated appraisals, fake documents, sales to straw buyers who represent the original sellers, and phantom second loans. Listen to your intuition; if a deal does not seem right, speak up if you suspect loan fraud.

¹⁵ *Foreclosure Opportunities for Buyer-Clients*, Real Estate BUYER’S AGENT Council, Inc., 2006, p.18-19, 36-41.

Skill Builder Tip 15: Watch for fraud “red flags”

A request to calculate a commission on some amount that is less than the purchase price shown on the contract or raise the price of a property in the MLS after the contract has been signed are “red flags” for loan fraud. Also be alert for any arrangement that routes money from the seller to the buyer through a third party or charity. Make sure the true facts of the deal are shown on the contract and the HUD-1.

Predatory lending

Predatory lenders prey on the financially-inexperienced and cash-poor who often live paycheck-to-paycheck. Typical lending techniques include:

- convincing potential borrowers that what they are doing is right and favorable.
- rushing borrowers into signing documents before they have an opportunity to read or fully understand the obligations and risks.
- pushing borrowers to purchase unnecessary products and services, such as life insurance.
- imposing high interest rates, fees, and prepayment penalties.
- inducing borrowers to repeatedly refinance with higher interest rates and points.

Often the victims of these practices do not know what they have signed until it is too late.

It is important to draw a distinction between predatory practices and creative lending programs, such as loans intended for “flipping” a property; these products have specific uses and should not be assumed to be predatory lending practices. It is the abusive and deceitful actions of the lender, including failure to fully explain the risks, that characterize predatory lending.

Why are buyers attracted to these loans?

Why would borrowers willingly subject themselves to these situations? Some typical scenarios are:

- quick money
- cash for expenses such as college tuition, home improvements, vacations, and medical treatment
- assumption of continued increases in property values
- initial lower costs associated with ARMs and similar types of financing

Figure 17: Seven Signs of Predatory Lending¹⁶

Predatory mortgage lending involves a wide array of abusive practices. Some of the most common are:

1. Excessive fees
2. Abusive prepayment penalties
3. Kickbacks
4. Loan flipping
5. Unnecessary products
6. Mandatory arbitration
7. Steering and targeting

Non-traditional Loan Programs

As the real estate industry fluctuates, the banking industry has created a number of new and exotic consumer loan products. Non-traditional loan programs should not be immediately associated with predatory lending practices. Non-traditional loan products are suitable for certain situations and fully informed borrowers. When financially-inexperienced borrowers are pushed into these types of loans by high-pressure tactics, the line can be crossed into predatory lending. As a result, some of these loan products have contributed to the rising rate of property foreclosures. What is the appeal for buyers?

- payment flexibility
- maximize cash flow
- minimize impact of vacancy for rental properties
- leverage to pay off personal bills
- leverage to buy more property

Choosing the right loan

With a variety of different loan programs available, it is important to choose the type of loan that will best suit the borrower's needs. The determining factors are chiefly the length of time the borrower plans to stay in the house and the amount of monthly payment that is affordable.

If the borrower plans to stay in the house for less than five to seven years, it is reasonable to consider an adjustable rate, balloon, or two-step mortgage. For example, ARMs traditionally offer lower interest rates than fixed-rate loans during the early years of the loan, a two-step mortgage

¹⁶ Center for Responsible Lending, www.responsiblelending.org

offers a lower interest rate than a thirty-year mortgage for the first five to seven years, and a balloon mortgage offers lower interest rates for shorter term financing, usually five or seven years. Low interest rates make it is easier to qualify for these types of mortgages. However borrowers should not accept an ARM unless they can afford the maximum possible monthly payment.

Interest-only loans

The borrower makes monthly payments of interest-only for a fixed period of time, usually five to seven years. After the end of the term, the borrower must pay the balance in a lump sum or start paying off the loan, in which case the payments increase dramatically. An interest-only mortgage might be a good fit for borrowers who have income in the form of infrequent commissions or bonuses, expect a significant increase in earning in a future years, or plan to invest the savings between an interest-only and an amortizing mortgage, and are confident that the investments will make money.

Buydown mortgage

A temporary buydown offers an initial discounted interest rate which gradually increases to an agreed-upon fixed rate, usually within one to three years. This initial discounted rate allows the borrower to qualify for “more house.” It provides the advantage of low initial monthly payments for the first years of the loan, when extra money may be needed for furnishings or home improvements. Monthly payments can be reduced during the first few years of a mortgage by making an initial lump sum payment. If the borrower does not have the cash to pay for the buydown, the lender may pay this fee if the borrower agrees to a somewhat higher interest rate. The 2-1 buydown is a very popular loan product. For example, if the interest rate on the note is 8% with a 2-1 buydown mortgage, the initial discounted rate is 6% with a 6% interest rate for the first year, 7% for the second year, and 8% afterwards. A buydown may be used to qualify a borrower who would otherwise not qualify because it results in lower payments.

Graduated payment mortgage (GPM)

Graduated payment mortgages offer low initial payments that gradually increase at predetermined times. Low initial payments allow the borrower to qualify for a larger loan amount. The monthly payments will eventually be higher in order to catch up from the lower initial payments. In fact, there will be negative amortization during the early years of the loan; the mortgage is paid off at an accelerated pace during the later years of the loan. Lenders offer a variety of GPM payment plans, with variations in the rate of payment increases and the number of years over which the payments will increase. The greater the rate of increase or the longer the period of increase, the lower the mortgage payments in the early years.

Adjustable Rate Mortgages

Adjustable rate mortgages (ARMs) have soared in popularity. In 2003, ARMs accounted for as little as 0.5% of all mortgages written, but in the first five months of 2005 alone, accounted for 12.3% of mortgages. Legitimate lenders counsel the borrower on the pros and cons of an ARM. A predatory lender, on the other hand, will often state that continued increases in home equity will offset the loan-to-value ratio.

Convertible ARM

Some ARMs provide an option to convert to a fixed-rate mortgage at designated times, usually during the first five years on the adjustment date; an action the borrower can take if interest rates start rising. The new rate is established at the current market rate for fixed-rate mortgages. There is usually a nominal fee but little paperwork is required. The disadvantage is that the conversion interest rate is typically higher than the market rate at that time. Another type of convertible mortgage is a fixed rate loan with rate reduction option. If rates have dropped since the time of closing, it allows the borrower, under some prescribed conditions and for a small conversion fee, to adjust the mortgage to current market rates. However, the interest rate or discount points may be a somewhat higher.

Fixed-period ARM

A fixed-period ARM starts out with three to ten years of fixed payments. At the end of the fixed period, the interest rate will adjust annually. Fixed-period ARMs are generally tied to the one-year Treasury Securities Index. ARMs with an initial fixed period and lifetime and adjustment caps usually also have a first adjustment cap. The advantage of this type of loan is that the interest rate is lower than a 30-year fixed-rate mortgage. Because the lender is not “locked in” for a long time period, the risk is lower, and consequently a lower rate can be charged. The borrower benefits from a fixed rate for a period of time.

Two-step mortgage

Two-step mortgages offer a fixed rate for a time period, usually five to seven years, after which the interest rate changes to a current market rate. After this one-time adjustment, the mortgage maintains the new fixed rate for the remaining life of the loan.

Option adjustable rate mortgage (Option ARM)

Option ARM loan programs are targeted to those with variable incomes, such as the self-employed and those who receive large year-end bonuses, because they allow adjustment of monthly payments. Unfortunately, buyers also use option ARMS to buy “more house” than they could otherwise afford; in these circumstances, borrowers can default if interest rates rise.

Fair Housing and the Buyer's Representative

All federal, state, and local fair housing laws and regulations must be obeyed in all dealings with customers and clients. Federal Fair Housing law specifies seven protected classes: race, color, religion, sex, handicap, familial status, and national origin. A handy method for remembering the seven protected classes is the sentence:

REALTORS® (race)
Can (color)
Really (religion)
Sell (sex)
Houses (handicap)
Fast (familial status)
Now (national origin)

Some state and local governments have defined additional protected classes such as: age, sexual preference, source of income, marital status, age, military status and/or discharge, ancestry, parental status, and housing status (homeless).

Which law prevails?

What if, for example, the local law does not prohibit discrimination based on handicap, but the federal law does? The federal Fair Housing Law **always** prevails. Federal statutes should be considered as the minimum laws. However, you must also comply with local and state laws at all times. An overall rule of thumb is to comply with the law that provides the greatest protection against discrimination.

How will you respond if the buyer asks:

- ▶ What is the racial composition of this neighborhood? Or, I am Asian. Do you service any areas that I would feel at home in? Or, what kind of people live in this neighborhood?

Never estimate or give an opinion on the racial, religious or ethnic, composition of the neighborhood. Focus on providing objective data from third-party sources, such as the chamber of commerce and make sure you provide this information to all clients. Refer home buyers to sources of information such as the library, public Web sites, or the local municipal offices so they can research the questions themselves. Focus on economic status and occupation, which are not protected by fair housing law. If you mention people you know or have worked with in the area, do not describe them in a way that includes a protected class. For example, you could say, "this is a middle-income neighborhood. Many of the folks who live here work at the businesses downtown because it is an easy commute."

- ▶ How are the schools in this area? Are they good? Are the schools integrated?

Provide the buyer only with reliable and authoritative information, such as student-teacher ratios, expenditures per pupil, percentage of students who go on to college, the number of National Merit scholars, and the like. School statistics are available at www.realtor.com; click on “moving tools” on the Moving page. Refer the buyer to sources of information, such as the school or the school district’s main office. Maintain the same type of information for each school; never show favoritism for one school over another. Never attempt to influence a housing choice with either complimentary or negative general comments about the school or give an estimate or opinion of the racial, religious or ethnic composition of the student body. You could say, “our office does not maintain statistics regarding the racial makeup of the student body of schools in our market area. To get the best answers to your questions, you should contact either the school or the school district’s main office. Also, you might want to check with some of your potential new neighbors about how they feel about the schools their children attend.”

- ▶ Why don’t you just pick out some nice properties in a safe area for us? Or, would you live here?

Give your honest opinion, whether it’s positive or negative, to this question and give a non-discriminatory reason that focuses on the attributes of the property. Never mention or volunteer information related to the racial, religious or ethnic makeup of the area. You could say, “Yes, I would. The area is well-maintained and that particular house is very nicely located.” Or, “no, I wouldn’t because the house is too small for our family.” Or, “no, I wouldn’t because it’s too far from my spouse’s office.”

Statement of fair housing policy

It is recommended that a buyer’s representative include language in their buyer representation agreement indicating a commitment to equal housing opportunity and a statement that the agent may not lawfully disclose information regarding race or other protected classes.

The following is suggested language for such an agreement:

It is the policy of (firm name) to abide by all local, state, and federal fair housing laws and not discriminate against any individual or group of individuals. The agent may not lawfully disclose the racial, ethnic or religious composition of any neighborhood, community, or building, nor whether persons with disabilities are housed in any home or facility, except that the agent may identify housing facilities meeting needs of a disabled buyer.

Skill Builder Tip 16: Equal Professional Services Model

- Use systematic procedures
- Obtain objective information
- Let the client or customer set the limits
- Provide a variety of choices
- Document the service you provide

Fair Housing Self-Assessment Questionnaire

Real estate professionals who continually evaluate their performance are likely to perform well. By asking yourself questions such as the ones that follow, you will develop a heightened awareness of the importance of providing consistent service to all clients. In addition, these questions help the agent to better identify the needs of prospects.

Figure 18: Fair Housing Self-Assessment Questionnaire

Figure 18: Fair Housing Self-Assessment Questionnaire	
<p>1. Meeting the Prospect for the First Time</p> <ul style="list-style-type: none"> ▪ How is the prospect greeted? ▪ What information is distributed to the prospect? ▪ Do you explain the firm's commitment to fair housing laws? ▪ What information about the prospect is recorded? How is the information recorded? ▪ Do you request the same information from everyone? ▪ What questions do you ask the prospect? ▪ Do you make suggestions? ▪ Do you record information regarding the suggestions you make? How? 	<p>3. Choosing Properties</p> <ul style="list-style-type: none"> ▪ Do you ask about preferences concerning home features and location? ▪ Who sets the priorities? Do you record this information? How? ▪ Does the prospect set limits, not merely in terms of price and features, but also location? ▪ Who decides where to look for housing? ▪ Do you rely on the prospect to make the choices? ▪ Do you develop a list of properties to show? ▪ What resources do you use to locate properties? ▪ Does this process vary with different prospects?
<p>2. Qualifying the Prospect</p> <ul style="list-style-type: none"> ▪ Do you always seek the same information from all prospects or does it depend on your personal assessment of each prospect? ▪ Do you let prospects determine their price range? ▪ Do you calculate the price range for the prospect? ▪ Does your method vary by the price range or location requested? ▪ When does the qualifying usually take place? Does this vary by prospect and circumstance? ▪ Do you suggest that the prospect be pre-qualified by a lender prior to showing? ▪ Do you require a credit check prior to inspecting properties or submitting a bid? ▪ How do you record this information? Do you use a standard form? ▪ Are prospects told they will need to locate their own financing? ▪ Do you refer prospects to lenders? ▪ Do you explain financing and quote interest rates? ▪ Is this information recorded? How? 	<p>4. Showing Properties</p> <ul style="list-style-type: none"> ▪ Do you schedule appointments and accompany the prospect? ▪ Do you offer a variety of choices? ▪ Do you offer a list and suggest that the prospect drive around to narrow the list? ▪ Do you point out positive and negative aspects of each property? Some properties? ▪ Do you always record the prospect's likes and dislikes? How? ▪ What materials does the prospect receive concerning each listing?
	<p>5. Performing Follow-up Activities</p> <ul style="list-style-type: none"> ▪ Are your follow-up techniques more aggressive with some prospects than with others? ▪ What information is kept on completed sales? ▪ What information is kept on prospects who do not purchase?

Accredited Buyer's Representative

Building Blocks

What could you say to explain to a potential buyer-client the advantage of services provided by a buyer's representative in each of the stages of the real estate transaction?

Needs Assessment:

Property Selection:

Viewing Properties:

Negotiating:

Follow-through:

5. The Buyer Counseling Session

In this chapter

- ▶ Goals of a buyer counseling session
- ▶ Conducting the buyer counseling session
- ▶ Common provisions in a buyer representation agreement
- ▶ Explaining the advantages of buyer representation
- ▶ Modes of compensation
- ▶ Responding to buyers' frequently asked questions
- ▶ Buyers to avoid

Goals of a Counseling Session

The buyer counseling session is a focused conversation between the buyer and the real estate professional. It is an opportunity for buyer representatives to explain buyer representation and its advantages and present their qualifications, such as experience, numbers of transactions, professional designations, and market knowledge; real estate professionals who are new to the business can stress the experience and success of the brokerage. For both the buyer and the real estate professional, the counseling session is an opportunity to build rapport.

For the buyer's representative the aims are to:

- Learn the buyer's needs and goals
- Define the buyer's parameters
- Help the buyer form realistic expectations
- Obtain a representation commitment from the buyer
- Plan a strategy for finding the right property

For the buyer the goals are to:

- Learn about the buying process and the market in general
- Learn about disclosures and agency representations
- Get acquainted with the real estate professional
- Obtain answers to questions and concerns

Conducting a Buyer Counseling Session

Your interview strategy should be a combination of gathering and communicating information, advising on the buying process, building confidence, and laying the groundwork for a buyer-client relationship. As you proceed through the session, continuously review the buyer's responses to your questions as these responses will determine your presentation's direction and content. The interview is your opportunity to ease buyer-client's concerns about purchasing property by describing the services you can provide as their representative.

The information you learn about the buyer in your initial presentation and buyer counseling session will be valuable in the negotiation phase of the transaction. The more you know about your buyer-clients and the better you understand their needs, wants, and demands, the more effectively you can negotiate with a seller on their behalf. A counseling session checklist can help assure that all important topics are touched on.

With practice and experience you will develop your individual presentation style. The steps listed below provide the foundation upon which you can develop your own style. These steps assure that the buyer counseling session will yield the information you need and impart information that your buyers need to know.

Skill Builder Tip 17: Steps for a successful counseling session

- Prepare a presentation packet
- Build rapport with the buyer
- Disclose agency status
- Determine previous home search efforts
- Determine price range and motivation
- Perform a needs assessment
- Discuss financing with the buyer
- Determine if you want to represent this buyer
- Obtain commitment
- Review the buyer representation agreement
- Provide client-level services

Prepare a presentation packet

Experienced buyer's representatives recommend developing an information packet to provide to the prospective buyer. The packet can contain:

- information about the real estate professional's background, credentials, and experience
- general market information
- information about neighborhoods, schools, and community services
- sample forms including a representation agreement
- the agent's performance guarantee

Build rapport with the buyer

A distinguishing characteristic that makes your presentation memorable is the way you go about building rapport with buyers. Small talk breaks the ice and helps buyers get comfortable as you summarize your agenda for the meeting about agency and brokerage relationships. In the course of the conversation, you can also learn important information such as the buyer's employment and overall familiarity with the buying process. Use the opportunity to differentiate yourself and your firm. You could describe your business philosophy and experience and the skills and services you can offer to buyers. Determine buyer concerns in the purchase of a property and allay those concerns by promoting your services.

Be prepared to answer questions such as:

- How long have you been in the real estate industry?
- Do you work full-time or part-time?
- Are you a salesperson or a broker?
- How experienced are you as a buyer's representative?
- Do you also represent sellers?
- How many buyers do you represent on an annual basis?
- What sets you and your services apart from other agents?
- How do you get paid?

Disclose agency obligations

Fulfill your state's agency disclosure obligation. Caution buyers not to reveal confidential information by saying, "because we don't know yet if I will be representing you in your real estate transaction, please don't give me any information you would not want a seller to know." It is also critical to determine if a relationship already exists between the buyer and another agent.

Determine previous home search efforts

You need to determine how long the buyers have been searching and if other listing agents or other buyer's reps have been working with them. Ask questions such as:

- Why are you looking? Relocation? Larger or smaller home? Schools?
- How long have you been looking?
- How have you been conducting your search?
- Did you see any properties you liked?
- What kept you from buying?
- Do you rent your current home? Rent amount?
- Do you have a home to sell or a lease commitment to complete before buying? How long is the lease?
- How soon do you need to move?
- Have any salespeople shown you homes?
- What is your relationship with other salespeople?
- Did you sign anything with them?

Be prepared to answer questions such as:

- Do you specialize in any specific area, type of housing, or price range?
- Do you live in the community?
- How long have you lived in the area?

Perform a needs assessment

If the buyers do not have another representative, the next step is to learn what the buyer is looking for in a home. In this phase you can help buyers distinguish needs and wants by posing questions that probe and test their priorities. Ask the buyers what is important to them in the selection of a property, such as price, location, and features. Prioritize needs and wants by asking, "If a property meets all of your other needs but does not have (a desired feature), should I eliminate the property or would you like to see it?" Other questions include:

- How many bedrooms do you need? Square feet? Units?
- Tell me about your dream house?
- What are the things you do not want in your new home?
- Tell me three things you like about your present home?
- Is there a particular location you prefer?

- Is there a particular style of home you have in mind?
- What special requirements do you need in a property?

Be prepared to answer questions such as:

- How will you identify properties to show me?
- Will you provide me with copies of MLS listings?
- Can I look at the MLS listings on my own?
- How will you identify “new on the market” properties in advance of the competition?
- What can I expect when you are showing me a property?
- Will you identify the “negatives” as well as the positives?
- If you think the property is not “right” for me, will you tell me so?
- Why would I need a buyer’s representative at a new home subdivision?

Determine the buyer’s price range

In addition to determining wants and needs, it is important to determine a price range. A mortgage pre-qualification or pre-approval from a lender can make this step easier. However, if the buyer has not obtained these, it may be necessary to help the buyer estimate “how much house” is affordable. The following worksheets can help estimate maximum affordable payment. These worksheets are not a substitute for mortgage qualification, but they can serve as a quick reference for estimating price range. Once again, caution buyers about revealing confidential information. Questions to ask include:

- What is the price range of houses you have been looking at?
- How much do you think you can afford?
- Do you have a budget for monthly payments?
- What do you base these decisions on?

Be prepared to answer questions such as:

- How will you work to get me the best deal?
- How will you help me determine the best offer price?
- Will a mortgage payment be more than my current rent?
- Before making an offer, how will I know my total purchasing costs?

Figure 19: Mortgage Worksheet¹⁷

Step 1. Figure Your Total Monthly Pretax Income

Salary/wages of buyers	\$ _____
Other income (child support, alimony, etc.).....	\$ _____
 Total annual income	 \$ _____
Divide Total annual income by 12 months	÷ 12
= Total Monthly Pretax Income	= \$ _____

Step 2. Figure Your Total Monthly Debt

Car Payment.....	\$ _____
Student Loan Payment.....	\$ _____
Child support/alimony	\$ _____
Credit Cards (minimum monthly payment).....	\$ _____
Other Long Term Debts.....	\$ _____
Total Monthly Debt	\$ _____

Step 3: Maximum Monthly Mortgage Payment (28% of Pretax income, 29% FHA)
(includes principle, interest, tax, mortgage insurance)

Total Monthly Pretax Income	\$ _____
multiply by .28 (FHA mortgages .29)	x .28 or x .29
= Maximum Monthly Mortgage Payment.....	= \$ _____

Step 4: Maximum Monthly Debt including Mortgage Payment (36%, 41% FHA & VA)

Total Monthly Pretax Income	\$ _____
multiply by .36 (FHA &VA mortgages .41)	x .36 or x .41
= Maximum Monthly Allowable Debt including Mortgage	= \$ _____

Maximum monthly mortgage payment: Total monthly mortgage payment (principle, interest, taxes, and mortgage insurance) allowable equals 28% of pretax income, 29% for FHA mortgages.

Maximum monthly debt including mortgage payment: Total allowable monthly debt (includes mortgage payment, car loan, student loan, child support, alimony, minimum credit card payments, and other long term debt) equals 36% of pretax income, 41% for FHA and VA mortgages.

¹⁷ Homebuyer's Toolkit, Real Estate BUYER'S AGENT Council

Figure 20: Thirty-Year Fixed Rate Mortgage Monthly Payment Chart¹⁸

Mortgage Amount	Interest Rates and Monthly Payment				
	5%	6%	7%	8%	9%
\$10,000	\$53.68	\$59.96	\$66.53	\$73.38	\$80.46
\$20,000	\$107.36	\$119.91	\$133.06	\$146.75	\$160.92
\$30,000	\$161.05	\$179.87	\$199.59	\$220.13	\$241.39
\$40,000	\$214.73	\$239.82	\$266.12	\$293.51	\$321.85
\$50,000	\$268.41	\$299.78	\$332.65	\$366.88	\$402.31
\$60,000	\$322.09	\$359.73	\$399.18	\$440.26	\$482.77
\$70,000	\$375.77	\$419.69	\$465.71	\$513.64	\$563.24
\$100,000	\$536.82	\$599.55	\$665.30	\$733.76	\$804.62
\$110,000	\$590.50	\$659.51	\$731.83	\$807.14	\$885.08
\$120,000	\$644.19	\$719.46	\$798.36	\$880.52	\$965.55
\$130,000	\$697.87	\$779.42	\$864.89	\$953.89	\$1,046.01
\$140,000	\$751.55	\$839.37	\$931.42	\$1,027.27	\$1,126.47
\$150,000	\$805.23	\$899.33	\$997.95	\$1,100.65	\$1,206.93
\$160,000	\$858.91	\$959.28	\$1,064.48	\$1,174.02	\$1,287.40
\$170,000	\$912.60	\$1,019.24	\$1,131.01	\$1,247.40	\$1,367.86
\$180,000	\$966.28	\$1,079.19	\$1,197.54	\$1,320.78	\$1,448.32
\$190,000	\$1,019.96	\$1,139.15	\$1,264.07	\$1,394.15	\$1,528.78
\$200,000	\$1,073.64	\$1,199.10	\$1,330.60	\$1,467.53	\$1,609.25
\$210,000	\$1,127.33	\$1,259.06	\$1,397.14	\$1,540.91	\$1,689.71
\$220,000	\$1,181.01	\$1,319.01	\$1,463.67	\$1,614.28	\$1,770.17
\$230,000	\$1,234.69	\$1,378.97	\$1,530.20	\$1,687.66	\$1,850.63
\$240,000	\$1,288.37	\$1,438.92	\$1,596.73	\$1,761.03	\$1,931.09
\$250,000	\$1,342.05	\$1,498.88	\$1,663.26	\$1,834.41	\$2,011.56
\$300,000	\$1,610.46	\$1,798.65	\$1,995.91	\$2,201.29	\$2,413.87
\$350,000	\$1,878.88	\$2,098.43	\$2,328.56	\$2,568.18	\$2,816.18
\$400,000	\$2,147.29	\$2,398.20	\$2,661.21	\$2,935.06	\$3,218.49
\$450,000	\$2,415.70	\$2,697.98	\$2,993.86	\$3,301.94	\$3,620.80

¹⁸ Ibid.

Determine the level of motivation

What is the buyer's current living situation compared to the property the buyer would like to purchase? Generally, buyers looking to make a big change in their housing situation are more motivated than buyers looking for a home similar to what they already own. Time constraints also create greater motivation. Ask, if we find the right property, are you prepared to make a decision now? Will anyone else be helping you make the buying decision?

Some buyers may appear unmotivated or indecisive, when in fact they are apprehensive about process. Ask if they are uneasy about some aspect of the process and let them voice their concerns, but do not try to talk them into anything.

Skill Builder Tip 18: Qualifying buyers

Be careful when qualifying buyers not to tell them that they cannot afford a home. Such a statement could be considered steering which is a violation of Fair Housing law. When in doubt, let a lender pre-qualify buyers.

Discuss financing with the buyer

Though you should not pre-qualify the buyers until they have become clients, you should discuss financing. Discuss the pre-qualification process, its benefits, and options for it. Ask questions such as:

- What types of financing have you been considering?
- What amount of down payment do you plan to make?
- How much of the purchase will be financed with a mortgage?
- Are you eligible for any mortgage programs like FHA, workforce housing assistance, state and local programs, or employee assistance programs?
- Has a lender pre-qualified you for a loan? If so, how much? What is the name of the lender?
- Are you eligible for VA financing?

Be prepared to answer questions such as:

- Will you qualify me so I know how much I can afford?
- Why would I want to meet with a lender prior to shopping?
- What is the difference between pre-qualification and pre-approval?

Skill Builder Tip 19: Three good reasons for mortgage pre-approval¹⁹

1. Pre-approval helps you know which houses to show.
2. Pre-approval facilitates the closing transaction and payment of commission.
3. Lenders can detect any potential problems that might make obtaining a loan difficult. If credit problems are significant enough to keep buyers from obtaining financing, it's better to learn about it before you invest time showing them homes they cannot qualify for.

Determine if you want to represent the buyer and if the buyer wants client- or customer-level service

By this time, you should have formed an impression of the buyers and a picture of their wants, needs, expectations, motivations, and capabilities. There are times when you may encounter buyers who you may not want to represent, which is discussed later in this chapter. Assuming that you want to represent the buyers, what is the next step?

Ask, "During your real estate transaction, what assistance would you like or expect from a real estate brokerage company?" Make notes of the answers and do not interrupt buyers as they describe their expectations. Review these comments and paraphrase them to the buyers. Inquire about additional services the buyers may desire. Ask, "What service would be important to you for a brokerage company to perform?" Respond by enumerating client-level services that might be of interest; add these services to the list of those that the buyer agrees to by stating, in writing, "I will... (list the client-level services you will provide)." Does the buyer expect client-level services? Do you have the time to service another buyer-client? Consider the following:

- properties available to meet buyer's needs
- the buyer's financial ability to purchase
- the buyer's motivation

Be prepared to answer questions such as:

- What are fiduciary duties?
- What happens if I find a home on my own? Or, if the seller will not pay a commission? Will I be expected to pay your commission?

