



## Do You Or Don't You Have A Real Estate Agent Representing Your Interests?

That is a "key" question!!

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The Colorado Real Estate Commission makes every attempt at making sure home buyers and sellers truly understand the various broker and agent roles and responsibilities. Unfortunately, not every broker or agent explains these duties, responsibilities, and obligations to prospective home buyers and sellers as well as they should. This article is written in an attempt to clarify some of the complexities surrounding agent representation. While lengthy, it will be worth your time to know and understand this information to avoid issues that could surface when you are in the middle of a real estate transaction, particularly when you are buying a home.

In all states, the practice of real estate is largely governed by state law. So what may be common in one state may not be an accepted practice in another. In addition, all states write their own real estate contracts for real estate professionals to use. This is true for both the purchase agreement between a buyer and a seller of real property, as well as for the working relationships between the prospective buyer or seller and the real estate agent. So it is very important that buyers and sellers understand in detail the duties, responsibilities, and obligations of the real estate agent they employ. Equally important is for buyers and sellers to understand their obligations to the agent they employ.

To begin with, first understand who the players are. A seller is anyone who is a private individual(s), a company or banking/financial institution, home builder, organization, or government agency selling any kind of real estate to which they own. A buyer can be similarly described, but for this article is generally anyone, or any entity, who desires to purchase real estate. A real estate agent is someone licensed in the state to sell real property. That real estate agent may or may not be representing the interests of the party they are working with.

The Colorado Real Estate Commission has created a document titled, Definitions of Working Relationships that is required to be disclosed to all buyers and sellers **before** rendering any kind of "specific" service to buyers and sellers. This document explains that there are essentially 3 types of relationships that can exist between the agent and the buyer or seller. Additionally, it goes on to explain the difference between a "client" and a "customer". In order to avoid "**conflicts of interest**" it is imperative that buyers and sellers thoroughly understand these relationships and distinctions and the contractual agreements they are associated with. Make certain that you have read the documents thoroughly and be sure to ask questions if you don't understand something in the documents. It is the real estate professional's job to make clear to you their duties, responsibilities, and obligations they **may or may not owe to you**.

The 3 types of broker relationships are as follows:

a) Buyer' Representative, wherein the real estate agent owes duties of trust and loyalty to the buyer. As a Buyer's Agent, the real estate agent is an advocate for the buyer. There can be an exception to this, as we will see later.

b) Seller's Representative, wherein the real estate agent owes duties of trust and loyalty to the seller. As a Seller's Agent, the real estate agent is an advocate for the seller. There can be an exception to this, as we will see later.

c) Transaction Broker, wherein the real estate agent **DOES NOT** owe any duty of trust or loyalty to either the buyer or the seller. Essentially, the real estate agent functions only as a "messenger of information" between the parties.

Now that you know that these different relationships exist, your mind may be made up on who and how you want to be represented. Or is it? Well the situation seems obvious enough, but when conflicts occur between buyers and sellers, or between buyers and agents (or for that matter between sellers and agents), that can be much more complicated.

So what's the exception referenced above? In those cases where the agent were to show a property to a buyer they represent and yet that same agent has that property listed for sale, then the agent would be acting as a Transaction Broker for that specific property only. This is designed to avoid conflict between all 3 parties: the buyer, the seller, and the agent. It is crucial that this be understood and in writing between the parties in order to avoid any potential conflicts, as is illustrated below.

However, if the buyer elects that the agent they employ act **ONLY** as their agent in ALL property showings, then that agent would be **prohibited** in showing any properties he possesses, now or later, that may interest the buyer. Why? Because the agreement stipulates that the agent will act only in the interest of the buyer, and since the agent may also have a property listed that may suit their buyer, they can **not** show that property to the buyer without creating a "conflict of interest". That in and of itself creates a conflict between the agent and the buyer, because the buyer may truly want to see that property and perhaps may even desire to buy it. Of course the reverse situation can be true if the seller retained the services of the agent to act **ONLY** as their agent, thereby preventing the agent from bringing buyers to the property with whom the agent also represents.

To look more closely at this issue let's take a look at the approved Colorado Real Estate Commission Buyer Agency Contract, specifically paragraph 4). There are 3 choices a buyer may select from when employing the services of an agent. If the agent selects Buyer's Agent Only then the agent is saying that in ALL property showings the agent will act solely as the buyer's agent. Sounds good **unless** that agent has now or later takes a property listing that suits the needs of the buyer, because the agent also now represents the interest of the Seller. To be clear, that choice selected in the Buyer Agency Contract creates a conflict of interest for the agent. Now, if the Transaction Brokerage relationship is selected, the agent is saying that in all property showings and subsequent negotiations the agent will **NOT** represent the interests of either buyer or seller regardless of who holds the property listing. Essentially this choice means the buyer is left up to their own to represent themselves in a transaction.