¹⁹ "Working with Buyers," *REALTOR® Magazine Online*, NATIONAL ASSOCIATION OF REALTORS®, www.realtor.org.

Explain the advantages of buyer representation

If you determine that a particular buyer desires client-level services, the next step is to explain how buyer representation, and the buyer-representation agreement, enables you to provide the level of services that the buyer desires. Advantages that a buyer's representative can describe include the following:

Searching for properties

- Locating suitable properties
- Previewing properties and verifying the properties' condition
- Suggesting necessary inspections by experts

Counseling and advocacy

- Helping buyers determine what they can afford
- Verifying property taxes and utilities
- Verifying the value of the property

Negotiating an offer

- Advising clients on structuring an offer
- Presenting the offer to the seller's representative
- Negotiating favorable contract terms for the buyer

Managing the transaction

- Explaining legal documents needed for closing and helping secure them
- Assisting in securing financing
- Assisting buyers and their attorney in clarifying title, zoning, building codes, and access easements
- Referring buyers to qualified vendors
- Analyzing the future salability of the property
- Maintaining buyer confidentiality

Be prepared to answer questions such as:

- How will you explain the various documents and their nuances?
- Do you have a sample purchase agreement
- Can you help me in completing the various documents?
- What contingencies might you suggest?
- How will you assist me with negotiations?
- Will you personally present my offer to the seller?
- How will you gather information about the seller?

5. The Buyer Counseling Session

- What are the “downsides” to me as a consumer?
- Do you have an “after-sale” service program?
- Will you help me find a qualified home inspector and other professionals?
- Can I look at homes on my own? Look at open houses?
- What should I do if another agent approaches me?

Obtain commitment

If you want to represent the buyer as a client, the next step is obtaining a commitment to formalize the relationship. Present your “pledge of performance” as a buyer’s representative and also describe the buyer-client’s commitment to you.

Review the buyer representation agreement

It is in your best interest to work within the parameters of the buyer representation agreement. It is also best to agree with the buyer-client on terms that are broad enough to cover many situations and conditions. Common provisions covered in a buyer representation agreement include:

- ▶ **Property type, description, and price range**
Is the client looking for residential, commercial or rental property, or land? What is the buyer’s preferred location? The description of the buyer’s desired property should be more general than precise. Likewise, price, if it is addressed in the agreement, should be defined in a range, not an exact amount. It should be broad enough to include all properties the buyer-client is qualified to see or may want to see.
- ▶ **Scope of work**
What is the range of duties and tasks you are agreeing to perform? And what is expected of the buyer-client? It is also important to define what you as the buyer’s representative will not do, for example, make “cold calls” on potential sellers.
- ▶ **Exclusive or non-exclusive**
This will vary by state and company policy, but generally an exclusive agreement is preferable to a non-exclusive or “open” agreement.
- ▶ **Duration of relationship**
How long will the buyer be your client? Factors that may influence this include your marketplace, desired property type, buyer needs, and the like. The agreement should not expire before the transaction is closed. Company policy should be observed if it addresses this issue.
- ▶ **Payment for services performed by others**
How you will be reimbursed for expenses and the payment of services performed by others on behalf of your buyer-client?
- ▶ **Consent to show properties to other buyers**
State regulations may affect this, but generally such a provision allows both you and your company to show the same property to other buyers.
- ▶ **Potential of a disclosed dual agency situation**
This affects those in disclosed dual agency states and in companies with office policies that allow disclosed dual agency. If the possibility exists, it should be included in the buyer representation agreement.

▶ **Compensation provisions**

The buyer-representation agreement should set forth the circumstances under which will you get paid, how much, and by whom. There are different modes of compensation available to buyer's representatives and your office policy will likely delineate the options. It is usually in the best interests of your clients to always try to negotiate your fee, so that the seller or seller's broker pays your fee. Ultimately, however, your clients are responsible for your fees. They should be informed that if the seller or seller's broker does not pay your fee, they must do so. Remember, that according to the NAR Code of Ethics, a buyer's representative may not attempt to interfere with the terms of the listing agreement between the seller and the seller's agent nor should the buyer's representative interfere or attempt to modify the listing broker's offer of compensation.

▶ **Non-discrimination**

All federal, state, and local fair housing statutes and regulations must be observed. Discrimination is unacceptable under any circumstance. Remember that it is unlawful under Fair Housing Laws to provide information that relates to the race, color, religion, sex, handicap, national origin or familial status of individuals in the area.

▶ **Miscellaneous**

The buyer-representation agreement can also address the following issues:

- agreement assignability
- recourse if a commission dispute or other problem develops
- dispute resolution – mediation, arbitration, or court action
- circumstances in which the agreement can be cancelled
- working with the buyer-client on a short trial-period basis

Provide client-level services

You can now offer advice and all of the client-level buyer services previously described during this course. You might conclude the session by asking about best time for clients to view properties, preferred communication methods – phone, fax, mail, or e-mail – and the best time and number to reach client by phone.

Getting Buyers to Give You a “Sign” A Sign of Loyalty, That Is, In the Form of a Signed Agreement²⁰

by Peter West, ABR[®], CRS, GRI
Vice President and Managing Partner
Premier Realty Concepts, Pittsfield, MA

It happens at least once in everyone's career. You work with a buyer for a long time—and they end up buying with someone else! Our first reaction, typically, is to get mad and point blame at the buyer, when in fact we should probably blame ourselves. As a practical matter, this is one of the best reasons for buyer representation. It seems that whenever buyer representation is discussed among agents, the familiar “issue” is “how do you get someone to sign a buyer representation agreement?” Furthermore, agents seem to believe the myth that buyers won't sign an agreement. This naturally leads to the all-time million-dollar question: “How do I get buyers to be loyal to me (i.e., sign an agreement)?” In my experience, certain steps can be taken to dramatically improve results.

It All Begins With You

The very first step in the process is to develop a mindset that you will only work with buyers who are willing to sign an agreement with you. You already believe in the concept of client loyalty for sellers. After all, how many seller's agents would take an “open listing” on a piece of property and actively market it, show it, sit at open houses, etc.? Not many agents are willing to go to these extremes with sellers without a signed agreement. When it comes to working with buyers, however, we are willing to drop whatever else we are doing and, without hesitation (much less an agreement), run out to show them a house or two, or maybe many more. The solution for most agents is to make a business decision—decide not to work with a buyer until they sign an agreement. It is easier to do than we think.

Believe In Yourself—And Your Value

The second step in getting buyers to sign an agreement with you is to have the right frame of mind. The only way to achieve this is to believe in your services as a buyer's representative! You must believe, beyond a shadow of a doubt, that you provide a valuable service that cannot be duplicated without you. Buyers have many ways to identify listed properties. What more do you bring to the table? First off, you must think of yourself as a top-level professional. This means you must look and act like someone who is an expert in their marketplace. The easiest way to determine your value is to retrace your actions on the last buyer deal that you successfully completed. Jot down all of the things you did, in order, from the first time you made face-to-face contact with the buyer until you closed the deal. These are the items that you will use to “build your value.” When you have completed the list you may be surprised by all of the “things” that you actually do—and that most buyers take for granted. After you review your list, you can compile this information and use it in your buyer presentations.

Counseling is Key

It is a fact that we as consumers do not like to be “sold.” It is a natural reaction. Think about the last time you were in a store and a sales clerk approached you, asking if they could help. Chances are your immediate reaction was “just looking,” when in fact, you were probably there to purchase something. One of the best ways around this practice in real estate is to embrace the concept of counseling. This is an effective approach where you truly work as a partner with the client. The relationship is developed by working with each other towards the buyer's common goals. To do this you have a meeting or a series of meetings in which you review every step of the transaction process and examine it in small pieces. Then you take all the small pieces and build a platform that becomes the foundation for this particular client.

²⁰ *Today's Buyer's Rep*, Real Estate BUYER'S AGENT Council, Inc. April 2004.

5. The Buyer Counseling Session

There is more time spent up front prior to even looking at property. But I can assure you that it is time well spent. It is much easier to anticipate and prevent problems than to put out a fire when a particular situation turns explosive during the transaction. This is particularly effective with first-time homebuyers. The relationship with them naturally creates an atmosphere of professional service, versus a selling mentality. And it tends to attract more buyers who want to sign an agreement and protect this newly-created relationship. Also, you will find that you will receive more referrals from your buyers than you ever have in the past.

The Value of Due Diligence

Another great way to build value is to explain to buyers the amount of “due diligence” work that is done by you, their agent, on their behalf. As agents, we have sources for due diligence information at our fingertips (zoning, utilities, easement information, restrictions, inspection issues, pricing, etc.). This is a value-added service. Sure, in today’s high-tech society anyone can get the information. But does a buyer have direct access or know how to find it—and do they have the time to do it? Often, the information needed is readily available in our offices from past transactions or files we’ve created. (It’s identical to the information you gather when you list a house; in other words, deed, field card, map, zoning map, flood maps, etc.) Provide your buyers with access to the information they need and they will immediately see the value you bring to the home-buying process. As part of due diligence, it is a buyer’s representative’s job to create a market value range for the buyer to determine the price they are willing to pay for a property. This is probably the one service most valued by buyers.

Home Buyer Seminars

A very effective way to communicate this information to potential clients is in the form of homebuyers’ seminars. If you take the same information covered in a counseling session and organize it in a logical outline, it is very easy to create a presentation designed to lead buyers into making a commitment to work with you before you even ask for a signature! A copy of a due diligence checklist makes a great handout.

Home buyer seminars offer a great opportunity to display your knowledge and enthusiasm—and you will have buyers wanting to work with you and tap into your energy. Be passionate about your profession throughout your presentation. Buyers will view you as successful and be much more likely to back up their commitment to work with you with a signed buyer’s representation agreement.

Reprinted with permission of *Today’s Buyer’s Rep*, Real Estate BUYER’S AGENT Council, Inc., April 2004

For another viewpoint on conducting a successful buyer counseling session, read “Lessons Learned at the REBAC Newly Buyer Game” on page 181 in the reference section of this manual.

Exercise: Overcoming Agent Fears about Buyer Representation Agreements

If you were the broker, what would you say to a buyer representative to help overcome these common fears?

- I am afraid to ask the buyer to sign the agreement right away. They don't know me yet. Why would they want to sign an agreement before they know me?
- The buyer may not want to commit to just one agent. If I ask them to sign the agreement they will think I'm pushy and I may lose their business.
- The buyers say that they want to work with me, but they don't want to sign anything?
- I made a commitment with the buyers and now I don't like working with them, what should I do?
- The buyer doesn't seem very motivated, what should I do?
- My buyer's demands seem unreasonable and are really draining me of my time and energy. How can I get control of the situation?
- I'm afraid of the liability of representing a buyer. What if the buyer isn't happy with my best efforts?
- I am really uncomfortable telling a buyer that they may have to pay me. How can I present the issue of compensation?
- I have a house that is just right for my buyer, but it is my own listing? What should I do?
- If I bring up representation issues during the initial counseling session, won't it scare off the buyer?



NAR Code of Ethics

Standard of Practice 1-13

When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:

1. the REALTOR®'s company policies regarding cooperation;
2. the amount of compensation to be paid by the client;
3. the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties;
4. any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g. listing broker, subagent, landlord's agent, etc., and
5. the possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. (Adopted 1/93, Renumbered 1/98, Amended 1/06)

Standard of Practice 16-6

When REALTORS® are contacted by the client of another REALTOR® regarding the creation of an exclusive relationship to provide the same type of service, and REALTORS® have not directly or indirectly initiated such discussions, they may discuss the terms upon which they might enter into a future agreement or, alternatively, may enter into an agreement which becomes effective upon expiration of any existing exclusive agreement. (Amended 1/98)

Standard of Practice 16-9

REALTORS®, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service. (Amended 1/04)

Modes of Compensation

Compensation should be set forth in the buyer representation agreement. Acceptable methods of compensation – when, by whom, and how much – should be defined by your office policy; it is important to understand the options that are available to your client. For payment to be made to a brokerage company, the following three conditions must exist:

- All parties must know and understand who represents whom in the real estate transaction.
- All representatives, subagents, and non-agents (facilitator or transaction broker) must speak and act in a manner that is consistent with their legal relationships.
- All parties must know, understand, and agree to how the brokerage fees will be paid.

Buyer's representatives can work on a "contingency fee" basis, which means a fee is paid only if a purchase is completed (also known as a "success fee"). Consumers often respond well to this option because it parallels the way selling and listing brokers often are compensated. They can also work on a non-contingency fee basis, which means the fee is paid, even if no purchase is made. A buyer's representative may also be compensated by means of a consulting fee, such as flat or hourly fee or for specific services like negotiating the contract. Does a retainer go into the same escrow as sales deposits? This is state specific and should be checked before accepting retainers. Retainers may not be allowed in some states.

Skill Builder Tip 20: Protecting your commission

To help ensure that you are compensated for your efforts in the transaction, include a commission protection clause in the buyer representation agreement. This will help to protect your commission in case the buyer is negotiating with the seller at the time the agreement expires, or you show the buyer-client a property during the term of the relationship but the buyer delays making an offer until after the agreement expires.

- ▶ Fees can be determined using the price of the property as a factor:
 - Percentage of purchase price
 - Percentage of list price
 - Percentage of purchase price plus a percentage of the amount less than the listing price

- ▶ Fees can also be determined using the time spent in the search and purchase as a factor:
 - Hourly fee or hourly fee plus expenses
 - Hourly fee plus non-refundable retainer, if retainers are allowed under state law
 - Either of the above with a minimum commission

- ▶ Salary (employee of the broker or firm)

Figure 22: Compensation of Real Estate Agents²¹

Paid by seller	81%
As a % of sales price	75%
Flat fee	4%
Task fee	*
Other	1%
Don't know	2%
Paid by buyer only	5%
Paid by buyer and seller	8%
Paid by buyer, flat fee	1%
Other	4%
Don't know/Not sure	2%

Other compensation scenarios

- ▶ When the seller is represented by both the listing and selling company.
 - The seller pays the listing agent and authorizes the listing agent to share the commission with subagents. The buyer has no representative and no obligation to pay compensation to anyone.
 - The seller provides written authorization to the listing agent, through the listing agreement, to share the brokerage commission with a buyer's representative. This information may be entered into the MLS or conveyed by the listing agent in promotions or telephone discussions. The buyer's representative, seller's representative, buyer, and seller all agree in writing that the payment of this fee is made solely as an economic adjustment in this transaction and does not create or imply that an agency relationship exists between the buyer's representative and any person other than the buyer.
 - Some buyer's representatives prefer to receive their compensation from the buyer, not the listing agent or the seller. They include language in the purchase agreement stating that the buyer's representative refuses the compensation offered to them from the listing agent and the seller; and the seller will pay to the buyer directly so that the buyer can use the funds to compensate the buyer's representative.

²¹ 2006 Profile of Home Buyers and Sellers, NATIONAL ASSOCIATION OF REALTORS

- ▶ The seller provides written authorization to the listing agent to refuse to share the commission with a buyer's representative. When this occurs, the buyer may:
 - pay the buyer's representative fee and compensate for this in the amount offered to the seller for the property. This is generally not an appropriate option with a cash-poor buyer.
 - include a provision in the purchase offer, stating that the seller agrees to pay a specified fee to the buyer in order for the buyer to pay the buyer's representative. Such as, "this offer is subject to and contingent upon the seller reimbursing the buyer at closing x% of the purchase price to pay the buyer's closing costs, and buyer agency compensation." See Code of Ethics Standard of Practice 16-16. However, the buyer cannot include in the offer anything that resembles "The listing agent shall pay to the buyer's representative x% of the selling price."

- ▶ When the seller is not represented:
 - The buyer can pay the buyer's representative fee and compensate for this in the amount offered to the seller. This is generally not an appropriate option with a cash-poor buyer.
 - The seller and the buyer's representative enter into a commission agreement, specifying that the seller agrees to pay the buyer's representation fee on behalf of the buyer.
 - The buyer can include a provision in the purchase offer, stating that the seller agrees to pay a specified fee to the buyer's representative on behalf of the buyer.

In each of the preceding two points, the purchase offer should stipulate that the payment of the fee is made solely as an economic adjustment in the transaction and does not create nor imply that an agency relationship exists between the buyer's representative and any person other than the buyer.

Skill Builder Tip 21: A tax tip

In a commercial or investment transaction, if the buyer pays the representative's fee, the amount of the fee is treated as a cost of the sale and added to the value of the property's basis for tax treatment.



Discussion Question 14: Accepting a Commission from a Buyer and Seller

A buyer engaged a broker to find a commercial property. The parties agreed that if the broker found a property that fit the buyer's specifications and price range, he would pay the broker a finder's fee. Two weeks later, the broker told the buyer that a seller had just listed a property with him that met all the buyer's specifications except that the listed price was a bit higher than the buyer wanted to pay. The buyer inspected the property and liked it but would not compromise on his original price. Three days later, the broker called the buyer to say that the seller had agreed to the buyer's price. The sale was made and the broker collected a commission from his client, the seller, as well as a finder's fee from the buyer, which was not disclosed to the seller.

The seller learned about the finder's fee a few weeks later and filed a complaint with the local board of REALTORS[®], charging the broker with duplicity and unprofessional conduct. The complaint noted that the broker had actually been the agent of the buyer while misrepresenting himself as the agent of the seller. The broker argued that he had not accepted the seller's listing until after he had agreed to help the buyer find a property and that the price paid for the property was fair.²²

What do you think was the hearing panel's ruling?

²² Case adapted from the 2001 Code of Ethics and Arbitration Manual, NATIONAL ASSOCIATION OF REALTORS[®], 2001.

Relocation Buyers

In general, relocation buyers are not familiar with the area they are moving to and need to buy quickly. And, relocation buyers often have families with specific needs and priorities of their own. Relocation buyers generally:

- Are not familiar with neighborhoods, traffic patterns, schools, market values, and the like
- May be relocating from an area with a different cost of living
- Are under pressure to buy quickly
- May have substantial equity and often are pre-qualified for financing
- Assume the salesperson at the destination end is acting in their best interests
- Need to buy right (for resale in a few years).

The buyer's representative should be prepared to:

- Cover as many details as possible in advance by phone or fax, because time is at a premium in corporate relocation
- Have buy-out details finalized at origination end so buyer can be pre-qualified with a lender prior to inspection trip
- Provide neighborhood counseling before an inspection tour
- Caution the transferee and family to remain non-committal when viewing properties
- Direct the transferee to sources of temporary housing, if needed
- Keep the buyer-client informed after the purchase agreement has been negotiated
- Apply an hourly fee for additional services
- Ask for a letter of recommendation after the move-in and follow up for referrals

After-the-fact referral fees

Although the occurrence of after-the-fact referral fees is on the decline, largely as a result of state regulation as well as development of industry standards, the issue is still present in the marketplace. Relocation companies and networks earn referral fees when they direct relocating employees to real estate brokers. Customarily, the broker agrees to pay a referral fee to the relocation company for each referral received as a result of this relationship. However, a problem arises when relocation companies demand referral fees when in fact they were not the sources of the referrals to the real estate agents. These situations often arise

when the relocating employee works outside of the network and the relocation company in turn tries to extract a referral fee from the real estate agent after the work has commenced. Sometimes the relocation company threatens the withdrawal of an employee's relocation package unless a referral fee is paid. This places the real estate agent in a very difficult position; often the agent feels forced to pay the referral fee because the employee is at risk of losing relocation benefits, like payment of moving expenses.

To avoid this situation, in the course of the initial counseling session, ask the buyers if they are being transferred by their company. Then you are in a better position to decide whether or not you want this business given that a referral fee will most likely be requested. Some questions to ask are:

- What company do you work for?
- Is this a job transfer?
- Are you receiving any relocation benefits? If so, what are they?
- Are you required to work with a particular real estate agent in order to qualify for relocation benefits?

If you agree to pay an after-the-fact referral fee, get the specifics in writing and also advise the buyer in writing that you will be paying the referral fee and specify the amount.

Exercise: “Pass the Hat” – Addressing Concerns

This exercise will help you practice responding to buyers' concerns. As the “hat is passed” to you, draw out a card, read the question or concern on the card, and provide an appropriate response as a buyer's representative.

Why is it necessary to sign an agreement before you have found me the right property?

- I don't like to make a commitment to just one sales agent. I like to keep my options open.
- Do I still owe you a commission if I find a home on my own?
- Can I look for a house on my own?
- I would like you to work for me, but I don't want to sign anything – a handshake is enough and I can trust you, right?
- Is this an open-ended commitment?
- If your commission is based on the sale price, how can I be sure you will try to get me the best deal?
- I don't want to pay a fee to a buyer's representative, the seller pays your commission, right?
- Do you have any references?
- If sellers can do a “FSBO” why can't I make a purchase on my own?
- The sale agents who show me property are really nice, why do I need a buyer's representative?
- I'm interested in a new home and the developers all say I can work directly with them.
- I have to find a home fast! What can you do for me?
- Is your commission negotiable?
- Do I have to pay a fee if I don't buy anything?
- Can you find a property inspector and appraiser for me?
- If you represent me as a buyer, can you also sell my current home?
- How will you help me decide how much to offer?
- Every agent has access to the MLS, what is the advantage of working with you?
- I'm concerned about finding the right property, but my spouse and I cannot agree on what is more important. Can you help us?
- I can find properties on the Internet, I just need you to “get me in the door.”

Notes:

Buyers to Avoid

You should consider not working with some buyers because they can drain you of your time and other resources. Some examples follow.

Unmotivated buyers who:

- Tell you that their lease is not up for another year, but want to go out on showings for the next several weekends to get a “feel” for what the market will be like.
- Tell you that it took two years to find their last house, that they do not believe into rushing things, or that they want to look for at least a couple months to be sure they will get a great deal.
- Want to see “what’s out there.”
- Are reluctant to sign an exclusive buyer’s agency agreement.

Unqualified buyers who:

- Tell you that they do not want to waste their time getting pre-qualified or pre-approved until you find them a property that meets their specific needs.
- Think that a good buyer’s representative will clean up their credit report for them so they can buy.
- Have a questionable payment history.
- Refuse to pre-qualify with a lender.

Buyers with unrealistic expectations who:

- Expect you to find properties, in a seller’s market, that they can buy far below market value with lots of equity.
- Are habitually late, miss appointments or otherwise treat you inconsiderately.
- Are hypercritical or overly demanding.
- Will not follow your advice.

Buyers whose actions create a conflict of interest such as those who:

- Want to purchase a property you own or one that you have an interest in.
- Have family members who are real estate agents and will not sign an exclusive agreement with you.
- Are working with several other agents.

Accredited Buyer's Representative

- Persist in trying to negotiate directly with the seller's agent.
- Are not honest with you.

Under no circumstances represent buyers who expect you to perform unlawful acts such as those who:

- Make demands that violate Fair Housing laws, whether made knowingly or unwittingly; such requests are some of those most frequently asked of buyer's representatives and would compel them to commit unlawful acts.
- Tell you that they "massaged the numbers" of their W2 or 1099s.
- Take or damage the seller's personal property during a showing and expect you, their buyer's representative, to "look the other way."

Skill Builder Tip 22: How to say "you're fired"²³

When you decide to call it quits with a buyer-client, it is important not to burn bridges. Here are some examples of tactful ways to get the message across, even if you are frustrated.

Harsh: "Your indecision is a real problem. I can see that you are not committed to buying."	Softer: "It looks like you need more time to think through your decision. Let's put things on hold for a while."
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Harsh: "Your expectations are unreasonable. I cannot afford to spend any more time with you."	Softer: "I do not specialize in the types of properties you are looking for, but I can refer you to a salesperson who does."
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Harsh: "I am offended that you are working with another salesperson behind my back."	Softer: "I am sorry that I am not meeting your needs. It is probably best for you to work with someone else."
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Harsh: "I will not work with anyone..... who will not sign an exclusive buyer agency agreement. I've been burned by clients too many times."	Softer: "A signed agreement protects us both. I value my client relationships too much to operate without one."
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²³ "Working with Buyers," REALTOR® Magazine Online, NATIONAL ASSOCIATION OF REALTORS®, www.realtor.org.

Building Blocks

This exercise focuses on two very important and sometimes difficult parts of the counseling session – obtaining a signed buyer representation agreement and discussing compensation. It is also an opportunity to share ideas on developing a presentation packet.

- ▶ What items could be included in a presentation packet?

- ▶ What could you say to convince buyers to sign a buyer representation agreement?

- ▶ If a seller will not compensate you as a buyer's representative, what would you say to explain compensation to your buyer-client?

6. Offers and Negotiations

In this chapter

- ▶ Creating an offer
- ▶ Protecting the buyer's interests
- ▶ Working toward a purchase contract
- ▶ Presenting an offer to a seller
- ▶ Handling multiple offers
- ▶ Negotiation know-how
- ▶ Strategies for buyers' or sellers' markets

Creating an Offer

When your buyer-clients have found the right property, the next step is formulating an offer that will hopefully lead to a purchase contract. As a buyer's representative you may advise the buyer on the factors that go into an offer but remember that the client is the ultimate decision maker.

The factors that go into formulating an offer include:

- ▶ Price of similar properties: a CMA can help establish price.
- ▶ Property condition: is it in good condition or must the buyer invest substantial money in repairs?
- ▶ Length of time on the market: a long time on the market may indicate a slow market or some inherent problem with the property.
- ▶ Supply and demand: in a hot sellers' market (high demand, low supply) your buyer's offer may have to compete with others.
- ▶ Seller's motivation: a seller under pressure to close a deal may be more receptive than one who can wait until the "right offer comes along."
- ▶ Terms: what terms and contingencies must be written into the offer? Terms that make an offer attractive are items such as an all-cash transaction, pre-approval for financing, short closing period, and few contingencies or seller concessions. Caution buyers that too many contingencies or expectations for seller concessions will likely make an offer less attractive.
- ▶ Return on investment: for a commercial and investment buyers, the future income stream and return on investment is an important consideration in developing an offer.

Preparing the Buyer

As you help the buyers formulate an offer, think of the process as a “training the buyer-clients” seminar to help them understand the give-and-take of the offer and negotiating process. Educating first-time buyers is particularly important because they may be intimidated by the paperwork as well as the unknown venture they are undertaking. Alleviate buyer-clients’ anxiety by providing sample forms with the blanks filled in with examples of information.

Buyers may need to be educated to understand important facts about making an offer, such as:

- Verbal promises are not enforceable, therefore everything regarding the transaction must be in writing.
- An offer is the opening step in negotiations, not the start of “negotiations fever.” Negotiating the price and terms is not a game and multiple counteroffers risk annoying the seller or losing out to another offer. In a hot sellers’ market with multiple offers likely, buyers should try to present their best offer first because there may not be another opportunity.
- An offer is a proposal of price and terms and if the seller accepts the offer it becomes a binding contract, which means no further negotiations.
- If the seller makes a counteroffer, which should be in writing, the buyer may accept or reject it, or make a counteroffer. If sellers reject an offer, they cannot change their mind later and hold the buyer to the terms of the offer; likewise if a buyer rejects a seller’s counteroffer.
- An offer may be revoked up to the time it is accepted or the buyer is notified of acceptance; however revoking an accepted offer is a serious step that can result in loss of earnest money or a lawsuit brought by the seller for recovery of damages.

Protecting the Buyer’s Interests

Caution buyers that although it is important to protect their interests, an offer is weakened by too many contingencies and protective clauses. Common contingencies are a satisfactory home inspection report, approval of financing, and sale of a current home; other contingencies may be prudent based on a particular property or seller’s circumstances and the buyer’s representative can counsel clients on these as properties are viewed. The need to protect the buyer’s interests must be weighed against the conditions of the property, the seller’s circumstances, market dynamics, and the buyer’s priorities. Based on these factors, the final selection of contingencies can be made at the time of the offer. Along with contingencies, the offer should specify any personal property to be included or excluded.

Working Toward a Purchase Contract

As an offer is developed, presented to the seller, and acted on, the buyer's representative must always remember that the client is the decision-maker. The role of the buyer's representative is to provide information and advice, not to determine what is "best" for the client. Working toward a purchase involves presenting the client's offer in the best possible light, preparing to respond to counteroffers, and planning a strategy if there are multiple offers.

Present your client's offer

The buyer's representative should personally present the client's offer to the seller and the seller's representative who will also be present when an offer is made. Some practitioners recommend including a cover letter with the offer to explain its rationale.



NAR Suggested MLS Rules and Regulations

Section 2.3: Right of Cooperating Broker in Presentation of Offer

The cooperating broker (subagent or buyer representative) or his representative has the right to participate in the presentation to the seller or lessor, of any offer he secures to purchase or lease. He does not have the right to be present at any discussion or evaluation of that offer by the seller or lessor and the listing broker. However, if the seller or lessor gives written instructions to the listing broker that the cooperating broker not be present when an offer the cooperating broker secured is presented, the cooperating broker has the right to a copy of the seller's written instructions. None of the foregoing diminishes the listing broker's right to control the establishment of appointments for such presentations. (Amended 4/92)

Create a friendly atmosphere

Every seller wants to see offers, but not every offer is one that a seller wants to see. Regardless of the particulars contained in an offer, you can enhance its acceptability by creating a friendly atmosphere and setting a constructive tone. People are more likely to consider concessions when dealing with people they like. Create a constructive atmosphere by:

- Introducing your buyer-clients into the conversation as real people, not adversaries; keep in mind that you must have permission to divulge personal information about them.
- Telling the sellers how much you enjoyed showing their home.
- Describing aspects of the home that your buyer-clients particularly like.
- Avoiding discussion of any negative attributes of the property.

Explain the offer

As you present the offer, explain the buyer's rationale, concerns, and limitations. Include a CMA if appropriate. Stress the positive attributes of the offer, such as your client's financial qualifications, large down payment, agreement on the settlement date and personal property, and the like. It is best to avoid emphasizing negative aspects of the property or seller's circumstances as a defense of the offer.

After the offer has been presented

Unless invited to stay, the buyer's representative will be asked to and should leave after presenting the offer so that the seller and seller's representative can discuss it privately. The seller may reject the offer, accept it (in which case it becomes a contractual obligation), or make a counteroffer. The seller's representative has the right to participate in the presentation to the buyer of any counteroffers the seller might make.

Adhering to the REALTOR® Code of Ethics

As you formulate your offers and negotiating strategies with your buyer-clients, be mindful of the REALTOR®'s Code of Ethics. Everything you do should comply with its tenets to ensure that all parties to the transaction are treated honestly. This helps to ensure that all parties feel satisfied with the transaction results and pleased with the experience of working with you and one another.



NAR Code of Ethics

Standard of Practice 1-6

REALTORS® shall submit offers and counteroffers objectively and as quickly as possible. (Adopted 1/93, Amended 1/95)

Standard of Practice 1-7

When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease. (Amended 1/93)

Standard of Practice 1-8

REALTORS®, acting as agents or brokers 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 or brokers 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 1/93, Amended 1/99)

Standard of Practice 1-13

When entering into buyer/tenant agreements, REALTORS® must advise potential clients of: the possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. (Adopted 1/93, Renumbered 1/98, Amended 1/06)

Standard of Practice 1-15

REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers' approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. (Adopted 1/03, Amended 1/06)

Standard of Practice 3-6

REALTORS® shall disclose the existence of accepted offers, including offers with unresolved contingencies, to any broker seeking cooperation. (Adopted 5/86, Amended 1/04)

Handling Multiple Offers

It does not have to be a hot market for a seller to receive multiple offers on a property. Multiple offers complicate the situation because buyers must consider not only their own interests and capabilities along with the property's condition, but also the unknown factor of other buyers' interests and capabilities. When a multiple-offer situation arises, consider the following factors as you help your buyer-client formulate an attractive offer:

- What is your responsibility, as the buyer's representative, to your buyer-client and how do you best meet it?
- Who made the other offers? A customer from the listing office or another cooperating brokerage? A buyer-client or customer of another salesperson from the listing office?
- Who should present the buyer-client's offer? Should the buyer's representative request to be present when other offers are presented? Or, is it in your buyer-client's best interest for the listing agent to present that offer to the seller along with other offers? Or, would it be better to ask the broker of the listing office to present your buyer-client's offer, instead of the listing agent?

Presentation and negotiation of multiple offers is one of the most misunderstood areas of practice. Basically, there are two ways multiple offers can be presented.

- ▶ Individual presentation: Each contract is presented to the seller and listing agent only; the contents of each offer are not shared with anyone else.
- ▶ Group presentation: All offers are presented at the same time with all representatives present. The contents of every offer are made known to the representatives of all buyers. Since some buyers may not want their information disclosed to other parties, all buyers should be notified if this method is to be used by the seller.

Some real estate professionals believe, incorrectly, that they are required to automatically disclose the existence of multiple offers on a property, whether or not the buyer's representative asks about other offers or the seller wants to divulge this information to buyers. As NAR Standard of Practice 1-15 states, the buyer or buyer's representative must ask for this information and the seller must consent to divulging it.

It should be obvious that the presence of multiple offers weakens a buyer's leverage. Sellers are neither obligated to consider offers in the order that they were received, nor accept the highest bid if a lower bid presents more attractive terms. If a multiple offer situation arises, do not panic or counsel buyers to withdraw an offer; they may be the highest bidders and will never know it if they pull out. Although the situation may be nerve-wracking and the final outcome disappointing, it is worth the time and effort to go through at least one round of negotiations before

Accredited Buyer's Representative

withdrawing. Counsel buyers to have a price in mind, remain objective, and stay in the negotiations until that price is reached.²⁴

Multiple offers present a complex situation and although there is no single standard approach or procedure, NAR does provide guidelines on how proceed. For more information on presenting multiple offers, refer to “*Presenting and Negotiating Multiple Offers White Paper*” in the reference section of this manual (see page 178).

When You Cannot Personally Present an Offer

Because you know your client’s objectives, concerns, and priorities, it is in your client’s best interests for you to present the offer. But what if the seller refuses to allow buyer’s representatives to present any offers? Your buyer-client can add a provision to the purchase agreement that makes the offer contingent on the buyer’s representative making the initial presentation to the seller. This, however, may not be in your buyer-client’s best interest, because the opportunity to purchase the property may be lost. Therefore, it is advisable to use this provision with caution.

Some actions you can take include:

- Verify that the listing agent is available to receive the buyer’s offer before faxing it.
- Consider personally presenting the buyer’s offer to the listing agent.
- Include a cover letter written by the buyer.
- Request up front, if not already covered in the contract, that the seller counter or reject the offer in writing.

²⁴ Courtesy of Lynn Madison Seminars, www.lynnmadison.com

Negotiation “Know-How”

Negotiating power is derived from knowledge and knowledge is derived from information. Therefore, a buyer’s representative should strive to learn as much as possible about the buyer-client, the seller, the property, the listing agent, the area, and the market.

Of course, all the information in the world will not be much help if there is no strategy for applying it. The following five steps will lead you and your buyer-clients through the process of transforming information into knowledge and power in order to negotiate a successful outcome.

1. Assess the strength of your buyer-client’s negotiating position
2. Identify your buyer-client’s objectives
3. Plan a negotiation strategy
4. Assess the big picture
5. Follow through

Assess the strength of your buyer-client’s negotiating position

If you understand that negotiating power ultimately derives from information, it only makes sense that the first step in creating a successful negotiating strategy is to assess your buyer-client’s negotiating position. This step involves collecting and evaluating information from different sources, such as general market conditions, property selection, the buyer’s financial strength, and the seller’s situation.

▶ ***General market conditions***

The housing market has major influence on how you negotiate. Examine the factors that influence market conditions such as the seasonal cycle, interest rates, national and local economy, unemployment levels, and inflation. In general, a strong economy strengthens a seller’s negotiating position. High interest rates generally mean fewer buyers, but a better negotiating position for them. Low interest rates attract more buyers, strengthening the seller’s negotiating position.

▶ ***Property selection***

The principle of supply and demand has a strong influence on the strength of your buyer-client’s negotiating position. The seller’s representative, as well as the buyer’s representative, can manipulate this by trying to differentiate the property or including it in the mix of properties. A small supply of appropriate and similar properties in a search area weakens a buyer’s leverage, particularly if the seller knows that the supply of appropriate properties is limited. New construction in the area may drive potential buyers away from existing properties, weakening the negotiating position for sellers of existing properties.

▶ ***Buyer's financial strength***

A buyer-client's financial strength impacts the negotiation position. A strong financial situation favors a buyer-client. In general, the more financially strong your buyer-clients are, the more attractive their offers will be. For example, with a low risk of a deal falling through due to financial problems, the seller may accept a lower price. A problematic financial situation creates a weaker negotiating position for your buyer-clients. Sellers are less likely to negotiate price with buyers who may need financial concessions. Of course, not all buyer-clients come ready to flex their fiscal muscles. There are some steps even buyers with a weak financial situation can take to strengthen offers, such as a loan pre-approval or a large down payment.

▶ ***Seller's situation***

The seller's situation impacts your buyer-client's negotiating position. For example, a seller who will only sell at top dollar weakens a buyer-client's negotiating leverage. Learn as much as you can about the sellers in order to better understand their negotiation strengths and weaknesses. Simple human nature can also be a factor. As a rule of thumb, the more compatible your buyer-client is with the seller, the better the negotiating position. Some of the intangible factors that affect the relationship between the buyer and seller may also affect your relationship with seller's representative. However, it would be unprofessional to allow your personal feelings about the seller and the seller's representative, negative or positive, affect your client's negotiating position.

Skill Builder Tip 24: How much did the seller pay?

Try to find out how much the sellers paid for the property. This will give an indication of how much leeway the seller may have in terms of not taking a loss. If a seller paid close to the current list price, there may not be much room for negotiating price.

Market	Property	Buyer Finances	Seller
<p>Buyer Advantages:</p> <ul style="list-style-type: none"> ▪ Buyers' market with many affordable properties available ▪ Low point of seasonal cycle ▪ Weakening economy ▪ High interest rates generally mean fewer buyers and a better negotiating position for them <p>Buyer Disadvantages:</p> <ul style="list-style-type: none"> ▪ Sellers' market with few affordable properties available ▪ High point of seasonal cycle ▪ Strengthening economy ▪ Low interest rates attract more buyers and strengthens the seller's position 	<p>Buyer Advantages:</p> <ul style="list-style-type: none"> ▪ Many similar properties in the area and on the market ▪ New home construction weakens seller's position on existing homes ▪ Long time on market ▪ Property needs repairs or remodeling <p>Buyer Disadvantages:</p> <ul style="list-style-type: none"> ▪ Few similar properties in the area and on the market ▪ Unique property ▪ Limited new construction increases competition for existing homes ▪ Pending offers ▪ Rapid property value appreciation 	<p>Buyer Advantages:</p> <ul style="list-style-type: none"> ▪ Large down payment ▪ High income in relation to mortgage payment ▪ Favorable credit history ▪ No current home to sell ▪ Pre-qualified and pre-approved for financing <p>Buyer Disadvantages:</p> <ul style="list-style-type: none"> ▪ Low cash reserves ▪ Low income ▪ History of credit problems ▪ Borderline position for financing ▪ Will need seller financing or cost-sharing 	<p>Buyer Advantages:</p> <ul style="list-style-type: none"> ▪ Personal rapport with seller ▪ Agreement on terms and occupancy dates ▪ Seller highly motivated ▪ Few contingencies <p>Buyer Disadvantages:</p> <ul style="list-style-type: none"> ▪ Personality clash with seller ▪ Personal issues with seller's representative ▪ Many contingencies ▪ Seller in no hurry to sell, can wait for right offer ▪ Low equity in property
<p>Questions to ask:</p> <ul style="list-style-type: none"> ▪ Is it a buyers' or sellers' market? ▪ Is it the high or low point of a seasonal cycle? ▪ How high are interest rates? ▪ What are general economic conditions nationally, locally (employment, inflation, interest rates)? ▪ What is an acceptable tradeoff between high or low interest rates and strength of negotiation position? 	<p>Questions to ask:</p> <ul style="list-style-type: none"> ▪ How does the property compare to similar ones in the area? ▪ How long has it been on the market? ▪ Have there been offers that fell through? ▪ Are there offers pending? ▪ Does the property need repair or remodeling? 	<p>Questions to ask:</p> <ul style="list-style-type: none"> ▪ Is the buyer eligible for FHA, VA, or financing assistance? ▪ Must the seller provide financing or share closing costs? ▪ Can the buyer's credit history be improved? ▪ Must the buyers sell their current home before closing on the new one? 	<p>Questions to ask:</p> <ul style="list-style-type: none"> ▪ What are the seller's motivations and objectives? ▪ Why is the property being sold? ▪ What is the seller's experience with real estate transactions? ▪ How important are the contingencies?
<p>Increase buyer advantage by:</p> <ul style="list-style-type: none"> ▪ Taking advantage of favorable interest rates ▪ Timing the purchase with the seasonal cycle and/or favorable market conditions 	<p>Increase buyer advantage by:</p> <ul style="list-style-type: none"> ▪ Recommending that buyers widen the search area or re-evaluate their needs and wants 	<p>Increase buyer advantage by:</p> <ul style="list-style-type: none"> ▪ Recommending mortgage pre-approval and minimizing contract contingencies ▪ Paying off credit card balances and other loan commitments 	<p>Increase buyer advantage by:</p> <ul style="list-style-type: none"> ▪ Building personal rapport with the seller ▪ Disallowing personal issues with the seller or seller's agent to impact negotiations

Strategies for Buyers' or Sellers' Markets

- ▶ Sellers' market
 - Obtain a mortgage commitment pre-approval before making an offer
 - Offer the list price or more
 - Make the first offer the best offer as there may not be a counteroffer or another opportunity
 - Keep contingencies to the minimum and do not ask the seller to pay closing costs or provide financing
 - Pay cash for all or the majority of the purchase

- ▶ Buyers' market
 - Keep up-to-date on price adjustments
 - Shop around for good mortgage terms
 - Request contingencies
 - Ask the seller to assume some of the closing costs or fees
 - Shorten the time period for the seller's acceptance
 - Request extras like a home warranty
 - All cash or pre-approved mortgage commitment provides even more leverage than in a sellers' market

Identify the Buyer's Objectives

A negotiating strategy should be based on the buyer-client's objectives. Identify these objectives early on, during the initial counseling session, but reassess them regularly in the negotiation process because they may change in the give-and-take of offer and counteroffer. Identify and monitor the buyer's primary objective and secondary objectives and assess their relative importance. Ask questions like:

- Is the lowest price still most important?
- Have circumstances changed to make a specific closing date imperative?
- At what point would you "walk away from" the negotiations and what would compel you to do so?
- How important is it to include items such as the ceiling fan, appliances, and other personal property in the purchase contract?

Identify points of agreement and differences between your buyer-client and the seller. Focus the negotiations on areas of disagreement and concentrate on resolving those issues.

Plan a Negotiation Strategy

Review the strengths and weaknesses of the negotiating position with your buyer-client so that the strengths can be emphasized. Discussing these strengths help you articulate the buyer's negotiating position and rationale. Given your buyer-client's primary objectives, negotiating rationale, and all other information, establish the overall strategy starting with the initial offering price and terms, and include the acceptable price and terms as the ultimate goal.

The key to a successful negotiation is the ability to see and understand your buyer-client's and the other party's positions. Only with this perspective can a win-win result be achieved. Make sure your buyer-clients understand this. Less successful and desirable, though sometimes achievable, is when both parties make concessions that may be too great to be considered win-win. Keep in mind that the essence of negotiation is agreement not competition or combat. The goal of a negotiation process is to reach agreement, not to grind the opponent into the ground.

Assess the Big Picture

The next stage is to take a step back and review the overall picture of the negotiation. Provide your buyer-client with any information that may be helpful for making informed decisions as you progress together through the negotiating process.

- Plan logically and rationally, understanding that responses may sometimes be illogical and irrational.
- Review the seller's listing price and terms with your buyer-client and any other information about the seller that may impact the negotiations.
- Review an up-to-date CMA so that your buyer-client has an informed frame of reference.
- Review the buyer's needs, wants, and level of affordability.

Skill Builder Tip 25: Tips for better negotiations²⁵

- Be prepared.
- Present a united front
- Do not let your personal opinion of the parties cloud your judgment
- Plan concessions in advance
- Do not bog down on a minor point, put it aside and discuss it later
- Get all the decision makers together
- Avoid distractions
- Do not share information unnecessarily
- Just keep quiet
- Successful negotiation is reaching agreement, not grinding the opponent into the ground

Follow-Through

Be ready to implement the rest of your negotiating strategy when the seller makes a counteroffer. Keep the negotiating process at a professional level. You will harm your buyer-client's negotiating position if the process becomes "personal." Though most concessions are often made at the end of negotiations, and patience achieves the best outcome, caution your buyer-clients that the longer the term of the negotiations, the greater the risk that a competing buyer will make an offer, perhaps one that is more attractive.

Six Top Seller Concessions²⁶

1. Letting the buyer move in quickly
2. Helping with financing
3. Letting the buyers rent with an option to buy
4. Permitting certain contingencies
5. Paying closing costs that are usually paid by the buyer
6. Paying for improvements such as exterior painting

²⁵ "Sales Meeting Tool Kit: Negotiating Resolvable Differences," *REALTOR® Magazine Online*, www.realtor.org

²⁶ "Counteroffers: What Sellers Need to Know" by Julie Garton-Good, *Real Estate Update*, December 2000

Exercise: Creating an Offer

1. Buyer may lose the property if first offer is too low

When showing a hot new listing to buyer-clients, the buyer's representative mentions that a below-asking-price offer may cause the buyers to lose the property. The buyers would like to offer a low price, but they do not want to lose the opportunity to purchase the property. If necessary, they would be willing to pay slightly more than the list price.

2. Buyer likes three different properties

Your buyer-clients like three properties all of which meet their needs. Although they have a first, second, and third preference, their preferences are not strong. They say they will probably select the one that can be purchased for the lowest purchase price. The buyers are relocating and must find a home quickly.

3. A cash-poor buyer loves a house priced higher than the CMA

Your buyer-clients fell in love with a property priced at \$189,000, but the appraisal value is \$187,000. You learn that the sellers want a quick settlement because they purchased the property to fix up and resell it and every day it remains unsold, they accrue additional interest on their loan. The sellers say they have \$191,000 in the property and cannot take a penny less than the appraised price for the property. The buyers cannot offer more than \$181,000, because they do not have a lot of cash and will need it for the down payment and closing costs.

4. Buyer would like to make an offer on an overpriced property

Your buyer-client made an offer of \$225,000 for a condo. The sellers have yet to respond. The CMA shows that the average sales price of similar condos in the building is \$220,000. The listing agent calls you and says, "Oh, by the way, I just wanted to tell you that two other offers have come in. One is for the full asking price and the other is more than full asking price. Another offer is supposedly on the way. I just thought you should know." What would you suggest to give your client's offer the best chance of being accepted?

7. Building Your Buyer Representation Business

In this chapter

- ▶ Developing a personal marketing plan
- ▶ Finding qualified buyers
- ▶ Reaching out to potential buyers
- ▶ Using your ABR[®] as a marketing edge

Developing a Personal Marketing Plan

The strategies used to build your buyer representation business are similar to those you might use to build your listing business, but the focus is on the buyer instead of the seller. A personal marketing plan will help you concentrate on buyers' needs, rather than sellers' needs, find buyers, and win them as clients.

Skill Builder Tip 26: Eight steps for designing a personal marketing plan

1. Define the objectives and goals
2. Focus on a specific audience
3. Differentiate
4. Refine the message
5. Determine the best media
6. Create an action plan and schedule
7. Prepare a detailed budget
8. Implement the plan and measure the results

The following article presents a simple process for developing a marketing plan. As you strategize how you will build your buyer agency business, consult with your broker on how the firm's marketing campaigns and your personal efforts can best work together. Also, read "Boosting Profits with a Marketing Makeover" on page 177 in the reference section of this manual.

8-Step Personal Marketing Plan²⁷

Personal marketing is the process of getting your name out there and convincing people to contact you when they need real estate services. A polished and thorough personal marketing plan will keep you motivated and help you reach your business goals. This essential document should include a detailed budget, your target audience, marketing and advertising plans, and other activities that will help you rise above the competition in your market.

Sound overwhelming? It's not. Just follow this 8-step plan and you'll be on your way to success.

1. Define Your Objectives and Goals.

First develop a big-picture vision for your business — become the top producer in your area, retire in 10 years, or whatever else you hope to accomplish. Then quantify that vision with measurable goals. Measurable goals might include:

- Obtaining 50 listings in the next year.
- Achieving a 60 percent name recognition in your target market area.
- Receiving referrals from 75 percent of your past customers or sphere of influence.
- Securing a 20 percent share of the market in your target area.

TIP: Determine your market share by dividing the number of sales you made by the total number of annual sales in your target market. The result is your percentage share of the market.

2. Target a Specific Audience.

Select one or two groups to target with your marketing efforts. Analyze the characteristics of your best prospects; other groups with similar qualities may be the best place to start. Characteristics might be:

- Income brackets
- Age groups
- Geographic areas
- Ethnic or cultural groups
- Levels of education or certain professions
- Lifestyles, such as golfers buying second homes

Market conditions also play a role in the marketing plan. A strong seller's market may require a plan that focuses on why a real estate professional is needed in the transaction. A weak economy might suggest highlighting your ability to help with financing as part of your marketing approach.

TIP: Be sure that your defined audiences are large enough to generate the number of sales and listings you want.

3. Differentiation.

What makes you unique? Setting yourself apart from other salespeople is essential in a crowded marketplace. Remember, customers chose products and services based on the benefits they deliver.

Consider your own strengths and weakness, and focus on the qualities and skills that make you special to potential customers.

Possible points of differentiation are:

- Education — law degree, CPA, etc. (Benefit: Knowledge of legal and financial issues transaction can make the process easier)
- Residency in the neighborhood you represent (Benefit: Knowledge of available services, activities, and interests of perspective neighbors)
- A leadership role in a community or professional group (Benefit: First access to new ideas in the industry and sources of solutions to problems via networking)
- A natural affinity for a certain group — seniors, for example (Benefit: A special understanding of the needs and desires of that group)

²⁷ Reprinted from *REALTOR® Magazine* with permission of the NATIONAL ASSOCIATION OF REALTORS®. Copyright 2005. All rights reserved. www.realtor.org.

7. Building Your Buyer Representation Business

4. Refine Your Message.

Select a message and sales approach that will grab the attention of the people you want to target. The message should highlight what makes you different from your competitors and have an emotional appeal to your target market. An emotional appeal speaks to what people want — security, a sense of family, financial security — and focuses on their needs and desires. You will probably think of many things you'd like to communicate, but try to focus on two or three key elements that are important to your niche. Too much information can be overwhelming.

TIP: Express your message in language that your target audience uses. For example, don't use current slang to sound cool when your audience is 40-something, move-up buyers.

5. Determine the Best Media.

Select two or three media to convey your message and allow for cross marketing among several different sources. Media choices include print advertising, online advertising, billboards, bus benches, in-person marketing, and more.

TIP: Match your media choices to your target market. Your media choices should reflect the interests, habits, and needs of your prospects.

6. Create Your Action Plan and a Schedule.

An action plan is a to-do list for a set period that lists every activity you need to do to market yourself and your services. Consistency is a key component to successful marketing. Advertising experts say that people must hear a message 11 times before they remember it. Make a commitment to use one marketing approach for at least six months, and budget accordingly.

TIP: Don't change your marketing message because you're bored; you have heard it many more times than the average prospect. Repetition is what builds recognition.

7. Prepare a Detailed Budget.

The most challenging aspect of creating a personal marketing budget is estimating costs. Rather than guessing, call your suppliers and service providers, tell them you're preparing a budget, and ask them to provide estimates of the price you can expect to pay for each item. Ask your suppliers about quantity discounts and other ways to cut costs. The total cost for your personal marketing effort will depend on the size of your target market and the media you choose.

TIP: The cost per item of printing 2,000 brochures at one time is less than the cost of printing two groups of 1,000 brochures each. Take advantage of these marginal savings if you can. But be sure you have a specific use in mind for the extra 1,000 brochures, or you are just wasting your money.

8. Measure your results.

Are you achieving the goals you set forth in your plan? You'll never know if you don't measure. Always ask callers where they heard about you, and keep track of their responses. Use small letter codes of direct mail to identify each piece for easier tracking. Analyze the results of your measurement and use your conclusions to update, revise, and improve your personal marketing campaign. Don't continue to spend money on something that isn't working. As you measure results, keep track of your costs. One way to do this is by calculating the cost per contact. If you mailed out 500 brochures at a cost of \$2,500 and received 10 inquiry calls, your cost per contact is \$250.

Set up a separate savings account for your marketing funds so you won't be tempted to dip into them for other expenses. Typically, you should allocate 10 percent of your funds for personal marketing, 30 percent to reach new prospects that fit your customer profile, and 60 percent for repeat business, according to marketing guru Jay Conrad Levinson, author of *Mastering Guerilla Marketing*.

Tip: The surest way to build a war chest for personal marketing is to set aside a certain percentage of your income on a regular basis. Real estate columnist Ralph Roberts recommends reserving 10 percent of every commission check for personal promotion. If your income is already well into six-figure territory, you might be able to shave off a few points.

Finding Qualified Buyers

You may have mined these groups in the past with the goal of finding listings and seller-clients. If you look at them again with a different viewpoint and the goal of winning buyer-clients, you will discover a new perspective. All of the following are great opportunities to promote your services as a buyer's representative.

People you know	Referrals	Events you attend or host	Marketing media	Interviews
<ul style="list-style-type: none">▪ Past customers▪ Past clients▪ Tenants	<ul style="list-style-type: none">▪ Friends and relatives▪ Past clients or customers▪ Other professionals such as, attorneys, and accountants	<ul style="list-style-type: none">▪ Open houses▪ Presentations to civic groups▪ Trade shows▪ Community events▪ Home buyer seminars	<ul style="list-style-type: none">▪ Direct mail post cards▪ Promotional items▪ Print media▪ Advertorials▪ Radio▪ TV▪ Billboards▪ Kiosks in shopping malls▪ Farming efforts▪ Web sites▪ Publicity	<ul style="list-style-type: none">▪ Radio▪ TV▪ Newspapers▪ Magazines▪ Podcasts
People you do not know	<ul style="list-style-type: none">▪ Brokerage companies not offering buyer representation▪ Brokerage companies of buyer-clients who will not agree to dual representation▪ Property management companies			Other real estate opportunities <ul style="list-style-type: none">▪ FSBOs▪ For Sale signs▪ Expired listings
<ul style="list-style-type: none">▪ Relocations▪ Call-ins▪ Walk-ins				

Segmenting your market

Segmenting your market will help you strategize the best ways to meet and communicate with potential clients. For example, first-time home buyers are usually apartment renters before they become home owners; flyers placed in a nearby laundromat may be an effective way to reach this market. Ways to segment your market include: geographically, by type of property, by price range, by profession of buyer, by first-time versus repeat buyer, "upsizers" versus "downsizers," and the like. However, be careful to avoid segmenting a market in a way that results intentionally or inadvertently in discriminatory practices.

Reaching Out to Potential Clients

You have identified and located potential buyers. Now you have to win them as clients. How?

Survey data show that about half of buyers are referred by a friend, neighbor, or relative, or used the agent previously. Those survey results reinforce the importance of building a client-base and maintaining communications; as the old saying goes, "out of sight, out of mind." On the other hand, almost half of all buyers had no prior contact with their agents. According to *The 2006 NAR Profile of Home Buyers and Sellers*, buyers' sources for finding sales agents were as follows:

How Buyers Found Real Estate Agent			
	All Buyers	First-time Buyers	Repeat Buyers
Referred by (or is) a friend, neighbor, or relative	40%	49%	35%
Used agent previously to buy or sell a home	13	2	19
Internet Web site	7	8	7
Visited an open house and met agent	7	6	7
Saw contact information on For Sale sign	7	8	6
Referred by another real estate agent/broker	5	6	5
Walked into or called office and agent was on duty	4	4	4
Referred through employer or relocation company	4	2	5
Personal contact by agent (telephone, e-mail, etc.)	3	3	3
Newspaper, Yellow Pages, or home book ad	2	2	1
Direct Mail (newsletter, flyer, postcard, etc.)	*	*	*
Advertising specialty	*	1	*
Other	7	8	6

* Less than one percent

The good news for real estate professionals is that this study found very high levels of satisfaction with the skills of real estate agents and two-thirds of buyers would recommend or use the real estate agent again; however, only nineteen percent did in fact use the same agent.

7. Building Your Buyer Representation Business

Information Sources Used in Home Search

	All Buyers	First-time Buyers	Repeat Buyers
Real estate agent	85%	84%	85%
Internet	80	83	78
Yard Sign	63	63	62
Print newspaper or advertisement	55	54	56
Open House	47	44	49
Home book or magazine	34	34	33
Home builder or their agent	26	19	30
Television	11	13	10
Billboard	9	9	8
Relocation company	5	4	6

Usefulness of Information Sources

	Very Useful	Somewhat Useful	Not Useful
Real estate agent	73%	25%	2%
Internet	69	20	11
Yard Sign	31	40	30
Open House	22	30	48
Print newspaper or advertisement	20	37	43
Home builder	15	17	68
Home book or magazine	11	24	65
Billboard	3	9	88
Television	3	13	85
Relocation company	2	7	91

Develop a presentation package

How much time do you spend developing a listing presentation for a seller compared to time spent developing a presentation for a buyer? The time invested should be similar. Obviously, the presentation packet should focus on services you can offer to buyers.

Author articles for newspapers and magazines

Writing articles for newspapers and magazines not only increases exposure to potential clients but also bestows upon you some authority. Include a bio and contact information with each article. Consider purchasing newspaper or magazine space to publish an advertorial, an article in the form of a paid advertisement, in local news media. The article can focus on aspects of the home buying process, local market conditions, home inspections, and similar topics.

Create a newsletter

Send out both a print and an Internet/e-mail version of a newsletter you create. It is becoming increasingly important to reach out to buyers over the Internet as they rank it almost equal with real estate agents as a source of home buying information. However, be careful not to abuse this communication channel and cross the line into spamming (sending out unsolicited e-mail advertisements). You must comply with both federal and state e-mail laws and regulations.

Consult with a publicist

A public relations specialist can help you focus your message to capture a large, interested audience.

Conduct telemarketing

Who in your farm area might be most interested in buying a home? A telephone call may be the best way to make contact. Be sure your telemarketing efforts comply with Do-Not-Call and Fax laws.

Market to new and relocating companies

Is a company relocating to your area or is there a company expanding or starting up? When companies expand or start up they often relocate and recruit employees from other locations; these new and relocated employees can benefit from buyer representation services. Contact the company's human resource manager and offer to conduct a home buyer seminar for employees; home ownership goes hand in hand with a stable workforce and an information seminar is a free benefit companies can offer to employees. Enhance your credibility by teaming up with a local mortgage lender, as a sponsor or co-presenter.

Develop relationships with property management firms

Property managers have valuable information, such as when leases come up for renewal and which of their tenants have the best potential to become buyer-clients.

SUCCESSFUL HOMEBUYERS SEMINAR

INTRODUCTIONROADMAPPLANNINGPRESENTATIONFOLLOW UPRESOURCES



Brought to you by
The Real Estate
BUYER'S AGENT
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Chicago, Illinois 60611
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312-329-8656
Fax: 312-329-8642
REBAC@realtors.org



ROADMAP

The Roadmap provides an "at-a-glance" view of the steps to planning a successful homebuyers seminar.

Click on these road map markers for more information.



- 1 Find your audience
- 2 Find sponsors and partners
- 3 Choose a date and location
- 4 Follow this preparation checklist
- 5 Promote the seminar
- 6 Plan the program agenda
- 7 Customize the PowerPoint present
- 8 Plan a "take away" for participant
- 9 Plan a follow up to win clients
- 10 Practice makes perfect!
- 11 **SHOWTIME!**
- 12 Evaluate and improve

[^ Back to top ^](#)

Present home buying seminars

Home buyers seminars are great opportunities to make a strong impression in front of motivated audiences. REBAC members can go to www.rebac.net to download and print a free 48-page guide to conducting home buyers seminars as well as tap into many other sources of authoritative home buying information

Ramp Up Your Web Site

According to *The 2006 NAR Profile of Home Buyers and Sellers*, seventy-seven percent of home buyers used the Internet as an information source and fifteen percent found their home on the Internet. During the last decade, the percentage of buyers who found their homes on the Internet has steadily increased. The good news for buyer's representatives is that home buyers who searched the Internet were likely to use a real estate agent to complete the home search and close the transaction. For tips on improving your Web site refer to The New "Internet Interview" on page 173 in the Reference Section of this manual.

Where Buyer Found the Home They Purchased, 1997 – 2006²⁸

	1997	1999	2001	2003	2004	2005	2006
Real estate agent	50%	49%	48%	41%	38%	36%	36%
Internet	2	4	8	11	15	24	24
Yard Sign	17	15	15	16	16	15	15
Friend, neighbor, relative	9	8	8	7	7	7	8
Home builder or their agent	3	4	3	7	7	7	8
Print newspaper or advertisement	8	8	7	7	5	5	5
Directly from seller/Knew the seller	4	3	4	4	5	3	3
Home book or magazine	3	3	2	1	2	1	1
Other	*	4	3	6	4	*	*

* less than one percent

What Home Buyers Were Looking For Online

	All Buyers	First-time Buyers	Repeat Buyers
Properties for Sale	96%	97%	95%
General Information about area	21	19	22
A real estate company	3	3	3
A real estate agent	3	3	3

²⁸ 2006 Profile of Home Buyers and Sellers, NATIONAL ASSOCIATION OF REALTORS®

Use your ABR® as a Marketing Edge

In addition to being a consumer- and industry-recognized designation and “the benchmark of excellence in buyer representation,” the ABR® designation is a valuable business-building resource. After completing the educational and experiential requirements, you can take full advantage of the power and prestige of the ABR® designation. Emphasize that your education is focused on representing buyers. Explain that as an ABR® designee you have met educational and experiential requirements to earn this nationally recognized designation. In a world of specialization, the ABR® is unique because it is specifically focused on serving the needs of the buyers.

Marketing Support for REBAC Members

REBAC conducts a national advertising and publicity campaign to support the individual marketing efforts of its members.


REBAC national consumer marketing

- ▶ National advertising campaign promoting the ABR® and ABRMSM designations
- ▶ National press coverage in publications such as the *Wall Street Journal* and *USA Today*, plus 1500 daily newspapers and 8500 suburban weeklies
- ▶ More than 300 nationally broadcast radio commercials

Marketing tools for the buyer’s representative


REBAC also provides tools that can be customized to promote your own buyer representation business. Through its Web site, www.REBAC.net, members can obtain customizable promotional materials such as:

- ▶ Postcards
- ▶ Ad slicks
- ▶ Press releases
- ▶ Logos and stickers
- ▶ Your own home page with your own URL – www.rebac.net\Your name
- ▶ Home Buyer’s Toolkit, an information packed, 39-page guide to buying a home, including worksheets and checklists, that leads buyers through the transaction. More than fifty consumers contact REBAC every day to request a copy of this booklet.



**Turn real estate
into leisure.**

Make the right move with an Accredited Buyer's Representative.



ABR® designees can download customizable four-color postcards and ad slicks at www.rebac.net.



**Take the leap
into your own home.**

Make the right move with an Accredited Buyer's Representative.



**Synchronize career
with real estate.**

Make the right move with an Accredited Buyer's Representative.



**Turn real estate
into growth strategy.**

Make the right move with an Accredited Buyer's Representative.



**Turn real estate
into a happy home.**

Make the right move with an Accredited Buyer's Representative.



Find a Buyer's Representative Referral Network

REBAC maintains an online database of its members. Through this searchable database, consumers can find a buyer's representative in a specific city, county, zip code, or neighborhood, or search by agent name. Consumers can choose to limit the search to buyer's representatives who have the ABR® designation.

The screenshot shows the REBAC website's search interface. At the top, there is a navigation menu with links: FIND A BUYER'S REP, REBAC HOME, SITE MAP, ABOUT REBAC, CONTACT US, REBAC HALL OF FAME, and TERMS OF USE. The REBAC logo is prominently displayed on the right, with the text "Real Estate BUYER'S AGENT C of the NATIONAL ASSOCIATION OF RE" and the phone number "1-800-648-6224 or (312) 329-4656". Below the navigation is a search bar with three buttons: "National Search" (highlighted in blue), "International Search", and "Quick Link Search".

The main content area is titled "Locate a Buyer's Rep in the United States." and includes a brief description of REBAC. The search process is divided into three steps:

- Step 1: Complete Required Search Fields**
 - State: [Make a Selection] (dropdown menu)
 - AND/OR --
 - Last Name: [] (text input field)
- Step 2: Select the geographic data for the area you wish to search - CHOOSE ONLY ONE**

Dropdown menus are based on United States Postal Service information and the areas that REBAC members have selected as their market areas. Some areas may not be listed. One selection in this step is required if no Last Name is specified in the step above.

 - City: [Not Applicable] (dropdown menu)
 - County: [Not Applicable] (dropdown menu)
 - Zip Code: [Not Applicable] (dropdown menu) [Find Zip Code](#)
- Step 3: Select Optional Search Fields**

You may refine your search by filling in any or all of these optional fields.

 - Neighborhood: [Not Applicable] (dropdown menu)
 - Search for [ABRs](#): Find ABRs Only

At the bottom of the search area, there are two buttons: "Find a Buyer's Rep" and "Reset Search Criteria".

Next Steps

Congratulations on completing the first step to achieve the Accredited Buyer's Representative designation. Before leaving the classroom, take a few minutes to plan how you will complete the remaining requirements to achieve the designation. You have up to three years to complete the education and experiential designation requirements but the sooner you achieve the designation the sooner you can put its power to work for you.

Complete one ABR® Designation elective course

- Successful Buyer Representation in New-Home Sales 
- Successful Relocation Representation 
- e-Buyer 
- Innovative Marketing for Buyer's Reps 
- Foreclosure Opportunities for Buyer-clients
- International Real Estate for Local Markets 
- e-PRO 
- Creating Wealth through Residential Real Estate Investment (CRS)
- Effective Negotiating for Real Estate Professionals (WCR)
- Harnessing the Power: Skills Based Performance Management (WCR)
- Land 101: Fundamentals of Real Estate Brokerages (RLI) 
- Resort and Second Home Markets 

 = **Course available online**

For course dates and locations go to www.CourseCalendar.com. Many of the elective courses are offered online.

Document five transactions

Document five completed transactions in which you acted as a buyer's representative. Any transactions closed before completing the course can count toward earning the designation.

Maintain REBAC membership

By completing this course, you receive a one-year membership in the Real Estate BUYER'S AGENT Council. Maintain this membership to earn and keep the ABR® designation and continue to take advantage of REBAC member benefits.

Tools

- ABR® Designation Application (page 166)
- Understanding the Buyer's Representation Agreement (page 167)
- Frequently Asked Questions about the Do-Not-Call Registry (page 170)
- The New "Internet Interview" (page 173)
- Making Prudent Referrals to Experts (page 175)
- Boosting Profits with a Marketing Makeover (page 177)
- Presenting and Negotiating Multiple Offers - White Paper (page 178)
- Spell Out Your Search Terms (page 180)
- Lessons Learned at the REBAC Newly Buyer Game (page 181)
- The Essence of Negotiations (page 184)

Accredited Buyer's Representative

ABR® Designation Application

Understanding the Buyer's Representation Agreement

Your office policy will dictate the provisions in its buyer representation agreement. Understand your company's buyer representation agreement, and know the scope of services you can provide. To protect the broker, work within the parameters of the agreement. Lawsuits often occur when consumer and client expectations are not met. The best ways to ensure that you meet those expectations is to define at the beginning what buyers should expect. That's what the buyer representation agreement does.

Common Provisions in a Buyer's Representation Agreement

Since it's in your best interest to work within the parameters of the buyer representation agreement, it's also best to agree on terms with the buyer-client that are broad enough to cover many situations and conditions. For instance, the description of the buyer's desired property should be more general than precise. Likewise, price, if it is addressed in the agreement, should be defined in a range, not an exact amount. It should be broad enough to include all properties the buyer-client is qualified to see or may want to see. Other provisions covered in a buyer representation agreement include:

Property Type/Description

Is the buyer-client looking to purchase residential, commercial or rental property or land?

Example of Description of Property Sought:

Buyer-client wishes to purchase Real Property, which may include a lot and residence to be constructed, as follows:

- A. Approximate Price Range: \$ _____ to \$ _____
- B. General Description: _____
- C. Preferred Location(s): _____
- D. Preferred Terms: _____

Scope of Work

What is the range of duties and tasks you are agreeing to perform? And what is expected of the buyer-client?

Exclusive or Non-exclusive

This will vary by state and company policy, but generally an exclusive agreement is much preferred to a non-exclusive or "open" agreement.

Example of Exclusive Agreement:

Buyer-client hereby grants _____ (Buyer Rep) the sole and exclusive right during the duration of this agreement to assist buyer-client in locating for purchase acceptable real estate ("Real Property") as indicated by Buyer signing an offer to purchase that is accepted by a seller. Other duties and responsibilities as defined by law.

Duration of Relationship

How long will the buyer be your client? Factors that may influence this include your marketplace, desired property type, buyer needs, etc. Company policy should be observed if it addresses this issue.

Example of Duration of Representation:

This agreement shall commence on _____ and shall continue through _____.

Payment for Services Performed by Others

How you will be reimbursed for expenses and for the payment of services performed by others on behalf of your buyer-client.

Example of Payment of Charges for Services Performed by Others:

The Buyer shall be responsible to pay immediately expenses/charges for services from outside sources. (Examples: roof or mechanical inspections, pest inspections, surveys, title reports, etc.)

Consent to Show Properties to Other Buyers

State regulations may affect this, but generally such a provision allows for both you and your company to show the same property to other buyers.

Example of Consent to Show Properties to Other Buyers:

Other potential buyers may be interested in the same properties as the buyer-client. It is agreed that Designated Agent may represent those buyers, whether such representation arises prior to, during, or after the end of this Agreement. In such a situation, the Designated Agent will not disclose to either buyer the terms of the other's offer.

Potential of a Disclosed Dual Agency Situation

The buyer-client may want to be shown Real Property which is listed by the Broker. In that event, the Broker will undertake a dual representation (represent both the seller and the buyer in the sale of Real Property). Representing more than one party in a transaction may present a conflict of interest since both clients (buyer and seller) may rely upon the Broker's advice and the clients' respective interests may be adverse to each other. The Broker will endeavor to be impartial between both parties and will not represent the interest of either party to the exclusion or detriment of the other party. The Broker will act as a dual agent only with the written consent of ALL parties in the transaction. Parties are not required to agree. Note: This only affects those in disclosed dual agency states and in companies with office policies that allow disclosed dual agency. If the possibility exists, it should be included in the buyer representation agreement. (Code of Ethics, Article 1, Standards of Practice 1-5 and 1-13).

Non-Discrimination

All federal, state and local fair housing statutes and regulations must be observed. Discrimination is unacceptable under any circumstance.

Miscellaneous

Other items to consider:

- Is the agreement assignable?
- Does the agreement dictate mediation, arbitration, or another way to resolve disputes or will the parties head straight for the courts?
- What is the recourse if a commission dispute or other problem develops?
- Do you begin working with the buyer-client on a short trial-period basis?
- Do you include a provision that allows you or your client to cancel the agreement?

Compensation Provisions

All of scenarios and many others must be discussed — UP FRONT— with your buyer-clients, with solutions agreed to in writing in the buyer representation agreement.

- Under what circumstances will you get paid?
- What if your buyer-client saw the property at an open house with the listing agent, creating a procuring cause question?
- How much will you get paid?
- Who will pay you?
- What if the MLS offer of compensation is more than what your agreement authorizes you to accept, creating an “overage?”
- What if it’s an MLS-entry-only property?
- What if it’s a FSBO or a broker exclusive property, not MLS-listed?
- What if the MLS offer of compensation is less than what is defined in your agreement?
- What if it’s new construction?

Frequently Asked Questions about the Do-Not-Call Registry

As has been widely publicized, the Federal Communications Commission ("FCC") has changed its regulations ("Rules") enacted pursuant to the authority given it by Congress in the Telephone Consumer Protection Act of 1991. The Rules call for the creation of a national do-not-call registry for which consumers can register. The cold-calling activities of real estate professionals after October 1, 2003 will need to comply with the requirements of the new federal do-not-call registry.

NAR has received numerous questions about the Rules, and below is a collection of these questions and answers. Note that these are not intended to be definitive interpretations of the Rules, but rather are based on our best understanding of the FCC's actions. If you are unsure of how the Rules will impact your telemarketing activities, it is recommended that you consult with your attorney before taking any action.

What is the Do-Not-Call Registry and how did it come about?

In December of 2002, the Federal Trade Commission ("FTC") finalized amendments to the Telemarketing Sales Rule ("TSR"). Key among the changes was the development of a national "Do-Not-Call" registry directed at stopping most unwanted interstate telemarketing calls to consumers. The new FTC rules provide consumers with the ability to place their telephone number on the registry. Telemarketers will be prohibited from calling anyone whose name is on the registry unless they meet certain criteria.

In a separate but similar effort, on June 26, 2003, the FCC announced final amendments to its telemarketing rules that would, among other things, prohibit intrastate calls to any person on the National Do-Not-Call registry, in addition to the prohibition against interstate calls established under the FTC rule. This is a significant change and as a result, all real estate professionals making interstate as well as intrastate calls must comply with the requirements of the National Do-Not-Call registry, regardless of state law exemptions.

What if my state has a "do not call" rule that provides an exemption for real estate licensees or other real

estate activity exemption? Does the FCC rule still apply to intrastate calls that are permitted under my state's law?

Yes. The FCC action preempts state law that is less restrictive. A state do not call law that provided an exemption for real estate licensees would be considered less restrictive and therefore preempted, prohibiting real estate professionals in that state from making intrastate calls to persons on the Federal list, notwithstanding the state exemption. It is also important that other exemptions in the state law such as those for existing business relationships and also calling time restrictions be considered when determining compliance requirements, as more restrictive state laws will remain in effect.

It is also important to note that some states continue to maintain their own "do-not-call" lists which are not integrated into the federal list. In those states, real estate professionals who would like to make telephone solicitations will need to consult both the state and federal lists.

How do I get the list and what does it cost?

Telemarketers will be able to access the registry on September 1, 2003. A telemarketer will receive access to the database by registering on the FTC's website. Following registration, the telemarketer will receive a unique account number that they may provide to any telemarketer or service provider that they employ on their behalf. In a real estate brokerage, real estate brokers can register and provide the account number to their agents. This will allow agents within the same brokerage the ability to access the registry under the same registration as the broker. The rules establish a bright line test under which corporate divisions, subsidiaries, and affiliates will be treated as separately for the purposes of gaining for access to the registry. Entities will be considered separate if: 1) they are separately incorporated or for a non-corporate entity such as a partnership, they are a distinct legal entity, and 2) they have different names or market their products under different names.

The list will be sorted by area code and telemarketers will be able to obtain the requested area codes from the FTC. Five area codes will be provided at no charge and additional ones will cost \$56.00 per area code, up to a maximum annual fee of \$15,400 for access to the Entire List. These charges will give the telemarketer access to the area codes they select for

one year. Following the conclusion of the year, the telemarketer will need to renew its subscription for registry, including paying additional subscription fees if it has elected to receive access to more than five (5) area codes.

The FTC will also maintain an Internet page where telemarketers can look up a single number at a time free of charge. Telemarketers can look up to ten (10) numbers at a time.

How often does a business have to check the Registry?

Telemarketers are required to check the Registry at least every thirty one (31) days.

When will the “do-not-call” requirements go into effect?

Enforcement of the Do-Not-Call registry requirements will begin October 1, 2003.

Are there any exemptions to the rule?

Yes. There are few exemptions to the new rules. A telemarketer may call the following:

- Consumers with whom the seller has an existing business relationship. This applies to existing clients and customers and extends for up to 18 months after the end of a transaction. If a consumer makes an inquiry, the telemarketer can call the person for up to three months after the inquiry.
- Persons who have granted prior express permission to call. This permission must be in writing.

In addition, the rules do not apply to the following entities

- Charities and tax -exempt nonprofit organizations
- Political campaigns
- Callers taking surveys or polls.

Do the new rules apply to calls made to FSBO's?

There are two instances when a real estate professional would call a FSBO seller. The first would be a real estate professional seeking of a FSBO listing, and the second would be a buyer's representative who believes his/her client might be interested in a FSBO property. NAR does not see any problem with a buyer's representative contacting a FSBO owner whose number is listed in the Do-Not-Call registry about a client's potential interest in the property, as this call is not a telephone solicitation by

the buyer's representative. Note that the buyer's representative can only discuss his/her client's interest in the property and not use a purported client's interest as a way to also discuss the possibility of the FSBO owner listing his/her property with the buyer's representative.

However, a real estate professional would be prohibited from initiating a telephone call to a FSBO seller whose number is listed in the Do-Not-Call registry in an attempt to obtain a listing. The rules prohibit anyone from making telephone solicitations to telephone numbers that are registered in the database, and a call initiated to obtain the listing falls within that definition. NAR is seeking clarification from the FCC for calls made to consumers in response to a yard sign or an advertisement in the newspaper that provides a telephone number. Until this clarification is provided, it is advisable to take a conservative approach and check the registry first for the telephone number, and refrain from calling if the number appears on the list.

Can I still call Expired Listings?

The established business relationship exemption permits the listing agent as well as other agents from the same company to contact the seller for up to 18 months after the expiration date. For all other agents, the Registry must be consulted prior to calling. If the seller has placed their number in the Registry, you should refrain from calling them until further clarification is provided by the FCC, unless some other exemption allows them to call the seller (such as an inquiry from the seller). NAR has specifically requested such clarification from the FCC in its "Petition for Reconsideration."

Do the new rules apply to calls made to businesses?

No, the Do-Not-Call Registry is only for residential telephone numbers.

Have the Rules changed the requirements for autodialers and prerecorded message calls to wireless numbers?

The answer is no. Since 1992, it has been a violation of the Telephone Consumer Protection Act to use an autodialer or prerecorded message “to any telephone number assigned to a paging service, cellular telephone service . . . or any service for which the called party is charged.” Due to the fact that land-

based residential telephone numbers are now being converted to wireless numbers (or, "ported"), the FCC has recently created a safe harbor which gives telemarketers who use autodialers or prerecorded messages amnesty from liability under the TCPA where such calls are made to wireless numbers within fifteen (15) days after the numbers are ported. Note the solicitation must otherwise comply with the established "Do-Not-Call" Rules, meaning that the newly ported number is not in the National Registry or on the company's do-not-call list. The FCC has contracted with a private company to create a list of ported numbers. Any telemarketers using autodialers or prerecorded messages will therefore need to check this ported number list prior to making any such calls.

How will these new rules be enforced?

The FTC and FCC are working to develop a Memorandum of Understanding to achieve an efficient enforcement strategy.

The FCC provides for a private right of action. Aggrieved consumers can sue if they receive two calls in violation of the regulations by the same company within a twelve month period.

My state association would like to download the area codes for my state and post those on its website for use by the members. Is this permissible?

No, the Rules make it clear that the only permissible use of the registry is for compliance purposes. It is not permissible to download and distribute the lists to third parties, even if the purpose of the distribution is to help members comply with the Rules.

A consumer calls my office to inquire about a listing. Can I call this consumer to talk about other listings over the next three months, or I am limited to only discussing the property which prompted the consumer's call?

The Rules permit a company to call consumer following an inquiry for three months after the inquiry or until the consumer requests to be placed on the company's do-not-call list. There is no limit on what the company can discuss with the consumer during those three months. Thus, other listings could be discussed with the consumer over the next three months.

A former client calls and tells me a friend of hers would like me to call her to discuss the possibility of

her listing her home with me. Do I have to check the Do-Not-Call registry before making this call?

Yes, you would need to check the Do-Not-Call registry because it is not clear whether this sort of indirect inquiry would qualify as a "customer inquiry" within the Rules. NAR is seeking clarification from the FCC on what exactly constitutes an "inquiry" which would give a telemarketer the ability to call someone, so perhaps following clarification from the FCC, we will be able to better address this question.

Can I call visitors to an open house who provide their phone numbers on a sign-in sheet?

Whether this would qualify as a customer inquiry is not clear from the Rules, and this is another area where NAR is seeking clarification from the FCC. The safest course would be to provide some kind of notice on the sign-in sheet alerting visitors that they are consenting to receive a follow-up call, such as providing space on the sign-in sheet for visitors to include their name, telephone number, and a box next to each line allowing the visitors to check "yes" if they would like to receive a follow-up call.

My company publishes a telephone number with particular listings that interested consumers can call to receive additional information about the property. When the number is called, the system plays a recorded message about the home's features. During the call, the system also captures the telephone number of the caller. Will this type of call be considered an "inquiry" for purposes of the exemption?

The test under the Rules is whether the consumer has a reasonable expectation of receiving a return call. Therefore, in your recorded message to consumers, your company should create such an expectation by informing the consumer that they can expect a return phone call. Offering the consumer the ability to opt out of the return call would be the recommended solution.

What are the fines and are there any safe harbors?

The fine for calling someone whose name appears on the Do-Not-Call Registry is up to \$11,000 per call by the federal government, \$500 for a lawsuit by a state attorney general or a consumer.

There is a "safe harbor" for inadvertent mistakes. To

meet the safe harbor, the entity making the call must demonstrate that:

- It has written procedures to comply with the do not call requirements
- It trains its personnel in those procedures
- It monitors and enforces compliance with these procedures
- It maintain a company specific list of telephone numbers that it may not call
- It accesses the national registry no more than 31 days prior to calling any consumer and maintains records documenting this process
- Any call made in violation of the do not call rules was the result of an error

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The New "Internet Interview"

By Jim Remley

Potential homebuyers who log on to Google, the largest Internet search portal, will find over 355,000,000 Web pages containing something on the topic of real estate. This easy access to information can provide tech-savvy buyer's representatives with both a competitive edge and an incredible challenge.

Consumers sifting through this mountain of available information can become virtual terminators, blasting through Web sites, and essentially destroying this information, at least those who just don't take the time to absorb it. In fact, researchers at Carleton University in Ottawa, Canada claim that people register their likes and dislikes in as little as 1/20th of a second, based on their overall "impression" of a site's home page. Additionally, researchers have discovered that those first emotional impressions trigger a "halo effect," which carries over to cognitive judgments of a Web site's other characteristics, including usability and credibility.

Welcome to the new Internet "interview," where you may be questioned, probed, searched, and discarded without ever knowing that a potential client has even come into contact with you or your company. Like shadowy ghosts, these

anonymous Internet-empowered consumers float above your marketing, assessing every aspect of your business before vanishing into a puff of virtual smoke, never to be seen or heard from again. "It's a constant struggle to move people out from behind a keyboard and through the front door of our offices," says Scot Spalding, managing broker and webmaster at All State Real Estate in Roseburg, Oregon. "We constantly have to improve our site to be competitive."

To ensure that your site will make a strong first impression and stand up against even your toughest competitors, it may be wise to follow these simple guidelines developed by the Stanford Persuasive Technology Lab at Stanford University, based on three years of intensive research and interviews with over 4,500 Internet users.

Research for the Stanford Guidelines also found that it was helpful to design a site that not only looks professional, but is also extremely easy to use. Web site designers sometimes have a tendency to build sites with features that may dazzle high-end users, but can turn off a more typical buyer. The key is to strike a balance between dazzle and usability. It was also recommended that content be updated frequently to maintain the perception that the site is a credible and timely source of information. Special attention should also be paid to avoiding errors of all types, including typographical errors and broken links.

Making Your Site "Flow"

Ideally, you want to create a site that has "flow," a term coined by Dr. Mihaly Csikszentmihalyi in his book with the same title. Andrew King, a respected author and founder of award-winning developer sites agrees. King says Web sites that flow provide "an optimal experience that is intrinsically enjoyable. Responsive, well designed Web sites can induce a flow state in their users." How can you ensure a sense of flow on your Web site? One way may be to follow these simple design tips:

- Design for speed and simplicity: Create web pages that load quickly and easily by using an uncluttered layout. Many agents choose to minimize animation, so not to distract users.

- Make navigation clear: Make it easier for users to find their way around your site by providing various "signposts," such as site maps, drop-down menus, and cues that appear when the user rolls their mouse over a navigation element.

- Accommodate user preferences: Many user-friendly Web sites adapt to their clients' needs and preferences by offering varying download speeds, font sizes, and even multiple languages.

- Match level of technology to user demand: Some technologies may add visual pizzazz to a site, but often get in the way of user goals. Research shows that users don't necessarily want the glitz. Rather, they just want to quickly and easily receive the information they desire.

What Content Matters Most?

Your first step is to ask yourself what buyers are looking for when they visit your site. A 2006 study by the California Association of REALTORS®, titled Internet vs. Traditional Buyer, reported that buyers primarily visit a real estate site to find information on specific homes and to conduct neighborhood research. Because of this, tech-savvy agents make their property search engine easy to find by placing it front-and-center on their home page.

Stanford University Guidelines for Web Site Credibility

(Adapted for Real Estate)

1. Make it easy to verify the accuracy of the information on your site. Build your site credibility by providing third party support (citations, references, source material, and testimonials) for any information presented. Even if people don't follow these links, you've shown confidence in your material. For example, to find reams of information on housing statistics, check out www.realtor.org, www.nahb.com, or www.census.gov.

2. Show that there's a real organization behind your site. Many agents accomplish this by posting a photo of their office location along with driving directions, a map, or even a satellite image of their location. Satellite photos of your office (and your listings) can be found at www.earth.google.com.

3. Highlight your expertise. Wisely, many agents demonstrate their expertise by listing their organizational membership in councils, accreditations, and certification programs, like the ABR®. For instance, linking your site to www.rebac.net can highlight your expertise in buyer representation.

4. Show that you are honest and trustworthy. To convey a sense of top-notch professionalism, many agents use only the best images and text to describe their services. To add high quality images to your site, consider using online digital photography sources such as www.gettyimages.com, www.photos.com, or www.istockphoto.com. In addition, many agents post brief biographies of themselves and each team member.

5. Make it easy to contact you. A simple way to boost your site's credibility is by posting contact information in a prominent position on each page of your site. Also, many communication companies can provide agents with one-stop calling solutions tied to Web platforms, making it even easier for users to find you.

The importance of this strategy is further supported by the 2005 National Association of REALTORS® Profile of Homebuyers and Sellers, which states that the number one item buyers want from a real estate professional is help in finding the right home to purchase. Once buyers land on a company's or agent's Web site, they cite these three items as most important: more (and better) photos or slide shows, more virtual tours, and better directions and maps to the properties.

Adding Blogs and Podcasts

Brad Korn, of the Korn Team in Independence, Missouri, understands what his customers are looking for when they visit his site: market information. This may be one reason why his team sold over twenty million dollars in real estate in 2005. One way Korn delivers high-quality information is through a blog. More than just a static posting of marketing information (like a Web site), a blog offers an interactive exchange of information among all the users. "We use our blog to post information on local real estate issues and to have an open discussion with our clients," says Korn. "We

receive 15 to 20 solid leads a month from our overall Internet strategy.” To start your own blog, at little or no cost, check out www.blogger.com or www.typepad.com. Many agents have found that another new way to deliver market information is through podcasting. A podcast is like a radio broadcast, except that instead of sending your signal through the air waves, you send them through the Internet. Low cost host sites like www.audioblog.com or www.podshowcreator.com allow virtually anyone to record short bursts of market data and then attach a link to a Web site, blog, or in e-mail messages sent to clients so they can listen to the latest market news.

Taking an Integrated Approach

In the end, your Internet and technology strategy may include a myriad of tools – a Web site, a blog, podcasts, e-mail messages, and other tech tools – all designed to support your brand and your business identity. These tools often trigger the first impression a potential client forms of your team, impacting the way you are silently measured against your competitors. Strong agents actively manage their business brand by carefully orchestrating every aspect of their corporate identity, including their Internet strategy. They know that at this very minute, someone, somewhere has just logged on to Google and is looking for their next home, conducting “interviews” to find the buyer’s rep they want to help them find it.

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Making Prudent Referrals to Experts

By Nan Roytberg

Associate Counsel, National Association of REALTORS®

You’re an expert on real estate. But you can’t be an expert on every aspect of real estate. You can’t know whether there’s mold behind the walls, whether the roof will last another ten years, whether the well water is potable. And trying to finesse these questions will quickly get you in big trouble, legal trouble. So just as discretion is the better part of valor, so too is knowing when to say, “I don’t know, but I can give you the names of some experts” is an important part of avoiding legal liability. You also can’t do everything your buyer wants and needs. And as much as you may want to go the extra mile to complete the sale, you can’t promise to paint the house, renovate the kitchen, repair the furnace and provide financing. You can, however, help your buyer find the right people to take on those jobs.

Buyers often expect that you’ll know who to contact to get certain services, and it’s always nice to anticipate their needs by having a written referral list of experts they may need, such as:

- Lenders
- Home inspectors, both general and those who specialize in lead-based paint, radon, termites, mold
- Structural engineers
- Painters, plumbers, electricians and carpenters
- Attorneys
- Insurance providers
- Cleaning services

However, you need to make sure that the people and companies on your list are reputable, so that your referrals don’t come back to haunt you through buyer dissatisfaction or, even worse, a lawsuit.

Cases in Point

One way a licensee can land in court is to recommend only one expert in a specific field who does an inadequate job. In 2000, a brokerage that represented buyers in Kentucky was sued when the pest control company it had recommended failed to perform satisfactorily.

The buyers engaged a particular pest control company, on the recommendation of the broker, to inspect and treat the property for termites prior to the sale. After the closing, the buyers discovered that their home was still infested with termites. They sued everyone involved in the transaction, including the brokerage that represented them and, of course, the pest control company. Fortunately, the broker had protected itself by recommending two other pest control companies to the buyers. The Kentucky appellate court thus affirmed the decision of the trial court that the brokerage's recommendation did not constitute a guarantee of performance. The court held that the buyer brokerage was not liable for the pest control company's failure to provide satisfactory services.

So when making any recommendation, your standard procedure should be to include contact information for at least three suggested experts for each category on your referral list, being careful not to recommend any one expert over the others. Still, you need to go further. Putting three names on a list is not enough to keep you out of trouble. Take the time to find the right names to put on your list. In other words, include only those experts with whom you have had good experiences yourself or who come highly recommended by others you trust.

You should also cover yourself a bit more by placing a clear, conspicuous statement on your referral information that says you are providing the list merely as a service to your buyers. Disclaim liability further by stating on the list that neither you nor your firm is responsible for any referred expert's availability, reliability or performance. Also include a statement attesting to the fact that you do not receive any referral fees or other compensation from the experts on the list. Any lawful affiliations you or your firm may have with any of the suggested individuals or companies need to be disclosed as well.

These are the basics that you should do, but there are some things—things that your buyer-clients might want or expect you to do to help them get that house ready—that you should not do. In a case the California Court of Appeals heard just last year, a home inspector identified a number of repairs for a particular property, including the replacement of a water heater. The broker, who was a disclosed dual agent, went

beyond just referring a handyman to do these repairs. The broker actually selected and retained the handyman, paying him out of the sellers' escrow funds. The handyman replaced the water heater with a natural gas heater instead of one compatible with propane, which was the fuel that fired it. There was a subsequent fire and the buyer's boyfriend suffered lung damage from smoke inhalation. The broker hoped that the "buyer's inspection advisory" and an addendum to the purchase agreement would shield him from liability. The advisory stated that the brokers didn't guarantee the performance of others. The addendum stated that representatives of the broker might provide referrals to "firms dealing in related real estate services such as title insurance, escrow, pest control, geological/physical property inspection, home warranties, etc.," but the use of these firms was at the sole discretion of the buyer and/or seller. The addendum further stated that referrals by the broker did not imply "any specific recommendation, or any warranty of any firm's expertise or professional licensing status." In this case, however, the court looked beyond the language of the advisory and addendum. The broker had gone beyond making a mere referral to the buyer. The broker had voluntarily undertaken the responsibility to oversee the repairs and had been negligent in such oversight by failing to ensure that the handyman understood that a propane water heater was necessary. The appellate court thus reversed summary judgment for the brokers, saying that there was a genuine issue of material fact as to whether their involvement established a duty of care beyond the exculpatory clauses (clauses intended to shield the broker from legal liability—to make him not culpable—for any negligence on the part of the experts whom the broker referred) in the buyer's inspection advisory and addendum to the purchase contract.

This is perhaps another case of actions speaking louder than words, but it is most certainly a warning: Unless you've been engaged to manage the property, stick to just giving the buyer some good, reliable names. Do more and you may need a referral yourself...a referral for an attorney!

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Boosting Profits with a Marketing Makeover

By Rhonda Hamilton, ABR®, GRI, Rhonda Hamilton Learning Services, Longview, TX

When you think of the term “marketing,” what words come to mind? Cost? Money? Advertising? For most of us, it's true that the costs related to marketing can be challenging to manage, at best. Many of us feel inadequate in making decisions regarding where, when, and how to advertise. Or we may feel that limited time restricts our ability to attain the desired results. The approach, decisions and direction we take are almost like a coin-toss. Let's see...heads or tails? Which deadlines are due? What will I do today, this month, this year? Hmm...that sounds like a good idea. Wonder if it will work for me? Let's see...heads or tails? Using this approach for marketing and advertising is a profit-drainer rather than a profit-maker.

What's needed instead is a marketing makeover—a plan that maximizes return on investment, leads to profit and the sweet sound of “cha-ching.” What's needed for a marketing makeover? The powerful potential for such a magnificent transformation lies in the knowledge that can be gained from gathering and analyzing a wealth of helpful information and implementing a strategic plan. There are many elements that can lead to smart marketing, but let's examine just a few.

1. Identify your personal strengths and weaknesses. Begin by asking yourself a number of questions: What are my areas of specialization? Why would a buyer want to work with me rather than my competitor? What specific value do I bring to the table? What makes me different? If we don't know the answers to these questions, how can we communicate that value to buyers? How can we expect them to recognize our strengths and make us their agent of choice?
2. Increase your knowledge and understanding of today's buyers and what they want. Outdated sales models don't necessarily work in today's consumer environment. Learn how to work with people the way they want to buy today, by delivering value-added, solution-based

services. Make your marketing efforts support this approach by communicating the value added services you provide to potential homebuyers.

3. Identify markets and marketing strategies. Let the research and statistics do the talking! Traditionally, we tend to spend the most money in the areas that bring the least return. How do buyers find their real estate professional? What sources do they use? According to the 2005 NAR Profile of Home Buyers and Sellers, 44 percent of buyers were referred by a friend or relative to the agent of choice, 11 percent said they used the agent in a previous transaction, seven percent found the professional on the Internet, seven percent met their agent at an open house, and six percent from contact information on a “for sale” sign. There were six other categories, which had even smaller shares. The two lowest categories for agent selection were direct mail, which accounted for a meager one percent, and print advertisements such as newspaper and home magazine ads.

We should ask ourselves why we are spending the bulk of our marketing budgets in the two lowest categories. Granted, direct mail and advertising can play an important supporting role in building name recognition, which is not always very easy to track and measure. Still, careful consideration must be given to allocating the marketing budget, the areas of emphasis, and strategies that include other activities beyond just advertising.

4. Recognize the difference between marketing to achieve recognition vs. marketing to achieve recognition and credibility. The majority of our time and focus is often spent on marketing and advertising designed only to build name recognition. Time after time, we send out catchy postcards, place business-card sized ads in the newspaper alongside our competitors' business-card-sized ads, and advertise a listing in an industry home magazine, all in hopes of increasing our name recognition. While it is important to be recognized by consumers as a prominent real estate agent, it is equally important, if not more important to be recognized as a reputable, professional and credible real estate agent. According to the 2005 NAR Profile of Home Buyers and Sellers, 41 percent of buyers cited reputation as the most important

factor in agent selection. More than nine out of 10 buyers, when asked about the desired qualities in an agent, rated three categories as being very important. These three most important qualities were:

- 1) knowledge of the purchase process,
- 2) responsiveness, and
- 3) knowledge of the market.

Buyers want a reputable, knowledgeable, and professional agent. Buyers want credibility! These statistics reinforce the idea that it is important to spend time and effort to develop and implement a marketing plan that focuses on building recognition and, most importantly, credibility in the minds of consumers.

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Presenting and Negotiating Multiple Offers - White Paper

"When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their clients. This obligation to the client's interests is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly." (from Article 1 of the 2002 REALTORS® Code of Ethics)

"REALTORS® shall submit offers and counter-offers objectively and as quickly as possible." (Standard of Practice 1-6)

Perhaps no situation routinely faced by REALTORS® can be more frustrating, fraught with potential for misunderstanding and missed opportunity, and elusive of a formulaic solution than presenting and negotiating multiple purchase or lease offers and/or counter-offers on the same property. Consider the competing dynamics. Listing brokers are charged with helping sellers get the highest price and the most favorable terms for their property. Buyers' brokers help their clients purchase property at the lowest price and on favorable terms. Balanced against the Code's mandate of

honesty is the imperative to refrain from making disclosures that may not, in the final analysis, be in a client's interests. (Revised 11/01)

Will disclosing the existence of one offer make a second potential purchaser more likely to sign a full price purchase offer—or to pursue a different opportunity? Will telling several potential purchasers that each will be given a final opportunity to make their best offer result in spirited competition for the seller's property—or in a table devoid of offers?

What is fair? What is honest? What is to be done? Who decides? And why is there not a simple way to deal with these situations?

As REALTORS® know, there are almost never simple answers to complex situations. And multiple offer presentations and negotiations are nothing if not complex. But, although there is not a single, standard approach to dealing with multiple offers, there are fundamental principles to guide REALTORS®. While these guidelines focus on negotiation of purchase offers, the following general principles are equally applicable to negotiation of lease agreements. (Revised 11/01)

- Be aware of your duties to your client—seller or buyer—both as established in the Code of Ethics and in state law and regulations. (Revised 05/01)

The Code requires you to protect and promote your client's interests. State law or regulations will likely also spell out duties you owe to your client.

- The Code requires that you be honest with all parties. State law or regulations will likely spell out duties you owe to other parties and to other real estate professionals. Those duties may vary from the general guidance offered here. REALTORS® need to be familiar with applicable laws and regulations.

Be aware of your duties to other parties—both as established in the Code of Ethics and in state law and regulation.

- Remember that the decisions about how offers will be presented, how offers will be negotiated, whether counter-offers will be made and

ultimately which offer, if any, will be accepted, are made by the seller – not by the listing broker. (Revised 05/01)

- Remember that decisions about how counter-offers will be presented, how counter-offers will be negotiated, and whether a counter-offer will be accepted, are made by the buyer – not by the buyer's broker. (Adopted 05/01)

- When taking listings, explain to sellers that receiving multiple, competing offers is a possibility. Explain the various ways they may be dealt with (e.g. acceptance of the "best" offer; informing all potential purchasers that other offers are on the table and inviting them to make their best offer; countering one offer while putting the others to the side; countering one offer while rejecting the other offers, etc.).

Explain the pluses and minuses of each approach (patience may result in an even better offer; inviting each offeror to make their "best" offer may produce a better offer[s] than what is currently on the table – or may discourage offerors and result in their pursuing other properties).

Explain that your advice is just that and that your past experience cannot guarantee what a particular buyer may do.

Remember—and remind the seller—that the decisions are theirs to make—not yours, and that you are bound by their lawful and ethical instructions.

- When entering into buyer representation agreements, explain to buyers that you or your firm may represent more than one buyer-client, that more than one of your clients or your firm's clients may be interested in purchasing the same property, and how offers and counter-offers will be negotiated if that happens. (Adopted 05/01)

Explain the pluses and minuses of various negotiating strategies (that a "low" initial offer may result in the buyer purchasing the desired property at less than the listed price – or in another, higher offer from another buyer being accepted; that a full price offer may result in the buyer purchasing the desired property while paying more than the seller might have taken for

the property, etc.). (Adopted 05/01)

Explain to the buyer that sellers are not bound by the Code of Ethics. Sellers, in multiple offers situations, are not prohibited from "shopping" offers. Real estate brokers may – unless prohibited by law or regulation – "shop" offers. Therefore, REALTORS® assisting purchasers in formulating purchase offers should advise those purchasers it is possible that the existence, terms and conditions of any offer they make may be disclosed to other purchasers by sellers or by sellers' representatives except where such disclosure is prohibited by law or regulation. (Adopted 05/05)

Remember – and remind the buyer – that the decisions are theirs to make – not yours, and that you are bound by their lawful and ethical instructions. (Adopted 05/01)

- If the possibility of multiple offers – and the various ways they might be dealt with – were not discussed with the seller when their property was listed and it becomes apparent that multiple offers may be (or have been) made, immediately explain the options and alternatives available to the sellers – and get direction from them.

- When representing sellers or buyers, be mindful of Standard of Practice 1-6's charge to "...submit offers and counter-offers objectively and as quickly as possible." (Revised 05/01)

- While the Code of Ethics does not expressly mandate "fairness" (given its inherent subjectivity), remember that the Preamble has long noted that "...REALTOR® has come to connote competency, fairness, and high integrity..." If a seller directs you to advise offerors about the existence of other purchase offers, fairness dictates that all offerors or their representatives be so informed.

- Article 3 calls on REALTORS® to "...cooperate with other brokers except when cooperation is not in the client's best interest." Implicit in cooperation is forthright sharing of information related to cooperative transactions and potential cooperative transactions. Much of the frustration that occurs in multiple offer situations results from cooperating brokers being unaware of the status of offers they have procured. Listing brokers should make

reasonable efforts to keep cooperating brokers informed. Similarly, buyer brokers should make reasonable efforts to keep listing brokers informed about the status of counter-offers their seller-clients have made. (Revised 05/01)

- Realize that in multiple offer situations only one offer will result in a sale and one (or more) potential purchasers will be disappointed that their offer was not accepted. While little can be done to assuage their disappointment, fair and honest treatment throughout the process; coupled with prompt, ongoing and open communication, will enhance the likelihood they will feel they were treated fairly and honestly. In this regard, "... REALTORS® can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, 'Whatsoever ye would that others should do to you, do ye even so to them.' "(from the Preamble to the Code of Ethics).

(Revised 05/05)

Spell Out Your Search Terms

Buyer's reps should specify search parameters to avoid breaching fiduciary duty.

BY Oliver E. Frasca

Sarah was excited about signing her first buyer agency contract. She told her buyers she'd look out for their best interests, and they smiled, signed, and said they understood.

Sarah then searched the MLS for possible properties. Several met the criteria indicated on her written buyer agency contract, which detailed what type of home Sarah would search for: "3 bedrooms, 2 baths, 2-car garage, and full basement."

The buyers liked the third property they saw and wanted to make an offer. The home, in a local subdivision, was the Prelude model, with an unfinished basement. The offers went back and forth, and finally a contract for \$175,000 was signed.

The buyers were happy with the sales price Sarah had helped negotiate; it was well below the list price of \$197,500. Sarah had a great bargaining chip during the negotiation: Even after she had told the listing broker that she was a buyer's agent, as required by NAR's Code of Ethics, she had learned from the listing agent that the sellers were very motivated and that several offers had fallen through. Sarah recommended that the offer be structured to include a large amount of earnest money, a simple and fast loan condition, and a quick close.

The deal closed, and things looked great. Sarah felt confident that she'd represented the buyers properly in every way. However, the next day Sarah got a call from the buyers. Apparently, as they were moving in, a neighbor came over to welcome them to the neighborhood. He mentioned that he also had a Prelude house for sale and that he was selling it as a FSBO. When the neighbor asked what the buyers paid for their new home, they crowed about how great their agent had been to get the house for \$175,000.

The neighbor's house was nicer than the one they had bought--it was on a quiet cul-de-sac, and part of the basement was already finished--and it was also priced at \$175,000. The buyers were upset and immediately called their attorney.

The attorney explained that since Sarah was a buyer's agent, she had fiduciary duties to the buyers of "loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting." Therefore, unless they agreed otherwise, Sarah had an obligation to search out all available properties for her clients, including those not listed in the MLS.

Sarah had a written buyer agency agreement with the buyers. But even if she'd had only an oral agreement, her fiduciary duties would have been the same in most states.

Rather than litigate, the parties decided to try mediation. The buyers said that they liked their house and trusted their agent but that they never knew she was showing them only properties listed by other licensees in the MLS. They testified that had they known of the FSBO home,

they would have tried to buy it first. At the very least, they'd have used the comparable price to negotiate a better price on the house they bought.

The mediator, a retired judge, told Sarah privately that if the case were to go to court, Sarah would likely be found to have breached her duty to her clients. He also told Sarah that she had a duty to either disclaim her obligation to search all listings or make a reasonable effort to search all listings, including those not in the MLS. In short, Sarah probably breached her fiduciary duty to her buyers and could be liable to the buyers, at least to the extent of the selling commission – the whole selling commission, not just the portion paid to her. She decided it was probably in her best interest to reach an agreement with the buyers, and they settled.

The lesson learned is that buyer's agents have a fiduciary duty to search for all available properties – just as the listing agent has a duty to work with all potential buyers – unless the agency agreement says otherwise. Keep in mind that there's no need for buyers to show actual loss in a breach-of-fiduciary-duty case; if a breach took place, you can lose your commission or worse.

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Lessons Learned at the REBAC Newly Buyer Game

By Mary Ann Bush, ABR, CRS, GRI
Bush Real Estate and Bush Training – a
RealtyU® School, Portage, Michigan

Imagine my excitement! REBAC had just called to ask if I would be a contestant on the “Newly-Buyer Game.” Would I? Of course I would! I would be one of four buyer's representatives, and we would be paired with four people, who don't work in real estate, as if they were buyers looking to transfer to our markets. Like the other buyer's reps in the game, I would have one hour to meet with my “buyer” as if actually counseling him for his home buying experience.

Before I met with my buyer, I reviewed my buyer presentation package, confirming I had the appropriate forms and information. During the counseling session, I reviewed these materials with my buyer and asked him about his needs and concerns, just as I would as if he were really a client. REBAC had prepared nine questions for the game, intended to reflect how well the buyers and the buyer's reps understood each other. Game show icon Bob Eubanks hosted and he made sure that we all had fun. But this was about a lot more than just having fun. After the game, I looked back to reflect on each question. This review gave me considerable personal insight, providing a great refresher about what we, as buyer's reps, need to be attentive to during our counseling sessions.

Following are the questions we were asked, the responses we gave, and the lessons I learned. Hopefully they will challenge you to pay even closer attention to your buyer-clients. They did for me.

1. What will your buyer say ABR® stands for?
When this question was asked, I froze. As important as it is to me to have those letters appearing behind my name, I realized that I had not taken the time to fully explain them to my buyer. I knew that I had referred to myself as an ABR®, but had never fully explained the acronym's definition. My buyer's response was humorous and well-received by the audience, but in no way denoted what ABR® stands for.

The Lesson: Most agents know that, more often than not, the initials behind our names on each piece of our marketing materials mean very little to the public because we have not educated them well enough. Out of curiosity I decided to look up the definition of “accredited” in Webster's Dictionary. The definition read “to send (a representative or agent) with credentials.” The ABR® designation certifies that we have attained the credentials to perform as a buyer's agent. REBAC's letter of certification and our certificates from the ABR® Course and elective course are the credentials that provide us with the authority to profess our ability to represent buyers in the home buying transaction. Our credentials and ABR® designation are things that need to be clearly explained to buyers.

2. What is the most important characteristic to look for in a buyer's representative?

Having discussed this with my buyer and taken notes on my buyer profile sheet, I thought I had this answer. Actually, my buyer had mentioned several issues. The one that I heard was that he wanted someone who knew the area because he had moved to a strange location before and counted on the agent to be able to give him good information about the area. His answer was that he wanted an agent who would be honest.

The Lesson: Even though we had discussed this topic, I failed to identify the one issue that was primary to my buyer. I assumed that he knew I would be honest and went on to the next important issue – knowledge of the area. Do we really listen? How many times do we assume we know our buyer's primary interests and concerns?

3. What will your buyer say a fiduciary is?

This question brought a host of both incorrect and humorous answers, with me and my buyer failing to match. While I understand and respect the importance of this issue, I had failed to fully describe the fiduciary duties of a client relationship in our state. My guess is that many of us fall into the same trap.

The Lesson: Do we fully explain these duties when we sit with our buyers? How often do we slide by the fiduciary duties assuming that buyers will just assume we are working in their best interests, protecting their position, keeping things confidential, etc.? Do we hold an effective counseling session with our buyers in the same manner as we do with our sellers? Statistics show that we spend 1 to 1 ½ hours in preparation for our seller's listing presentation and then 1–2 hours in the actual presentation to the seller. The average time spent in preparation for a meeting with a buyer is approximately 15 minutes and then less than 30 minutes is spent in the actual first meeting with the buyer. Agents are often concerned about whether the buyer is going to like them and are afraid to ask them to sign any form of commitment. Many states mandate by law that a buyer/seller be informed of their agency options before they share any confidential information. The Code of Ethics, 16.13 paragraph 2 states that "before providing

substantive services to prospects, REALTORS® shall ask prospects whether they are a party to any exclusive representation agreement."

Agents find it natural to present agency options within their states for seller representation, yet often struggle in the same scenario with a buyer. We must take steps to make certain that buyers are not serviced as buyer-clients, when in fact they merely hold the status of customer. While agency laws do vary by state, it is safe to assume that buyers should not be given information that should only be shared with buyer-clients. If we perform these activities for them, we can create an implied agency relationship through our actions with those buyers – and expose ourselves to the risk of litigation.

4. How many homes will your buyer see before they buy?

During our buyer counseling session I told my buyer that we would see approximately 10 homes. I informed him that statistics show that if I did my job in determining his priorities, I should be able to find the right house in the first 5–7 homes. The balance of the ten houses would be homes he'd probably want to see just to confirm his decision. My buyer answered correctly by saying that he would see 10 homes before he would buy.

The Lesson: If a buyer thinks that you are going to show them everything on the market, then they will let you.

5. Which newspaper ad most closely resembles the home the buyer is looking for now?

One of the issues that I tried to thoroughly discuss with my buyer was the style of home he was looking to buy. We talked about "must haves" and "wanna haves." We talked about family likes and dislikes. None of the 5 homes described by our host, Bob Eubanks, matched my buyer's specific criteria. But one of them was near a golf course. In our counseling session, my buyer had mentioned that his wife loves golf. Based on that common knowledge, we answered this one correctly.

The Lesson: The decision-maker may select a feature that is not necessarily their primary interest, but is based on the needs or desires of another family member.

6. What aspect of buying a home most concerns or intimidates you?

I had specifically asked this question in our counseling session. What is your greatest concern about buying? In our discussion, I had recorded my buyer's response as "the details of the whole home buying process," reflecting concern over completing the right paperwork, legal details, etc. My buyer responded that he was concerned with "what could go wrong with the home," meaning that he was worried that some defect would go undetected during the buying process.

The Lesson: Even when the buyer gives you specifics at the counseling session, during the home buying process, their priorities can change. Stay in constant communication so as to determine any shifts in the buyer's priorities.

7. What feature must you have in your new home?

On my buyer profile sheet, I had recorded several lines detailing my buyer's criteria in a home. He mentioned things like number of bedrooms, baths, square footage, dining room, garage, basement, and various special features. He mentioned that he would want a fireplace, but when I asked him, "If I find a home that meets all of your requirements but does not have a fireplace, should I eliminate it?" he responded, "no." That question tested the weight of a fireplace in his criteria. He did, however, continue to say that he needed a home with an open floor plan. In the competition, we matched answers with "open floor plan."

The Lesson: Test each of the buyer's criteria to determine its weight in the home selection process. List the criteria that are absolutes.

8. What papers, if any, did you sign with your buyer's rep?

Even though I had taken an Exclusive Buyer Agency Contract with me and had presented it to my buyer for his review during the counseling session, we ran out of time and I did not ask him to specifically sign the document.

The Lesson: The counseling session should not end until the contract is signed or rejected.

9. What percent of REALTORS® have the ABR® designation?

This tie-breaking question was asked only of the ABR®-members of each team. Did you know that even though there are over one million REALTORS® in the U.S., only about 4 percent hold the ABR® designation? While so many agents are missing out on the professional differentiation that this designation represents, those who have earned it possess an edge that they should work to their advantage. ABR® designees have learned how to effectively represent buyers and know the value that representation brings to buyer-clients. I'm proud to be one of the 4 percent of REALTORS® who have earned the ABR® designation. How 'bout you?

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The Essence of Negotiations

Katheryn M. Dutenhaver
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Why bother to negotiate? Because you want a certain person to give you a particular thing.

How do you get that person to give it to you?
Give something to that person.

How do you find out what the other person wants?

This is the essence of negotiations.

If I want to sell my house for a particular price and the potential buyer refuses to purchase it for that price, our negotiations are stalled before they even begin. However, if each party is willing to make some concessions on price, our negotiation is less likely to reach an impasse. In addition to purchase price, we should consider other issues of importance to each of us, such as the closing date, contingencies, personal property, etc. Now the chances for a successful conclusion to our negotiations have increased substantially.

One way to prepare for these important issues in a negotiation is to use a checklist. After the negotiation is complete, use the checklist to evaluate all the results of the negotiation. As a starting point, consider the following:

Checklist: Preparing for a Negotiation

A. Terms of the agreement

1. What do I want to accomplish in this negotiation?
2. How can I communicate what I want to the other side?
3. How can I encourage the other side to give me what I want?
4. What does the other side want to accomplish in this negotiation?
5. How can I encourage the other side to disclose to me what they want?
6. How can I give the other side what they want?

B. Implementation plan

1. What could the other side realistically give to me?
2. What could the other side willingly give to me?
3. What could I realistically give to the other side?
4. What could I willingly give to the other side?

C. Improving the agreement

1. What would make this agreement better for me?
2. What would make this agreement better for the other side?

D. Effect on the relationship of the parties

1. How can I affect the atmosphere of the negotiation in such a way that I would want to negotiate with the other side on another matter in the future.
2. What can I do to encourage the other side to want to negotiate with me on another matter in the future?

Focusing only on what I want in a negotiation often leads to impasse. But refocusing on what I want and what the other side wants often enables trades to take place.

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References

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- Determining the Buyer's Level of Service (page 192)
- Get a Clue: The Lowdown on Loss-History Reports (page 193)
- Niche Marketing: Auctions (page 196)
- Niche Marketing: Relocation (page 198)
- Relocation Aspects of Buyer Agency (page 198)
- More Than We Bargained For (page 199)
- Court Cases (page 204)

Frequently Asked Questions about the ABR® and ABRMsm designations

Q What if I fail the exam?

A You can take the exam again. The fee for retaking the exam is based on the licensed provider's policy.

Q My new business cards are being printed tomorrow and I want to include the designation after my name. When can I use the ABR® or ABRMsm designation?

A You can use the ABR® or ABRMsm designation and refer to yourself an ABR® or ABRMsm only after receiving certification from REBAC. Completion of the ABR® or ABRMsm designation course does not qualify you to use the designation or call yourself an ABR® or ABRMsm.

Q How do I obtain copies of REBAC marketing materials?

A REBAC marketing materials can be ordered by using the form included with the Certification and Welcome Packet or downloaded from REBAC's Web site, www.rebac.net.

Q What documents do I need to submit to verify my role as a buyer's representative in the five transactions needed to meet the experiential requirement for the ABR® designation?

A Two items (one from each Group) are required for each transaction:

Group 1 (choose one for each transaction)

- Copy of signed Buyer representation agreement
- Copy of disclosure statement
- Copy of purchase/sale agreement statement (RESPA – HUD statement)

Group 2 (choose one for each transaction)

- Copy of closing/settlement statement (RESPA – HUD statement)
- In lieu of documentation, you can submit, on company letterhead, the buyer's last name, address and date of closing, along with your broker's signature as verification the properties have closed.

Note: Transactions in which the candidate acted as a single-person dual agent cannot be credited toward the experiential requirement.

Q What documents do I need to submit to verify the experience needed in managing buyer's representatives to meet the requirement for the ABRMsm designation?

A Submit a completed ABRMsm designation Application Form, testifying that the candidate has either:

- Two years experience overseeing buyer's representatives, including a list of the buyer's representatives under supervision.

or

- Supervised 25 closed transactions completed by buyer's representatives who were managed by the candidate, including the client's and buyer's representative's names, the property address and the closing date for each transaction.

Note: Transactions in which the candidate acted as a single-person dual agent cannot be credited toward the experiential requirement.

History of Real Estate Timeline

The real estate business as we know it today is the result of more than a century of evolution in law and practice. Throughout this evolutionary process, the issue of representation has always been a challenging topic for anyone – attorneys, real estate agents, and consumers – who has ever been involved in the business of real estate. In order to better understand buyer agency and how it fits into the picture, it is helpful to learn about significant milestones in the industry's development.

Representation, compensation, ethics, and various license laws are issues that have always been part of the picture. Keep in mind that each state's real estate commission has developed their own rules and regulations that govern the practice of real estate. All REBAC members are also members of the NATIONAL ASSOCIATION OF REALTORS® and pledged to uphold its Code of Ethics. The following timeline highlights important milestones in the development of the business of real estate, NAR, and REBAC.

Real Estate's "Culture of Cooperation"

NY Real Estate Exchange founded	Baltimore Board of Real Estate Brokers & Property Agents formed	Cincinnati and San Diego established "multiple listing bureaus"	National Assn. of Real Estate Boards founded (NAREB)	NAREB urges use of exclusive listings and the MLS system	REALTORS® Code of Ethics adopted	MLS falls out of favor	MLS revives as "suburbanization" accelerates	NAR adopts "14 point policy" to minimize antitrust risks.	NAR provides guidance to MLSs through MLS Policy Statements adopted by the Directors
1847	1858	1886-87	1908	1912	1913	1920s	Post WWII	1971	1980 — present

Evolution of Buyer Representation

The Federal Trade Commission surveyed buyers and sellers in 1983 and found that the public's perception regarding agency relationships was not in fact reality. Seventy-one percent of buyers thought that the "subagent/seller's agent" showing them a property was actually "their" agent. Seventy-three percent of buyers told their agent confidential information, including the final price they would pay for the property. Seventy-six percent of sellers believed that the agent working with the buyer was the "buyer's agent." Armed with this information, the FTC approached the Association of Real Estate License Law Officials (ARELLO). In turn, ARELLO began discussions with NAR about the possibility of requiring real estate agents to disclose who they represent in the transaction.

As we review the history of agency relationships and buyer representation, we should keep in mind the great change implemented in 1993 as a result of a Presidential Advisory Group convened by the NATIONAL ASSOCIATION OF REALTORS®. Before this, all companies and

their salespeople were offered a “blanket unilateral offer of subagency,” which meant that when a listing was inserted into a MLS, cooperating selling brokers and their salespeople became the subagents of the seller. In some areas today there are still offices that offer “cooperation and compensation” to cooperating selling brokers who wish to act as the subagent of the seller.

Since 1985, the NATIONAL ASSOCIATION OF REALTORS® has appointed six member-groups to study agency issues and the brokerage relationships between licensees and consumers in real estate transactions.

1985 NAR forms its first Agency Task Force to study agency issues in depth, in particular, the relationship between real estate practitioners and consumers. NAR’s Board of Directors adopted a policy encouraging state REALTOR® Associations to work with their state legislatures to enact legislation providing for mandatory agency disclosure.

1991 NAR’s President appoints a Presidential Advisory Group (PAG) on Agency to make recommendations to assist the state REALTOR® associations during a time of transition in the industry.

1992 The first PAG to review the MLS policy of “subagency” is formed. The report recommends that:

1. Subagency becomes optional instead of mandatory
2. All states encourage the adoption of mandated agency disclosure

The NAR Board of Directors approved the recommendations which became effective in 1993.

1993 Recommendations from the 1992 PAG on Subagency become effective NAR policy.

Under this policy MLS-member brokers have the option of offering cooperation and compensation to cooperating brokers wishing to act as subagents of the seller or agents of the buyer or both. Furthermore, if the listing broker makes an offer of cooperation (which simply means “the ability to show that broker’s listing”) that offer of cooperation must be accompanied by an offer of compensation.

1996 NAR’s Professional Standards Committee recommends changes to the Code of Ethics to ensure that it covers non-agency relationships.

1998 A Presidential Advisory Group on Buyer Representation Liability Issues (BRLI PAG) is appointed in response to: concerns over the lack of clear, specific duties and responsibilities owed to a buyer-client by his representative; and the growing number of judicial decisions imposing divergent and sometimes expansive “standards of care” on buyer’s representatives.

- 1999 The BRLI PAG's recommendations are adopted. The PAG is significant because its recommendations continue to influence and shape real estate firms' policies and procedures as well as states' laws and regulations. These recommendations seek to statutorily define the duties of each type of agency relationship; replacing common (case) law as applied to real estate agency relationships; enact mandatory disclosure forms and rules requiring meaningful, timely written disclosure of brokerage relationships; and eliminate or modify the consumer's vicarious liability for the acts of the licensee. For the complete list of recommendations, go to www.realtor.org and search on BRLI PAG.

Presidential Advisory Group on Buyer Representation Liability Issues²⁹

Recommendations Regarding State Statutes and/or Regulations

Recommendation: NAR should identify and/or develop suggested elements of legislation to:

A. Specify well-defined licensee duties for each type of brokerage relationship with a consumer. Once licensee duties are legislatively defined, the legislation should state that it abrogates (makes void/annuls and replaces) that state's common law (case law) as applied to real estate brokerage relationships to the extent the common law duties are inconsistent with the statutorily defined duties.

B. Define the specific duties of a licensee.

Duties to be included by statute:

1. Disclose known adverse material facts
2. Advise consumer to obtain third party expert advice
3. Act with honesty and in good faith
4. Use reasonable skill and care
5. Maintain confidentiality
6. Account
7. Act in best interest of client
8. Follow lawful instructions of client
9. Make timely presentation of all offers
10. Seek best price and terms

And the ability to:

- * Discharge duties by using third party experts
- * Rely upon statements of others
- * Limit duty to inspect, if any

Duties to be limited and clarified:

1. Investigate conditions affecting the property
2. Standard of care is that of a reasonably prudent licensee and is measured by the degree of knowledge required to obtain the relevant real estate license.

C. Specify the licensee's disclosure duties with respect to conditions affecting the property and address licensee liability issues, including the ability of a licensee to rely on information from third parties.

D. Create a presumption that the licensee/consumer relationship is one defined in the statute unless they enter into a written agreement specifically providing for a different type of relationship.

Specific duties to a buyer to be considered for inclusion in a default non-agency relationship include, but are not limited to:

1. Disclose known adverse material facts
2. Advise consumer to obtain third party expert advice
3. Act with honesty and in good faith
4. Use reasonable skill and care

²⁹ Approved by the Board of Directors of the NATIONAL ASSOCIATION OF REALTORS®, May 1999.

5. Account
6. Make timely presentation of all offers
7. Perform terms of any oral or written agreement

E. Enable a managing broker to use "designated agency" within the brokerage to: designate individual licensees within the brokerage to act as exclusive agents for buyers and sellers; designate exclusive agents without creating an agency relationship between the consumers and the broker; clarify the status of the other (non-designated) licensees affiliated with the brokerage; and limit instances of dual agency (one individual licensee is the agent of both the buyer and the seller in the same transaction).

F. Eliminate or modify the consumer's vicarious liability for the acts of the licensee.

G. Adopt mandatory disclosure forms and rules requiring meaningful, timely written disclosure of brokerage relationships. "Timely" means before consumers offer any information that could be detrimental to their interests.

H. Specify how brokerage relationships end and describe the licensee's duties upon the termination of the relationship.

Definitions:

Buyer's representative: For the purposes of this Report, "buyer's representative" means any licensee working with a buyer, either in an agency relationship, or in a non-agency relationship with specific, statutory duties to the buyer.

Common law: Common law is law articulated in judicial decisions, as opposed to law created by legislatures in a statute. Common law from judicial decisions is difficult to ascertain in any given state because it involves in-depth legal research and may change with new judicial decisions.

Designated agency: Once legislatively established in a given state, a brokerage practice (office policy) chosen by the managing broker to appoint, or *designate*, licensees associated with the managing broker as exclusive agents of consumers. This means that no other licensee in the brokerage represents that client.

In-house transaction: A transaction that takes place under the supervision of the same managing broker.

Judicial decision: A judicial decision is a court decision.

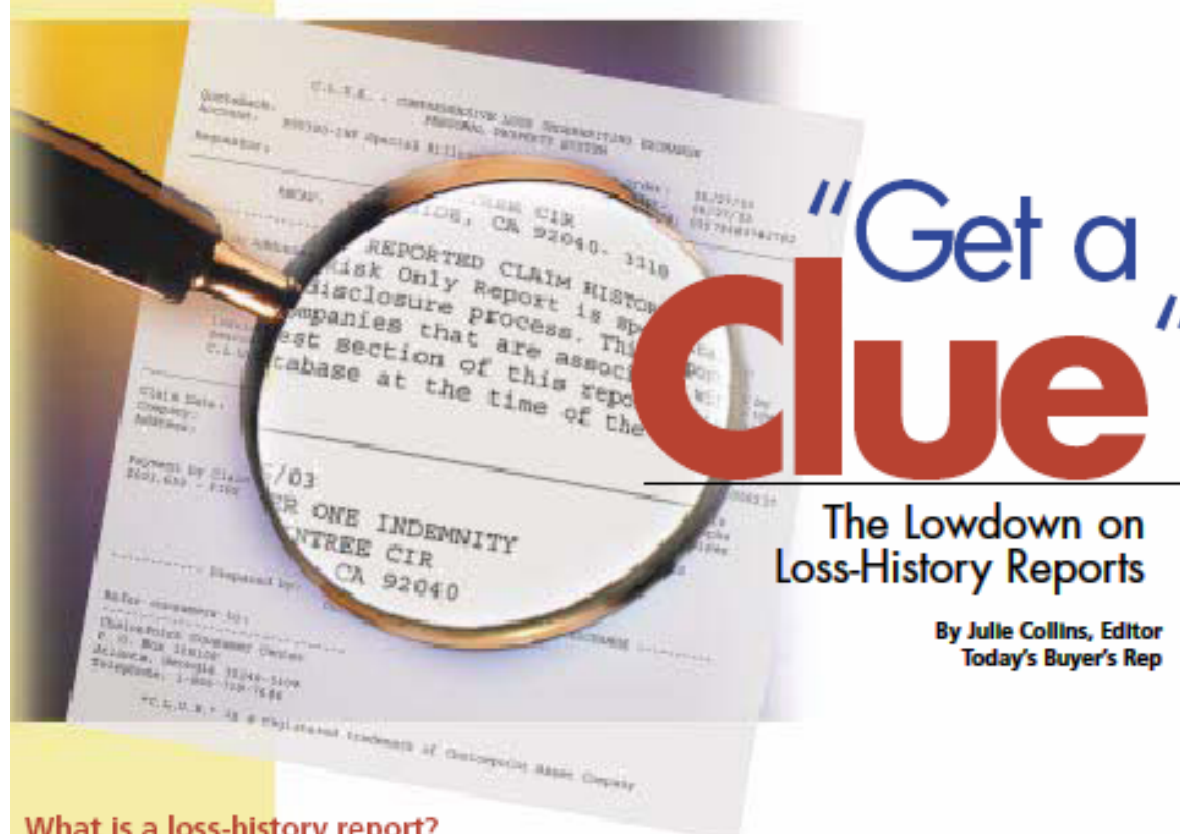
"Pure" non-agency: A relationship in which the licensee owes the consumer none of the traditional common law fiduciary duties. This is distinguishable from several states' versions of non-agency relationships with consumers (often called "transaction broker" or "facilitator"), in which the licensee still owes the consumer a variety of duties.

Determining the Buyer's Level of Service

Needs Assessment	
If the buyer is a client	If the buyer is a customer
<ul style="list-style-type: none"> • Pay full attention to the buyer's needs 	<ul style="list-style-type: none"> • Maintain loyalty to the seller's needs
<ul style="list-style-type: none"> • Tell the buyer all that you learn about sellers 	<ul style="list-style-type: none"> • Tell the seller all that you learn about buyers
<ul style="list-style-type: none"> • Keep information about the buyer confidential 	<ul style="list-style-type: none"> • Keep information about the seller confidential
<ul style="list-style-type: none"> • Focus on expanding the range of choices to satisfy buyer's needs 	<ul style="list-style-type: none"> • Focus on the seller-client's property
Property Selection	
If the buyer is a client	If the buyer is a customer
<ul style="list-style-type: none"> • Find the best property for the buyer-client 	<ul style="list-style-type: none"> • Get the best offer for the seller-client
<ul style="list-style-type: none"> • Promote the buyer's search 	<ul style="list-style-type: none"> • Limit properties to listed properties only
<ul style="list-style-type: none"> • First opportunity to view new listings 	<ul style="list-style-type: none"> • View new listings after buyer-clients
<ul style="list-style-type: none"> • Make all properties available and viewable; the sale price is negotiable 	<ul style="list-style-type: none"> • Show only properties listed within buyer's affordability range.
Viewing Properties	
If the buyer is a client	If the buyer is a customer
<ul style="list-style-type: none"> • Okay to give advice with facts 	<ul style="list-style-type: none"> • Just the material facts
<ul style="list-style-type: none"> • Educate the buyer 	<ul style="list-style-type: none"> • Protect the seller
<ul style="list-style-type: none"> • Okay to compare competing properties 	<ul style="list-style-type: none"> • Cannot help the buyer compare competing properties
Negotiating the Purchase and Sales Agreement	
If the buyer is a client	If the buyer is a customer
<ul style="list-style-type: none"> • Give advice with facts 	<ul style="list-style-type: none"> • Disclose only material facts
<ul style="list-style-type: none"> • Negotiate on behalf of buyer-client 	<ul style="list-style-type: none"> • Negotiate on behalf of seller-client
<ul style="list-style-type: none"> • Strengthen the buyer-client's negotiating position 	<ul style="list-style-type: none"> • Strengthen the seller-client's negotiating position
<ul style="list-style-type: none"> • Share all information about seller 	<ul style="list-style-type: none"> • Share all information about buyer
<ul style="list-style-type: none"> • Provide price counseling 	<ul style="list-style-type: none"> • Volunteer a CMA for the buyer only if it supports the seller-client's listing price
<ul style="list-style-type: none"> • Negotiate approved purchase agreement to safeguard buyer-clients 	<ul style="list-style-type: none"> • Negotiate approved purchase agreement protective clauses to safeguard the seller-client
<ul style="list-style-type: none"> • Suggest financing alternatives that may be in buyer-client's best interests 	<ul style="list-style-type: none"> • Suggest buyer financing alternatives that benefit the seller's interests
<ul style="list-style-type: none"> • Continue services to buyer-client during negotiations 	<ul style="list-style-type: none"> • Continue services to seller-client during negotiations
Follow Through After Purchase and Sales Agreement	
If the buyer is a client	If the buyer is a customer
<ul style="list-style-type: none"> • Attempt to solve problems to the buyer-client's advantage and satisfaction 	<ul style="list-style-type: none"> • Attempt to solve problems to the seller-client's advantage and satisfaction

Get a Clue: The Lowdown on Loss-History Reports

Homeowners Insurance plays an important role in most residential real estate transactions. As insurance companies have grappled with escalating claims, they've also sought better tools to assess the risks of underwriting properties and charging appropriate premiums to reflect those risks. As a result, one important tool that has emerged on the insurance landscape is the loss-history report. While loss-history reports have grown in use and acceptance in the insurance industry, this has not been without a ripple effect felt by the real estate industry. In this article, we'll examine loss-history reports and how they could affect your business.



The Lowdown on Loss-History Reports

By Julie Collins, Editor
Today's Buyer's Rep

What is a loss-history report?

Most simply, a loss-history report is collected information about the claims filed under a policyholder's homeowners and auto insurance policies. Two companies—ChoicePoint® and ISO—work in partnership with insurance companies to manage national databases that collect such information. ChoicePoint® calls their product C.L.U.E.® reports, short for Comprehensive Loss Underwriting Exchange. ISO calls its product A-PLUS loss-history reports. However, you may sometimes hear “CLUE Report” used erroneously as a generic term for all loss-history reports, despite it being a registered trademark of the ChoicePoint® Asset Company.

How do insurers use loss-history reports?

When a home buyer applies for insurance, insurers need to be able to assess the risk of potential loss claims. If it's a new applicant, they'll look at their personal claim history, but that will tell them little about the risk of insuring the property they plan to purchase. Loss-history reports provide a 5-year loss history on the property, even if it changed ownership during that time, and allow insurers to make better underwriting decisions.

chase, or create an important negotiating point. Some agents are even including references to loss-history reports on their Web sites and adding links to facilitate ordering them.

Loss-history reports can also be an important marketing tool for sellers, as long as the property has a clean record. No wonder they are becoming increasingly popular among both buyers and sellers. "In my opinion," said Terry Watson, ABR®, CIPS, CRB, CRS, GRI, with Watson World, "it's just a matter of time before every state includes loss-history reports on their seller disclosure requirements."

Have loss-history reports also created new headaches?

There has been considerable industry buzz over botched real estate deals due to problems triggered by loss-history reports. One potential scenario arises when the buyer waits until shortly before closing to secure their homeowners insurance. Upon receiving the buyer's application, the insurer orders a loss-history report and learns that the property has had two water-damage losses in the last three years. They insist on an excessively high premium to insure the property. The lender then steps in and cancels the buyer's mortgage approval since the monthly payment now exceeds their prior loan qualification figures.

Sound like an ugly situation? Of course. Was it avoidable? Yes. As Lynn Madison, ABR®, GRI of Lynn Madison Seminars suggests, "Perhaps the most important lesson to be learned from the emergence of loss-history reports is that we, as buyer's reps, should add this to our list of disclosure documents requested when presenting an offer on behalf of our clients. After all, we want to ensure that our buyer-clients are purchasing quality property and one that can be insured at a reasonable cost. Loss-history reports can be a valuable tool in protecting our clients—as long as we utilize them at the beginning of the transaction and don't wait until closing."

Other Potential Pitfalls

Other objections to loss-history reports stem from assertions that simple inquiries from homeowners about eligibility can appear on the report, even if an actual loss claim was never filed. The likelihood of this occurring is difficult to ascertain, primarily because each insurance company manages its affairs differently.


If, for example, an insurer is asked to send an estimator into the field to evaluate a loss, the incident would very likely be recorded into the insurer's system and potentially appear on a loss-history report, even if the homeowner decided not to proceed on the claim.

On the other hand, it would be unusual—though not impossible—for documentation to result from a homeowner

inquiry to their insurance company about coverage options related to a particular incident or even a hypothetical event. If, however, this were to appear on a loss-history report, homeowners would probably be able to successfully dispute the claim. An aggravation, to be sure, but not an uncorrectable problem.

As Leslie Mulherin, a marketing representative for ChoicePoint® explains, "We want C.L.U.E.® reports to gain broad acceptance in the real estate industry so it's in our best interests, as well as those of real estate buyers and agents, that the reports be fair and accurate. We work actively with the insurance industry to limit their contributions to actual losses and to encourage compliance with the true spirit of the reporting system."

Still, another potential problem may occur when the property changes ownership during the 5-year period covered by loss-history reports. Assume that the current owner did not file any claims or make any claims inquiries. But the prior owner neglected the property, failing to repair a broken sump pump and not taking steps to direct downspout drainage away from the house. Three water damage losses were filed. Because loss-history reports are linked to property addresses, the home was unfairly tagged as a "high risk." The current owners have corrected the problems, but what about your buyer-clients who are now interested in the property? Should they proceed with the purchase, knowing that insurers will see this loss history and may demand an excessive premium?

When it comes to loss-history reports, there are no easy answers. But there are numerous important issues. Buyer's reps who take time to learn more about loss-history reports will be in a much better position to serve their clients—and avoid having a loss-history report unexpectedly sour a real estate transaction. 

Educating Your Clients About Insurance

If you're interested in providing your clients with background information about homeowners insurance issues and options, consider printing copies of NAR's brochure *The New Reality of Property Insurance*. Based on recommendations from NAR's Insurance Task Force, and utilizing a simple Q&A format, the brochure presents straightforward information and guidelines on obtaining insurance and the role of loss-history reports.

To download and print copies, go to <http://www.realtor.org/realtor.org.nsf/Pages/propinsbrochure?OpenDocument>.

How to Order Reports

Both ChoicePoint® and ISO allow you to order reports for losses associated with your personal property or automobile, either free or for a nominal charge. However, federal privacy laws preclude you from ordering reports on other individuals or properties you do not own.

When selecting a report, it's important to first distinguish what you plan to do with it. If you're simply interested in learning more about what appears on your personal records, order the free report, which will include detailed personal information such as date of birth, telephone and social security numbers.

If, however, you want a report that you're comfortable sharing with others for property disclosure purposes, make certain that the company's product doesn't report personal information. The ChoicePoint® C.L.U.E.® Property Risk Only Report costs \$19.50, but is tailored specifically for real estate transactions, masking the seller's personal information and restricting disclosure to the property in question.

C.L.U.E.® Reports from ChoicePoint®

www.choicepoint.com

To order free personal reports: Select C.L.U.E.® Reports under "Your Personal Records." From here you can order a Personal Property Report that includes loss history, inquiry history, and information on how to dispute the claims in your report. Reports can be ordered by mail, phone or online.

To order property reports for real estate transactions: From the home page, select C.L.U.E.® Property Risk Only Report under "Attention Home Sellers." Reports can also be requested for vacation homes and rental properties. Currently reports can only be ordered by mail, but ChoicePoint® is in the process of adding online ordering and delivery.

A-PLUS Loss-History Reports from ISO

www.iso.com/products/2500/prod2562.html

Consumers can order one free loss-history report by calling ISO's Consumer Report Request Line at 800-627-3487. Reports are only delivered by mail. But note that these reports will include personal information of a confidential nature.

"Get a Clue"

(Continued from page 1.)

Since the average homeowner files a loss claim just once every 10 years, and since data is only maintained for 5 years, most homeowners will find that a loss-history report does not exist for their property. If a report does exist, and the homeowner suspects it contains an error, they can file a dispute. According to the Insurance Information Institute, disputes arise in only 3 out of every 10,000 cases.

ChoicePoint® in the News

If ChoicePoint® rings a bell, it may be because the company has been in the news in connection with a story that has been getting a lot of media attention lately: the security of personal information. According to the company Web site, ChoicePoint® "will discontinue the sale of information products that contain sensitive consumer data, including social security and driver's license numbers, except where there is a specific consumer-driven transaction or benefit, or where the products support federal, state or local government and criminal justice purposes." However, the company "will continue to serve most of its core markets and customers." Added Chairman and CEO Derek V. Smith, "These changes are a direct result of the recent fraud activity."

(To read the entire statement, visit: http://www.choicepoint.com/news/statement_0205_1.html)

How can buyer's reps use loss-history reports to their advantage?

Just as insurers can use loss-history reports to make better underwriting decisions, buyer's reps can use them to help their clients make better home-purchasing decisions. Consider asking sellers to include loss-history reports in their property disclosure documents, particularly in a noncompetitive bidding environment. This could provide your buyer-clients important information that would make them think twice about proceeding with a pur-

Niche Marketing: Auctions

There are several ways to get involved in real estate auctions. They are:

Referral to an Auction Company

A real estate agent or broker can refer a seller to an auction company and receive a referral fee. The referring salesperson or broker may also be instrumental in convincing the seller of the merits of auction.

Responsibilities of Referring Agent/Broker:

- Help seller analyze his/her needs, the property, and market to determine if a good auction situation exists
- Refer seller to professional real estate auction company
- If a negotiated sale listing agreement exists, cancel the previous listing to be superseded by an auction contract
- Send notice to MLS stating that the property will be sold at public auction
- Collect referral fee from auction company when the property closes

Types of Agreements Used in This Situation:

- Auction contract to supersede listing agreement

Cooperating Agent/Broker

A cooperating (selling) agent is any agent/broker who sells a property. He or she may be the:

- Subagent
- Buyer's agent
- A dual agent

A cooperating salesperson or broker registers a buyer who purchases property offered through an auction and earns a commission established by the auction firm. This salesperson or broker accompanies the bidder to pre-auction events and the auction, registers him or her to bid, and receives a portion of the commission.

Responsibilities of Cooperating Agent/Broker:

Before the Auction

- Call auction companies to be placed on their mailing lists

- Attend real estate auctions to learn how they work
- Advertise yourself as an agent/broker who is knowledgeable about auctions to obtain prospects
- Attend pre-auction open houses with prospects
- Help prospects determine the market value of the property prior to sale (check comparables, property indebtedness, title, lien and market conditions, and read the due diligence or bidders packet)
- Learn the rules necessary to earn a commission for registering a successful buyer
- Learn the terms of the auction
- Register bidder prior to the auction pursuant to the auction firm's requirements
- Assist bidder with auction strategy

During the Auction

- Attend the auction with prospects
- Help them register
- Assist prospect with bidding strategy
- Accompany successful bidder to contract room

After the Auction

- Collect commission check when property closes (usually handled by title or escrow company)

Types of Agreements Used in This Situation:

- Buyer registration at open houses
- Broker registration for prospect representation

Listing Agent/Broker (Co-Broker)

A listing agent/broker is an agent of the seller who markets the seller's property and represents the seller during the sale and at the closing. In a sale by auction, the listing agent/broker manages many traditional real

estate functions and shares the commission based on the amount of involvement and the relationship defined by the parties involved.

This relationship is beneficial for the auctioneer and licensees when services by a local auction or real estate company are needed or when an agent identifies a potential auction situation for a seller and the licensees is not an auctioneer.

Responsibilities of Listing Agent/Broker:

Before the Auction:

- Provide the lead (in most cases)
- If a negotiated sale listing agreement exists, cancel the previous listing to be superseded by an auction contract
- Send notice to MLS stating that the property will be sold at public auction
- Provide a fact sheet on the property
- Perform market analysis
- Provide local licensing information
- Complete due diligence
- Order and obtain sign, photographs and keys
- Obtain bids for maintenance and supervise property management
- Hold open houses for inspection
- Assist bidders with pre-qualification process
- Provide feedback (progress reports) to the seller

During the Auction:

- Assist auctioneer in bid process as needed
- Accompany buyer to contract signing room
- After the Auction:
 - Help buyers with post-auction inspections, insurance, financing, etc
 - Assist in pre-closing events
 - Attend closing
 - Collect commission check when the property closes

Types of Agreements Used in This Situation:

- Listing agreement between the broker, auction company and seller
- Auction contract to supersede listing agreement
- Pre-auction sales contracts and addendum
- Prospect registration forms

Niche Marketing: Relocation

The corporate relocation industry began about 1960. At that time, there were no franchises or relocation networks. Real estate brokerage companies were local entities with one office. Mega-brokers had two or three offices.

Corporations were concerned with the sale of the employee's old property at the origination end and the purchase of a property at a destination end. The corporation's main concern was that the employee was happy after both transactions.

The real estate industry approached this situation in two ways. Referral networks were established to handle the destination end. Between 1960 and the end of 1961, referral networks were established: All-Points, RELO, and The National Multi-list Network (which later became Homes of Living). On the origination end, some brokerage companies began Guaranteed Sales Programs to make sure the relocated employee had access to the equity from the old house in time to complete the purchase at the destination end. If the property did not sell during the initial listing period, the Guaranteed Sales Program (with money usually taken from a line of credit) frequently resulted in a very low offer on the old property. Often employees were not happy with the transaction and this caused concern by the corporation.

The financial services industry responded to this need by creating "third party relocation companies". They required two appraisals (frequently paid by the corporation with a service fee added by the "third party company"). If the property didn't sell during the listing period, the Third Party Company released the employee's

equity to the employee and the corporation paid interest on the money. The third party company also received a fee for managing the property until it sold, and if the property sold at a loss, the corporation reimbursed the third party company.

By the mid 1980s only about 30% of these relocation properties sold during the original listing period. The cost of relocating an employee averaged about \$35,000 per employee. Real estate brokerage companies sought the listing of the 70% of the properties that did not sell. The corporations wanted to reduce the high cost to relocate employees.

This led to the birth of advanced marketing companies. These fee-based companies attempt to sell a larger percentage of the homes during the initial listing period by hiring the most effective real estate brokerage companies in each area to market the properties.

Today, corporations are still trying to reduce relocation expenses. About 30% of homes handled by advanced marketing companies still don't sell during the original listing period. When properties were purchased, seller's agents knew that the transferee was not familiar with the new area. The transferees frequently paid too much, chose properties in slow moving or low appreciation areas, bought stigmatized properties or homes with narrow appeal, etc.

Today, a number of corporations will not pay relocation expenses unless a buyer's representative represents that transferee in the new location. The corporations are beginning to realize that buyer representation can help reduce the cost of relocating employees by helping them buy the right kind of properties. This is a great opportunity for buyer's representatives because these transferees have special needs that cannot be met by a seller's agent. The REBAC Directory becomes very important.

Relocation Aspects of Buyer Agency

Overview

In the past, transferee's company placed primary emphasis on:

- Buy out and disposition of home at the origin end

- Quality service to acquire a home at the destination end
- Keep the transferee happy

Focus shifted to reducing costs:

- Buy-out programs under fiscal fire
- Advent of advance marketing companies

Recent realizations:

- Acquisition of home at destination end affects tomorrow's relocation costs
- Advent of directives to use buyer's representatives

Profile of the relocating buyer

- Not familiar with neighborhoods, traffic patterns, school, market values, etc.
- Generally relocating from area with different cost of living.
- Needs to buy quickly.
- Is working under pressure.
- Usually has ready equity for purchase. Often pre-qualified for financing.
- Assumes the salesperson at destination end is acting in his/her best interests.
- Needs to buy right (for resale in a few years).

Relocation buyer as a customer

- Seller's agent concentrates on finding the best buyer for the client's house, not the best house for the customer.
- Ignorance makes the relocating buyer the ideal buyer for the overpriced listing or problem property.
- Often trusts salesperson because of strong referral from salesperson in originating area.

Cover many details in advance by phone or fax.

- Time is at a premium in corporate relocation.
- Negotiate representation agreement in advance (including agency and/or dual agency disclosure documentation if necessary).
- Discuss the relative importance of commuting distance, special school needs, lifestyle issues (cultural activities, entertainment, recreation facilities, etc.) age of home, unique medical facilities, property size expectations (both lot and house).
- Determine property requirements.
- Are there friends or relatives in the new area that they may want to live near?
- Will the spouse be seeking new employment and, if it can be determined, where can their type of work be found in the new location.
- Has the transferee received any information or recommendations from company employees in the new location?
- Other issues?

Have buy-out details finalized at origination end so buyer can be pre-qualified with a lender prior to the inspection trip.

- It is important to find a lender who will consider a spouse's income even though he or she does not yet have a job in the new location.
- Secure a list of financial documentation the buyer will have to send the lender in advance.
- Take care of credit problems, if possible, before making application.

Neighborhood counseling before inspection tour

- Use a map to identify the location of the transferee's place of employment and possible communities or neighborhoods. Send maps, school and community information, and demographic information for convenient communities with highest appreciation rates (or lowest depreciation rates, depending on the market) and fastest average sale times.
- Profile how each possible community or neighborhood satisfies needs and wants.
- Listen carefully to all family members for clues to additional needs or wants that were not previously expressed.

What is a good relocation property?

- Quick turnover time
- High appreciation
- Fewer neighborhood changes (zoning, new on-ramp, dramatic increase in construction, etc.) increases predictability
- Smallest home or least expensive property in the neighborhood
- Good schools and municipal services
- Reasonable property taxes
- Others?

What is not a good relocation property?

- Unique or one-of-a-kind property
- New house where builder will still be building for a period of time
- Largest or most expensive home in neighborhood
- Low appreciation rate
- Stigmatized property

When viewing properties, caution transferee and family to remain non-committal.

Be prepared to direct transferee to sources of temporary housing.

After the purchase agreement has been negotiated

- Keep the buyer-client informed
- Use hourly fee for additional services

After move-in

- Take a satisfaction survey
- Get a letter of recommendation
- Follow up for referrals

***More Than We Bargained for
Lessons Learned About Stigmatized
Properties***

By Tom Starck,
Meachum Spahr & Postel, Chicago, IL

My wife and I purchased a house in an older neighborhood of Chicago a little more than five years ago. We are both attorneys specializing in litigation for midsized law firms, but don't hold that against us, at least not yet.

The house we purchased is more than a hundred years old and needed repair. But we were hoping to take advantage of moving into an up-and-coming neighborhood on the north side of the city during a period of gentrification.

Shortly after we moved in, my brother, an anesthesiologist at a large hospital in downtown Chicago and a Gulf War veteran, came to live with us. He was in transition and needed a place to stay for a year.

Two months after we had all settled into our new and cozy life, I noticed my wife occasionally staring down a long upstairs hallway towards the front bedroom. After days of being pressed on what she had noticed, she reluctantly related that she had seen something that looked like a woman dressed in clothing from the turn of the (last) century, walking into the front bedroom in the oldest part of the house.

Days later, my brother approached me and told me, also reluctantly (for fear of losing his hard-earned scientific medical objectivity and rigid military air), that something was peculiar about his bed in the upstairs bedroom – he said it sometimes shook back and forth for thirty seconds at a time.

The plot thickens.

We sat down that evening to swap stories. I, fortunately or unfortunately, had no stories to share. Suddenly, a large closet door in the front bedroom slammed shut. Slammed. Not creaked. Not gently closed. Slammed. My wife and brother ran to investigate but I, succumbing to my litigation instincts, ran to call the prior owner.

The woman who sold the house to us was a single mother of a young teenage daughter. I simply asked her if there was something “unusual” about the house. Without any prompting, but with some hesitation, she related that her daughter had seen a ghost from time to time in the first year they lived in the home. She described the ghost as an elderly woman dressed in old fashioned clothes. Without any hints from me (I’ve taken too many depositions), she went on to say the ghost always appeared in the front upstairs bedrooms.

After I picked up my jaw and put my sometimes stone heart back in my chest, my thoughts turned to disclosure issues prior to the sale of what later proves to be a “stigmatized property.” The ghost of “Caveat Emptor” was beginning to haunt me.

What Says the Law?

Stigmatized properties or “psychologically impacted” houses have been generally defined as properties involving non-physical or emotional defects. These non-physical or emotional defects can involve the paranormal, like my house, a suicide, or an infamous crime or gruesome murder scene.

The specific definitions and applicable remedies, if any, vary widely from state to state. California, Florida, Idaho, Illinois, Connecticut and other states have gone so far as to enact legislation governing requirements to and exemptions from disclosure of non-physical defects. (Editor’s Note: State-specific information on a number of subjects, including agency and seller’s disclosures, appears in the State Issues Clearinghouse on www.realtor.org under Government Affairs. See “Seller’s Required Disclosures,” and then select “Agent’s Obligations Regarding Seller’s Required Disclosures” under your state. State case law may also address this issue. For this reason, it is important to consult with an attorney who is familiar with your state’s position on obligations

to disclose nonphysical defects.) If neither your state legislation nor case law addresses the issue of disclosing non-physical defects, your question becomes, was this a material defect or condition that has a significant effect upon the value of the property? Put another way, would a buyer be willing to buy the property or pay the same price for the property if he or she were aware of the “condition?”

Here in Illinois, the real estate licensing statute (225 ILCS 454/15-20, 25 (West Supp. 2003)) says, in relevant part, that “no cause of action arises against a licensee for failing to disclose...ii) that the property was the site of an act or occurrence that had no effect on the physical condition of the property or its environment or the structures located thereon...” Arguably the “appearance of” ghosts has “no effect on the physical condition of the property or its environment or the structures located thereon.” Likewise, the scene of a bloody murder once the blood bath has been thoroughly cleaned up (usually long before the transaction and sometimes even the arrest) has no such effect. Thus, in Illinois, a seller’s agent will normally have no duty to disclose that a murder occurred on a property or that a ghost “occupies” the premises. Buyer representatives who are aware that a property has non-physical defects that may be material to their clients may, however, depending on state law, be obligated to meet a higher standard with respect to such disclosures.

As a buyer, litigation is an option that should only be considered after weighing the costs, both in terms of legal fees, but also the time and notoriety involved in pursuing an ill-defined diminution in value. The diminution will be difficult to prove and needs to be somewhat substantial to justify a lawsuit. Again, because the law varies so widely, always consult a local attorney well versed in both property disputes and litigation. But don’t expect to find Ghostbusters, Dealbreakers & Associates. This is a niche market.

My quick survey of some of the states and issues around the country started with a California case where a property had been the site of a triple murder 10 years earlier, one of the first cases to impose a duty to disclose such material facts that are not readily apparent to the

buyer (Reed v. King in 1983). A New York case later held that the seller had a duty to disclose a “poltergeist,” which in that case was described as an elderly woman with rosy cheeks in American Revolution-era clothes (Stambovsky v. Ellis in 1991). In that case, the judge actually quotes the Ghostbusters theme song and permitted the buyer to rescind the contract since the seller believed and publicly promoted the house as being haunted.

A Return to Buyer Beware?

Some states (lacking the New York court’s sense of humor and respect for the “boo” process of law), have enacted legislation restricting remedies for buyers claiming to be damaged by nondisclosure of properties that were the site of a murder, suicide or even the home of an AIDS victim. Cases such as these make it tempting to think that new life is being breathed into the ghostlike doctrine of “Caveat Emptor,” rescuing this ancient legal principle from its haunting legal purgatory.

For example, Colorado adopted the “Nondisclosure of Information; Psychologically Impacting Real Property” law. And the District of Columbia acted to limit the options of the buyers in recourse and for rescission through the Department of Consumer and Regulatory Affairs: Government of the District of Columbia. In the vast majority of states, however, the doctrine of caveat emptor is no longer applied and a legal obligation exists to disclose material facts not readily observable upon reasonable inspection by the purchaser. But each state is unique, both in statutes and case law, and there are relatively few cases that have made it to the precedent-setting appellate level on this issue.

Advice for Buyer’s Reps

The bottom line as a buyer’s representative? Don’t be spooked. A general inquiry before the purchase as to whether there is anything about the property that is not readily apparent and might have an impact on its value would put the onus on the seller to disclose material defects, both worldly and unworldly. This simple inquiry could form the basis of an action based on misrepresentation, providing that the stigma or psychological impact is material, meaning impacting the value or desirability of the property.

Even if no inquiry is made and no disclosures are volunteered, there may be recourse for the purchase of stigmatized or psychologically-impacted properties, depending upon the state. But before walking into the nightmare of real life litigation, buyers should consult with an attorney knowledgeable and experienced in both property and litigation, then weigh the financial cost, psychological impacts and notoriety of chasing the ghost of ethereally-proved recourse through the ghouls of our litigation system. If your client sues, people will be ringing their doorbell and not just on Halloween.

In Our Case

You’ll be happy to know my wife and I chose not to open that slammed closet door. While my brother has moved on, we continue to live happily ever after with our phantom houseguest.

Tom Starck is a Senior Litigation Specialist for Meachum, Spahr, & Postel in Chicago, Illinois. A practicing attorney and litigation expert for 25 years, Starck is currently responsible for the defense of Liberty Mutual national and commercial market clients.

AIDS Disclosure and Other Stigmas

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(Editor’s Note: The following material provides legal counsel, primarily to listing agents, regarding stigmatized properties. This same guidance, however, can be valuable to buyer’s reps, who must also grapple with how to counsel buyer-clients on this subject. By understanding the disclosure obligations of listing agents, buyer’s agents are in a better position to properly represent their clients in purchasing negotiations.)

Agency disclosure, property condition disclosure—what other kinds of disclosures do real estate professionals need to make to consumers? How about stigmas such as murders, suicides, or AIDS? Do these factors need to be disclosed during the real property transaction?

The National Association of REALTORS® defines stigmatized property as: “a property that

has been psychologically impacted by an event which occurred, or was suspected to have occurred, on the property, such event being one that has no physical impact of any kind.”

In other words, when dealing with a stigmatized property, real estate agents are not dealing with facts about physical characteristics—they are dealing with the fears of a potential purchaser. The most common events associated with stigmatized property are murders, suicides and criminal activity. Stigmatized property also includes property in which a current or former occupant has been infected with HIV or diagnosed with AIDS.

AIDS Disclosure

The 1988 Fair Housing Act Amendments established the handicapped, which includes people diagnosed with AIDS, as a new protected class. It is now illegal to discriminate against people with handicaps just as it is illegal to discriminate on the basis of race, color, religion, sex, national origin or familial status.

According to the Department of Housing and Urban Development (HUD), it is illegal for real estate agents to make unsolicited disclosures that a current or former occupant of the property has AIDS. If a prospective purchaser directly asks an agent if a current or former occupant has AIDS, and the agent knows this is in fact true, HUD advises that the agent should not respond. NAR advises that the agent respond as follows:

It is the policy of our firm not to answer inquiries of this nature one way or the other since the firm feels that this information is not material to the transaction. In addition, any type of response by me or other agents of our firm may be a violation of the federal fair housing laws. If you believe that this information is relevant to your decision to buy the property, you must pursue this investigation on your own.

Other Stigmas

Although federal law provides guidelines for handling AIDS disclosures, there are still grey areas surrounding disclosures of other stigmas. When a property defect is physical, disclosure is mandatory in most states. When the “defect” is not physical, however, disclosure becomes dependent on materiality. The following guidelines are designed to help a listing agent,

when faced with information regarding a potential stigma, determine whether or not a stigma is material to a particular real estate transaction.

Step #1: Determine whether the information is fact or fiction.

Investigate the sources of the information, e.g., check newspaper accounts, talk to neighbors, etc. Separate rumor from reality. If the stigma is based on rumor and not on fact, you are under no obligation to disclose. If, on the other hand, the stigma turns out to be factual, e.g. there was in fact a murder, you should proceed to the next step.

Step #2: Check state laws.

Many states have enacted laws that generally apply to AIDS, homicides, or suicides, and provide that the stigma is not a material factor which needs to be disclosed. If a state does not have a specific law governing disclosure of stigmas, there may be other laws, such as privacy laws, that influence or affect disclosure decisions. State statutes vary widely, however, so it is essential that an agent be familiar with the laws of his state. If there is a law governing disclosure, it will probably state that you have no duty to disclose. Because there is no disclosure obligation, investigation into the issue ends here. If there is no law governing disclosure, proceed to Step #3.

Step #3: Determine materiality.

To analyze the materiality of a stigma, you should ask yourself this question: would knowing about the stigma affect the willingness of most people to buy the property or reduce the amount of money they would pay for the property?

Most stigmatized property cases involve stigmas that are less sensational than say a multiple-murder. Less sensational stigmas may or may not impact on the market value of the property. However, it is your job to make an analysis of what a reasonable person would do with this information. Would a reasonable person be willing to buy the property knowing about the stigma? Or, would a reasonable person pay less for the property knowing about the stigma? If, at this point in the analysis, the answer is yes to either question, you have concluded that the stigma is a material fact which should be disclosed.

Step #4: Discuss disclosure with the sellers. Go back and talk to the sellers about what you have determined. Walk them through your analysis and show them why this particular factor may make a difference in the sale of their property. If the sellers agree to disclose the stigma, make the disclosure judiciously. It is not necessary to disclose information about a stigma to those who simply express interest in the property. The best time to disclose is at the contract proposal stage. Present the subject as one more relevant piece of information about the property and use simple non-threatening language. If the sellers disagree and refuse to disclose what you have determined to be a material factor regarding the property, you will need to give up the listing.

Because the sellers are your clients, you cannot disclose information that they have specified should remain confidential without violating one of the duties inherent in your agency relationship with them. However, you may also be in violation of the basic duty to disclose material factors that affect the value or desirability of the property. The best way to handle this dilemma is to give up the listing.

Conclusion

Remember, property stigmas are emotional issues that need to be handled carefully. To reduce the legal risks in this area, it is essential that real estate agents:

- understand the issues associated with stigmatized property,
- know pertinent federal and state laws, and
- know how to evaluate facts and make informed decisions about disclosure.

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Court Cases

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Menzel v. Morse—Negligence and breach of fiduciary duty

In *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985), the Supreme Court of Iowa addressed the issues of negligence and breach of fiduciary duty. The court found that the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS[®] (NAR) was the standard for determining a broker's negligence. Further, the court held that conduct between the parties can constitute an implied agency relationship with attendant fiduciary duties.

Facts: The Menzels (buyers) were relocating to Fort Dodge, and were sought out by Morse, a sales agent for Jones, a broker who belonged to the local MLS. Morse testified he hoped to make the Menzels his customers. The Menzels testified Morse said he wished to be their broker and find them a house. Morse never told them they were not his clients, nor did he tell them he was an agent for any seller. Morse showed them an MLS-listed house that was under construction, and the Menzels made a full-price offer which was rejected. Later, in the absence of the Menzels, Morse drafted a new offer and signed it "By agent Morse" for the Menzels. The sellers signed the contract which stated that all necessary work was to be completed by the closing date.

On the closing date, the Menzels were given only fifteen minutes to inspect the house. The Menzels, who had no experience with construction or new homes, found so many obvious defects they refused to close. The Menzels testified that Morse told them that if they failed to close they would lose their down payment and would be sued for breach of contract. Morse also advised them they did not need an attorney. Mr. Menzel testified that he felt he had no choice but to go through with the closing. When the closing took place, \$1,500 was placed in escrow to cure the defects. Upon moving into the home, the Menzels found

serious defects. They sued the contractor, who then claimed bankruptcy. They sued Morse and Jones for negligence and breach of fiduciary duty. The trial court found for the defendants and the Menzels appealed.

Holdings/Analysis: The Supreme Court of Iowa first addressed the negligence issue. The court stated that the general rule requires a plaintiff to produce evidence to show the standards of conduct and practices that establish the requisite skill and knowledge of members in good standing in the defendant's trade or profession. The court found that the applicable standard for real estate brokers was the NAR Code of Ethics (Code). The court added that it was immaterial as to whether the broker is a NAR member if it is definitely established that the Code has been adopted and is applicable to those in the real estate profession in the state. The court noted the defendants' admissions that the Code was the accepted standard in Iowa. The court then remanded the negligence issue. Turning to the fiduciary duty issue, the Supreme Court of Iowa found that an agency relationship between the parties was a requirement for such a claim. The court stated that an agency relationship may be by express agreement between the parties, or by implication from the words and conduct of the parties. The court found overwhelming evidence that Morse was an agent for the Menzels, beginning with his seeking them out and soliciting them as customers. Further, the court found no substantial evidence that he represented the sellers. The court stated that, on remand, Morse's activities must be viewed in light of the agency relationship between him and the Menzels.



Smith v. Sullivan—Implied agency and undisclosed dual agency

In *Smith v. Sullivan*, 419 So. 2d 184 (Miss. 1982), the Supreme Court of Mississippi addressed the issues of implied agency and undisclosed dual agency. The court found that an expired agency contract may be extended by a broker's actions and the principal's acquiescence, and that where implied agency exists, the agent owes all requisite fiduciary duties.

Facts: The Sullivans (sellers) owned 220 acres of undeveloped land, most of which was held as security for a loan on which they were delinquent. To avoid an impending foreclosure, the Sullivans wished to sell some of the land, yet retain the mineral rights. In March 1978, the Sullivans executed a listing agreement with Smith, a broker, who was given a three-month exclusive right to sell 112 1/2 acres of the land. On the expiration date of the listing agreement, Smith had not found a purchaser. In August 1978, Smith produced Brown, a prospective purchaser. When the Sullivans inquired about Brown's financial background, Smith responded that Brown was a man with real estate development experience. In fact, Brown was a female acquaintance of Smith enlisted to purchase the Sullivans' property with a loan co-signed by Smith. This arrangement would enable Smith's petroleum company to develop any oil deposits. Under these false pretenses, the Sullivans authorized Smith to negotiate with Brown, who offered to purchase 120 acres of land, plus all mineral rights for \$54,000. Foreclosure was impending, and Smith persuaded the Sullivans to agree to those terms. Subsequently, Brown was granted a two-month option to purchase. Prior to Brown's exercise of the option, the Sullivans were approached by a third party interested in leasing the mineral rights for the entire 220 acres. The proposal would have netted the Sullivans an extra \$5,200. The Sullivans wished to speak with Brown regarding the offer, but Smith refused to arrange a meeting or to provide Brown's phone number. When the Sullivans eventually learned Brown's true identity, they refused to honor the option contract. Brown then sued the Sullivans for specific performance. Smith also sued the Sullivans for the sales commission. The Sullivans filed a complaint against Smith with the state real estate commission, which revoked Smith's real estate license. The revocation was affirmed by the Circuit Court of Hinds County and Smith appealed to the Supreme Court of Mississippi.

Holdings/Analysis: The Supreme Court of Mississippi found that a broker holds a fiduciary relationship with his principal, including all the attendant duties. The court also found that if the agency is conferred for a certain period of time, it expires upon the completion of that period. The court added that under Mississippi law, a

contract which has expired may be extended by a broker's actions and the principal's acquiescence. The court observed that Smith viewed himself as the Sullivans' agent after the expiration of the listing since he charged them a commission and filed suit on those grounds. Additionally, conversations between Smith and the Sullivans indicated that an implied or oral contract still existed. Therefore, the court held that Smith was the broker/agent for the Sullivans throughout the time period and owed them the duties attendant with fiduciary status.

The Supreme Court of Mississippi also held that an agent must not put himself in a position antagonistic to the principal's interest by fraud or by representing others with interests adverse to his principal's interests. The court affirmed the revocation of Smith's license on the basis that he acted as an undisclosed dual agent and that he had dealt unfairly with the Sullivans.



Bauman v. Nutter—Implied agency and specific performance

In *Bauman v. Nutter*, 328 N.W.2d 354 (Iowa Ct. App. 1982), the Court of Appeals of Iowa addressed the issues of implied agency and specific performance. The court held that an agent-principal relationship may be implied from the parties' words or conduct and the circumstances of a particular case, and that specific performance will be denied to the principal where the agent induces the seller to sign a contract with mistaken terms.

Facts: Nutter (seller) listed 151 acres of property with Davitt Realty at a firm price of \$750 per acre. The agreement authorized placement on a multiple listing service. Bauman (buyer) first learned of the property from Stanley, a broker who did not work for Davitt, and who was not a member of the listing service. Prior to this referral, Bauman asked Stanley to "keep his eye out and keep him in mind if he found anything suitable." Also, Bauman had previously acquired another piece of property through Stanley and had been satisfied with Stanley's work. After Stanley informed Bauman about the property, Bauman signed an offer.

Stanley took Bauman's offer to Davitt Realty, which informed him of the firm \$750 per acre

price. Against Davitt Realty's advice, Stanley presented the offer to Nutter. Rather than indicate a price of \$750/acre in the offer, Stanley wrote the terms with a net price of \$75,500 (which was less than \$500/acre). Nutter, who mistakenly believed Stanley was affiliated with Davitt Realty, accepted the offer with those terms. After realizing the mistake, Nutter sought to avoid the contract. Bauman sued Nutter for specific performance. Nutter then sued Stanley for breach of fiduciary relationship, false representation, and negligence. Stanley sued Nutter for the sales commission. The trial court held for Bauman and Stanley. Nutter appealed.

Holding/Analysis: The Court of Appeals of Iowa first addressed the specific performance claim. The court found that specific performance may be avoided when there is a mistake on the part of the defendants, though such mistake is not such to warrant the invalidating of the contract. The general rule regarding a mistake is that a person who signs a written contract without reading it is bound thereby, and is precluded by his own negligence from claiming that he did not know its contents.

However, if a person is induced to sign a contract without reading it through some trick or artifice or false representation on the part of another, he is not estopped to deny the validity of the document. The court found that Nutter thought that Stanley worked for Davitt and trusted that the offer included a price of \$750/acre. The court held that Stanley, who failed to inform Nutter of the change in the price, procured his signature by "trick or artifice," and that because there was a mistake as to the contract, specific performance should be denied.

The Court of Appeals of Iowa also addressed whether Stanley's actions were attributable to Bauman, the buyer. The court found that if an agency relationship existed between Stanley and Bauman, that specific performance would not be allowed for Bauman, as he would have the benefit of Stanley's actions, and the trick or artifice would be attributed to Bauman. With regard to agency, an agent-principal relationship "may be implied from the parties' words or conduct and the circumstances of the particular case." The court concluded that Bauman's request to "keep an eye out" for suitable

property, his prior acquisition of property through Stanley, and Bauman's acquiescence to Stanley's actions created an implied agency. Thus, specific performance was denied to Bauman.



Quechee Lakes Rental Corp. v. Boggess—Duration of fiduciary duties

In *Quechee Lakes Rental Corp. v. Boggess*, 158 Vt. 258, 608 A.2d 39 (1992), the Supreme Court of Vermont addressed the duration of the fiduciary duties owed by a broker to a seller. The court held that a listing broker's fiduciary duties to the seller continue even after the seller has rejected a purchaser's full-price offer. The court also held that even though the seller did not prove actual harm, because the broker's breach of fiduciary duty might have caused potential harm to the seller, the broker was not entitled to a commission.

Facts: The Boggesses listed a furnished condominium with Quechee Lakes Rental Corp. (QLRC) for \$289,500. Bacon, a QLRC sales agent, showed the property to a prospective buyer who offered \$275,000. After the offer lapsed, Bacon asked Mr. Boggess if he would consider \$281,000. Mr. Boggess said he would consider, but not necessarily accept, such an offer. Without authorization, Bacon told the buyers that the Boggesses would accept \$281,000. The buyers made this offer, but included a mortgage contingency and wanted the condo unfurnished. The Boggesses rejected the offer and told QLRC they were considering taking the condo off the market. QLRC offered the buyers a side agreement, of which the Boggesses were not advised, whereby QLRC would pay the buyers \$8,500 for the furnishings at closing. The buyers then made a full-price offer for the property. After receiving the full-price offer, Mr. Boggess made a counteroffer which led the buyers to believe he was not serious about selling the property. After QLRC advised Mr. Boggess's attorney that the rejection of a full-price offer could make the Boggesses liable for the brokerage commission, they accepted the buyer's offer.

Bacon, who knew that the buyers were upset with Mr. Boggess, did not tell the buyers about

the acceptance until three days later. In the interim, the buyers purchased a more expensive unit owned by QLRC's parent company. Later, QLRC filed suit seeking a brokerage commission for having produced a potential buyer who made a full-price offer. The trial court found that QLRC breached its fiduciary duty to the Boggesses by failing to disclose its interest in the sale. The trial court also found that QLRC was negligent for failing to immediately communicate to the buyers the seller's acceptance of the last offer. The trial court also denied QLRC a commission. QLRC appealed.

Holdings/Analysis: The Supreme Court of Vermont held that QLRC breached its fiduciary duty to the Boggesses. The court found that QLRC failed to communicate material information from Mr. Boggess to the buyers, and that QLRC's actions were antagonistic to the interests of its principals, the Boggesses. The court stated that "a real estate broker, as an agent, must act with the utmost good faith and loyalty for the furtherance and advancement of the interests of the principals." The court also stated that "a broker cannot be controlled by his own judgment, rather than that of his principal." The court added that QLRC had a duty to communicate material information relevant to the sale and that its failure to do so constituted a breach of fiduciary duty.

Regarding the payment of a commission, the Supreme Court of Vermont found that an agent who conceals material information from its principal, or does not otherwise comply with the principal's intentions, is not entitled to collect a commission on the sale. The court also found that a broker's fiduciary duty to the seller does not end when the broker procures a ready, willing, and able buyer on the seller's terms. The court held that when a broker breaches a fiduciary duty to a principal, the broker is not entitled to receive a commission if some potential harm to the principal may have been caused by the breach, even though no actual harm is shown.



Stambovsky v. Ackley - Stigmatized Property

In *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672 (1991), the New York Appellate

Division addressed whether a seller and/or broker had a duty to disclose the purported presence of ghosts in property. The court found that neither party had a legal duty to disclose the ghosts, but granted the equitable remedy of rescission holding that the seller, who promoted stories about the ghosts in local and national publications, could not deny their existence.

Facts: *Stambovsky* (Buyer) contracted to purchase a home from *Ackley* (Seller) through *Ellis Realty* (Broker). Buyer lived in New York City, over an hour from the location of the property on Long Island. Prior to closing, Buyer learned that the house was reputed to be possessed by poltergeists. Neither Seller nor Broker had disclosed this information to Buyer, who sued them for rescission and damages. During the previous decade, the paranormal activity had been featured once in *Readers' Digest* and twice in the local press. The New York Supreme Court dismissed the complaint, holding that Buyer had no remedy at law. Buyer appealed.

Holdings/Analysis: The New York Appellate Division stated that "New York adheres to the doctrine of caveat emptor and imposes no duty upon the vendor to disclose any information concerning the premises...unless there is a confidential or fiduciary relationship between the parties." *Caveat emptor* ("buyer beware") requires that a buyer act prudently to assess the fitness and value of his purchase and operates to bar the purchaser who fails to exercise due care from seeking the equitable remedy of rescission. Generally, some affirmative misrepresentation or partial disclosure is required to impose upon the seller a duty to communicate undisclosed conditions affecting the premises. The court noted that caveat emptor applied differently to law than in equity. It stated that "where a condition which has been created by the seller materially impairs the value of a contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity."

The New York Appellate Division granted rescission to Buyer on the basis that Seller deliberately fostered the public belief that her

home was possessed. It noted that “having taken to inform the public at large, to whom she has no legal relationship, about the supernatural occurrences on her property, she may be said to owe no less a duty to her contract vendee.” It also noted that “where, as here, the seller not only takes unfair advantage of the buyer’s ignorance but has perpetuated a condition about which he is unlikely even to inquire, enforcement of the contract (in whole or in part) is offensive to the court’s sense of equity. Thus, the court concluded that Buyer, who lived in New York City, could not have been expected to have any familiarity with the folklore of the Village of Nyack, and not being a “local,” he could not readily learn that the home was haunted. Thus, the court granted rescission.

Regarding Broker, the New York Appellate Division concluded, with virtually no discussion, only that, as agent for Seller, he was under no duty to disclose to a potential buyer the phantasmal reputation of the premises.



Bortz v. Noon – Innocent conduit of information from a third party

Bortz v. Noon, addressed the issue of misrepresentation in the context of a licensee acting as an innocent conduit of information from a third party. In 1986, Albert Bortz (the “Buyer”) entered into a contract with Mr. and Mrs. Noon (the “Sellers”) to purchase their home located in Pittsburgh. A salesperson (the “Sales Associate”) affiliated with the listing broker, Coldwell Banker Real Estate (the “Listing Broker”), was the selling licensee.

The Buyer’s lender required that the home’s septic system pass a dye test before the closing. The Sales Associate referred the Buyer to a contractor who performed the test. He told the Sales Associate that the system failed the test, and she informed the Buyer. Under the contract, the Sellers had the option of repairing the septic system, which they elected to do. They chose another contractor to do the work. After the contractor’s work was done, an employee of the title insurance company told the Sales Associate that the system passed the dye test. She conveyed this information to the Buyer and the closing was scheduled.

After the closing, the Buyer learned that the septic system had not passed a dye test; in fact the title company had forgotten to have it tested. Testing revealed that the system could not be repaired. The property had to be connected to the public sewer system, at a cost of over \$15,000. In an equity proceeding, the Buyer sued the Listing Broker, the title company and the Sellers, seeking monetary damages and rescission of the sale. Finding the Listing Broker liable for the Sales Associate’s misrepresentation, the Chancellor ruled in favor of the Buyer, but declined to rescind the sale. The Sellers appealed to the Superior Court, which upheld the lower court decision. Neither of these courts specified on which theory of misrepresentation their finding of liability was based.

On appeal to the Pennsylvania Supreme Court, the issue was whether the Sales Associate had a duty to ascertain whether the septic system actually had passed a dye test and whether her failure to do so constituted a misrepresentation to the Buyer. The court reviewed Pennsylvania law regarding liability for misrepresentation in-depth, and explained the theories of intentional misrepresentation, negligent misrepresentation, and innocent misrepresentation. It found no evidence that the Sales Associate intentionally misrepresented any facts to the Buyer, nor that she intended to deceive the Buyer by not providing him with copies of the reports, when she herself did not have copies of the reports. While she made an affirmative misrepresentation with respect to the dye test, she did so not knowing the information was false.

As far as negligent misrepresentation, the Pennsylvania Supreme Court stated that it has not recognized this cause of action in connection with a real estate licensee (although lower courts in the state have). It observed that courts in many other states recognize such a cause of action and have found liability where a real estate licensee fails to use reasonable care in ascertaining the veracity of a representation. Liability sometimes is found where a real estate licensee fails to independently verify a fact that the seller represents to the buyer, and which the licensee then passes on to the buyer.

The Bortz court noted that when the events took place, in 1986, the standard of care in the real state brokerage business did not require a licensee to verify or disclose test results that were not ordered by the licensee and were not part of the sale contract. In this particular situation, the Sales Associate would not have had a reason to know that the title company failed to have the dye test performed. The court stated that the Sales Associate “was not acting as a source of information from the Sellers or other entity with whom she had an agency relationship and which might then trigger a duty to physically transfer the reports to the Buyer and verify the accuracy of statements that were material to the sale transaction.” Instead, she was acting as an “innocent conduit” of information from the title company, an apparently reliable source, to the Buyer. Nothing gave the Sales Associate notice that the information was false, and she did not have a duty to independently investigate.

The court stated that with these facts, imposing a duty on the Sales Associate to investigate the accuracy of the test would place too high a burden on real estate licensees. Therefore, it held that a real estate licensee does not have a duty to perform an independent investigation of a contractor’s report, where the licensee did not have an agency or contractual relationship with the third party. The court reversed the lower court’s decision, finding instead that the Listing Broker was not liable to the Buyer for the Sales Associate’s affirmative misrepresentations.



Pagano v. Krohn – Buyer’s agent did not have duty to tell buyers that lawsuit might affect value

Raymond and Lillian Pagano, who were represented by Jim Lawson (the “Buyer’s Agent”) made an offer to purchase a condominium unit in the Black Horse Ranch, California, which was owned by Helga Krohn and listed for sale with Peggy Chodorow (the “Listing Broker”). Krohn completed a real estate disclosure statement, stating that she was unaware of any flooding, drainage or grading problems. The Listing Broker added that while some units have experienced problems with moisture, she knew of nothing to contradict the seller’s statement. The Buyer’s Agent was told

that some units in the development had water problems, but not Krohn’s unit. The transaction fell apart due to an unrelated issue.

A few weeks later, the Black Horse Homeowners Association informed all of the owners by letter that it had filed a lawsuit against the condominium developer in connection with the “water intrusion problem,” and the Buyer’s Agent gave the Paganos a copy of the letter. Shortly thereafter, the Paganos made a second offer to purchase Krohn’s unit. This offer was for \$5,000 less than their prior offer, and specifically stated that they were aware of the lawsuit and that this knowledge was reflected in their offer. They had the property inspected and no water problem was detected. The transaction closed and the Paganos subsequently discovered water damage.

They sued the seller, the Listing Broker, their Buyer’s Agent and the respective brokerages, claiming among other things, negligent misrepresentation and violation of a real estate broker’s duties as prescribed by California statute. The relevant portion of the California statute states that a real estate licensee has a duty to “conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to the prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal.”

The trial court granted the summary judgment motions of the seller and the brokers, observing that the Paganos’ offer indicated they had knowledge of the lawsuit and had adjusted their offering price accordingly. That court stated that “As a matter of law...real estate brokers are only required to disclose problems with a unit that could have been discovered through a visual inspection.”

On appeal, the California Court of Appeals ruled that the disclosure made by the Listing Broker to the Paganos was sufficient; she did not have a duty to disclose more facts about the water intrusion problem in general or about the litigation. The court stated that unless there was some reason to believe that the subject unit would be affected, she had no duty to tell them more about the water problem of the

development in general. The court also found that the seller's disclosure was sufficient.

As far as the Buyer's Agent, the Paganos claimed that he breached his fiduciary duty to them by not obtaining a copy of the complaint against the developer or independently verifying the information he received from the Listing Broker and the seller. The court stated that a buyer's agent is not required to verify information which is received from the seller and passed along to the buyer if the buyer understands that the information has not been verified. Here, the Buyer's Agent had informed the Paganos of the lawsuit and they knew that he was passing along information from the seller and the Listing Broker and that he had not personally investigated the matter.

The Paganos further argued that the Buyer's Agent had the duty to disclose to them his general knowledge that such a lawsuit has a detrimental effect on sales prices. The court held that "Conclusions as to how the legal or practical ramifications of disclosed facts adversely impact value are not 'facts' subject to an agent's duty of disclosure." The Buyer's Agent had fulfilled his duty to the Paganos under California law by informing them of the existence and nature of the lawsuit; he did not have a duty to tell them that it might adversely affect the value of the unit.



Dismuke v. Edina Realty – failure to disclose the effect of dual representation

In the state court case, *Dismuke v. Edina Realty*, (Not reported in N.W.2d) 1993 WL 327771 (Minn. Dist. Ct. 1993), the class consisted of 6,000 sellers of residential property who had exclusive listing agreements with Edina. The one-count complaint alleged breach of fiduciary duty. In its response, Edina filed a Motion for Summary Judgment asserting that its disclosure statement was "a sufficient disclosure of the dual agency relationship at issue" and that it satisfied statutory disclosure requirements. The plaintiffs also filed a Motion for Summary Judgment, contending that the disclosure statement was inadequate under common law.

Holdings/Analysis: In ruling on Edina's summary judgment motion, the state district court held that, while the disclosure statement appeared to comply with the state's statutory requirements, the statute did not eliminate common law disclosure requirements. As such, the issue of whether the form disclosure was full and adequate under the common law presented a question of fact which would ultimately need to be decided by a jury. The state court judge granted summary judgment to the plaintiffs holding that Edina breached its fiduciary duty to disclose to the class members the consequences and effect of dual representation. Thereafter, the parties reached a three-part settlement under which the court vacated the summary judgment.

Settlement: First, Edina agreed to issue each class member coupons for reduction in commissions on future sales of houses by Edina. Depending on the number of coupons redeemed, and the value of the homes sold, the coupons could be worth \$13 million. Second, the settlement allowed class members to exercise stock options within ten years of the settlement date. Estimates valued this part of the settlement at \$5.6 million. Third, Edina was directed to pay \$2.5 million to cover plaintiffs' attorneys' fees and other costs of the litigation.

Note: This case is not published in a reporter and may not constitute current law. *Consult with counsel before relying on this case.*



Field v. Century 21 Klowden-Forness – Fiduciary duties of a buyer representative

Realty, 63 Cal.App.4th 18, 73 Cal. Rptr.2d 784 (1998). The California case, *Field v. Century 21 Klowden-Forness Realty*, found that a broker in a fiduciary relationship with the buyer may be required to examine such things as public records and title documents for the buyer, as opposed to a seller's broker, who has no such duty.

In 1988, Robert and Betty Field (the "Buyers") purchased rural residential property in California. Real estate broker Century 21 Klowden-Forness, and its salesperson, Shirley Hays

(collectively referred to as the “Broker”) represented the Buyers in the purchase. Several years later, the Buyers discovered that a water district easement on the property was significantly greater than what they had understood it to be, and also that the property’s acreage was less than they had thought. In 1992, they sued their Broker for negligence, negligent misrepresentation, and breach of fiduciary duty, claiming that the Broker had not inspected title documents nor determined the extent of the easement.

At trial, the scope of the easement was established as being significantly more extensive than what had been represented to the Buyers and the acreage was less than had been represented to them. While the Broker had been aware of the existence of an easement, she had not verified its extent, or the size of the property, nor had she advised the Buyers to do so. The Broker could not have examined the title documents, since she did not even receive them until after the closing. The Broker asserted that the Buyers’ claims were barred by California’s two year statute of limitations, contained in Civil Code Section 2079, for breach of duties owed to purchasers by seller’s brokers and cooperating brokers. The Buyers won the jury trial, and the Broker appealed.

The Court of Appeal explained that, under Section 2079, there is a two year statute of limitations, from the date of possession, for actions against sellers’ real estate brokers and their cooperating brokers, for breach of their responsibility to conduct a “reasonably competent and diligent visual inspection of the property, and to disclose all material facts such an investigation would reveal to a prospective buyer.” This law was enacted to codify the holding of the well-known California case, *Easton v. Strassburger*. The statute expressly states that a seller’s broker does not have a duty to investigate public records or title matters for the purchaser. While the statute of limitations for a seller’s broker’s breach of duty to a purchaser is two years from the possession date, the statute of limitations for actions involving a fiduciary duty usually begins to run on the date the negligence is discovered. The Field court explained that the fiduciary duty owed by a broker to a client is much greater

than the non-fiduciary duty owed to a customer, which is codified in Section 2079. “Under the common law, unchanged by Easton and section 2079, a broker’s fiduciary duty to his client requires the highest good faith and undivided service and loyalty.” The court also stated that, depending on the circumstances of a given situation, “a broker’s fiduciary duty may be much broader than the duty to visually inspect and may include a duty to inspect public records or permits concerning title or use of the property, a duty which is expressly excluded from Section 2079.” Also that, “a broker has a fiduciary duty to his own client to refrain from making representations of facts material to the client’s decision to buy the property without advising the client that he is merely passing on information received from the seller without verifying its accuracy.”

The court rejected the Broker’s argument that it was a cooperating broker and that its responsibilities to the Buyers were governed by Section 2079. Finding that the statute only addressed the responsibilities of brokers acting in a non-fiduciary relationship with the buyer, it affirmed the lower court’s holding that the two-year statute of limitations did not prevent the Buyers’ suit against the Broker.



Kelly v. Marx – retention of buyer’s deposit

Kelly v. Marx, 1999 WL 64713 (Mass.)
 The issue in the Massachusetts case *Kelly v. Marx* was whether home sellers could retain the buyers’ deposit when the buyers backed out of the purchase, yet the sellers suffered no damages. In May, 1994, John and Pamela Kelly entered into a purchase and sale agreement (the “Agreement”) to purchase the home of Steven and Merrill Marx (the “Sellers”) for \$355,000. According to the Agreement, “If the Buyer shall fail to fulfill the Buyer’s agreements herein, all deposits made hereunder by the Buyer shall be retained by the Seller as liquidated damages.” The Kellys’ total deposit was \$17,750 - five percent of the purchase price.

The Kellys never purchased the house. On August 9, 1994, they notified the Sellers that they were unable to sell their present home, and

to put the house back on the market. On August 24th, the Sellers accepted another offer, and sold the property for \$360,000 a few weeks later. The Kellys sued the Sellers for the return of their \$17,750 deposit. The Sellers filed a motion for summary judgment, and the lower court held that the Sellers were entitled to keep the deposit pursuant to the liquidated damages clause of the Agreement. The Kellys appealed.

The Appeals Court reversed the lower court decision and ordered the Sellers to return the deposit to the Kellys. That court based its decision on the “second look” doctrine, under which it concluded that the Sellers were not entitled to keep the deposit because they had not suffered any actual damages; therefore, it reasoned, liquidated damages would be a penalty, as opposed to compensation for a real loss.

On appeal to the Supreme Judicial Court of Massachusetts, that court observed that liquidated damages clauses, such as the one contained in the Agreement, are recognized in Massachusetts and are common practice in real estate transactions. The issue was whether the enforceability of a liquidated damages clause should be tested by analyzing the circumstances that existed at the time the contract was formed (called the “prospective” or “single look” approach), or at the time of the breach (the “retrospective” or “second look” approach.)

Quoting another Massachusetts case, the court explained that in general, “[w]here actual damages are difficult to ascertain and where the sum agreed upon by the parties at the time of the execution of the contract represents a reasonable estimate of the actual damages, such a contract will be enforced.” It also explained that liquidated damages will not be enforced if they are “grossly disproportionate to a reasonable estimate of actual damages.”

The Kelly court determined that, in Massachusetts, the “single look” approach should be used, and therefore, only the circumstances at the contract’s formation should be analyzed. It stated that, in the situation at hand, potential damages were difficult to predict at the time the parties entered into the Agreement. “The parties could not know what delays might ensue, what might occur in the real

estate market, or how a failed sale might affect the seller’s plans. Real estate purchase and sale agreements are precisely the type of contracts that are amenable to liquidated damages provisions.”

The court affirmed the decision of the trial court, and the Sellers were permitted to keep the full amount of the Kellys’ deposit.

Editor’s Note: Please be aware that while some states follow the “single look” approach in determining whether liquidated damages should be enforced, other states use the “second look” approach, and consider the circumstances at the time of the breach.



Carter v. Gugliuzzi – brokerage liable to a residential purchaser under the state’s consumer protection act

Carter v. Gugliuzzi, 716 A.2d 17 (Vt. 1998).
Vermont High Court Holds Real Estate Company Liable to Home Buyer Under That State’s Consumer Protection Act.

In a recent case, the Vermont Supreme Court found a real estate brokerage liable to a residential purchaser under the state’s consumer protection act. Carter v. Gugliuzzi. In this case, Flavia Gugliuzzi and others (the “Sellers”) listed their home (the “Property”) for sale with Ruth Bennett, a real estate salesperson who was affiliated with the real estate brokerage Smith Bell Real Estate (“Smith Bell”), where she worked under the supervision of David Crane (the “Broker”).

A California attorney (the “Buyer”) was looking for a home in Vermont. A real estate licensee affiliated with another brokerage showed the Property to the Buyer as a subagent of the Sellers. Shortly after she bought the Property, the Buyer discovered a number of problems with the Property which she claimed either had been misrepresented to her or had not been disclosed, such as the poor condition of the hardwood floors, and the fact that half of a pond on her property actually was located on a neighboring property. Also, the Buyer claimed that the cost to correct the deficiencies with the

pond was much greater than she had been told. In addition, strong winds caused a variety of damage to the Property, such as toppled trees, broken windows and torn off shingles and gutters. The Buyer sued the Sellers and Smith Bell for fraud, negligent misrepresentation and breach of contract, and Smith Bell for violation of the Vermont Consumer Fraud Act (the "VCFA").

The trial court found that the Broker had personal knowledge that the Property, like others in the area, frequently was subject to severe winds but that he had not disclosed this to Bennett or to the Buyer. The court ruled that his knowledge was imputed to Smith Bell and that Smith Bell, through its agents, was liable to the Buyer in tort for various misrepresentations and for violating the VCFA. Smith Bell and the Sellers were held liable for \$30,624, plus interest and costs associated with the wind damage and some of the other misrepresentations. The Sellers further were held liable for \$19,700 due to its misrepresentations about the pond and other matters.

Smith Bell appealed, contending that the VCFA does not apply to acts of real estate brokers in connection with homebuyers. The VCFA provides a remedy to a consumer who contracts for goods or services and who, relying on false or fraudulent misrepresentations or promises, suffers damage or injury by "the seller, solicitor or other violator." Smith Bell claimed that it did not fall under any of these categories. It argued that it did not "sell" the Property, but rather, that it "assisted" the parties. It also argued that the sale of a home between non-merchants does not fall under the VCFA, which only prohibits deceptive acts or practices "in commerce."

Since there were no previous Vermont cases on this issue, the Vermont Supreme Court looked to Federal Trade Commission decisions and cases from other states with similar consumer protection laws. In light of the remedial purpose of the VCFA and its plain meaning, the court upheld the lower court decision, finding that the word "seller" includes real estate brokers who engage in residential real estate transactions, and that the transaction constituted being involved "in Commerce" under the VCFA.

Smith Bell also argued that the Broker's knowledge that the Property experienced high

winds had been gained because he lived in the area, not through his work. It claimed that since his knowledge had not been obtained within the scope of his employment, his knowledge should not be imputed to Smith Bell. The court did not agree and ruled instead that the Broker's knowledge about the high winds properly was imputed to Smith Bell. In reaching this conclusion, the court pointed to a basic tenet of agency law, that "the knowledge of an agent acting within the scope of his or her authority is chargeable to the principal, regardless of whether that knowledge is actually communicated."

The court further stated that it was immaterial how the Broker had gained his knowledge about the high winds, because in Vermont, a real estate licensee's statutory duty is to "fully disclose all material facts within his or her knowledge." The court observed that this "reflects the reality that a broker's business consists precisely of acquiring and conveying information about the community, neighborhood conditions, comparable properties, and other local factors that may affect the value, marketing and sale of property."