So what's the best solution? The buyer wants the agent to represent their interests whenever and wherever possible. Therefore, the best solution is for the agent to act as the buyer's agent when serving the needs of a buyer and to act as a transaction broker in those **rare** situations wherein the agent may have the selected property listed for sale. The best choice to select in this paragraph is Buyer's Agent Unless Brokerage Relationship with Both, wherein the agent selects the provision that allows the agent to represent the buyer's interests, except in those rare cases when the buyer wants to see and/or pursue the purchase of a property the agent has listed. In that case **alone**, the agent will function as a transaction broker. This means that the agent will not be the advocate for either the buyer or the seller, but will only exchange information between the parties. But at least the buyer gets the opportunity to see every property they desire, obtain some facts from the buyer agency relationship to make informed decisions, and thus have an opportunity to negotiate for any property they want to buy.

Next comes the issue of compensation to the real estate agent. Who is going to pay the agent for their brokerage services?

Generally, agents are compensated by the seller or the listing broker. When the seller has a property listed the seller promises to compensate the listing broker, which includes payment to the selling broker. When a buyer employs the services of a buyer's agent, they are responsible to see that their agent (the selling broker) is paid. This is frequently accomplished by the listing broker paying the selling broker a fee which is advertised in the multiple listing service (MLS). This is referred to as a "co-op" (cooperative) fee. It's paid this way because real estate brokers and agents network together to create sales that benefit both sellers and buyers of real property.

Buyers need to beware of agents who "seemingly" offer their services for "free". Agents may represent that their services are at no cost to the buyer, but that makes the assumption that the seller and/or listing broker is paying their fee. That is generally the procedure that is followed. However, an agent who incorrectly completes an approved Colorado Real Estate Commission Buyer Agency Agreement buying indicating that the fee charged is "0%", is negligent in their responsibilities as an agent to properly disclose how they intend to receive compensation. This can create a multitude of problems for buyers shopping for that perfect home.

The Colorado Real Estate Commission has recently advised brokers and agents of the false representations consumers have been complaining about. Apparently some agents have misled the public by charging a "0%" fee for broker services performed, as described in the Colorado Real Estate News, February 2004, the official publication of the Colorado Real Estate Commission.

"The Commission receives many complaints from brokers and the public concerning the advertising of 0% commissions. These complaints allege that the advertising of 0% is misleading (a violation of 12-61-113 (1) (a) C.R.S.) and that certain limitations and conditions of that offer are not specified or disclosed. Complainants feel victimized by the old "Bait and Switch." Everyone knows that brokers rarely work for free and that certain terms and conditions do apply to this offer. Further, there are very few circumstances in which a truly 0% commission exists."

Consider the following scenario: Let's assume that the buyer wants an agent to represent their interests and employs that agent as strictly a buyer's agent in **all** situations. Further, the agent incorrectly filled out the compensation section of the Buyer Agency Agreement paragraph 7, by inserting a "0%" fee. Now the buyer assumes the agent is representing their interests and that the agent will be compensated by the seller or the listing agent. So the process of shopping for a home begins. The agent shows 30 homes to the buyer, none of which meet the needs of the buyer. However, the 31<sup>st</sup> home that the buyer wants to see is offered "for sale by owner", and the buyer really wants to see that home! Now the buyer has a big problem! Since the agent "incorrectly" filled out the compensation section of the Buyer Agency contract, the agent will **NOT** show any properties offered "for sale by owner". Why? Because the "for sale by owner" is not represented by any real estate agent and therefore has not agreed to compensate the buyer's agent. So, who loses? Everyone! The buyer doesn't get to see the home and therefore loses the opportunity to buy the home he wants, the seller doesn't get the opportunity to show the home and possibly sell it, and the relationship between the agent and the buyer begins to "sour". All because someone didn't do their job correctly. So don't be misled by the terms of an agreement that an agent completes to "seemingly satisfy" you. If you allow that to happen, then understand that you may be losing out on opportunities that you do not want to slip by.

This doesn't need to happen! If you carefully read the Colorado Real Estate Commission approved Buyer Agency Contract, you will see that it clearly identifies that the compensation charged by the agent can be paid by the seller or listing broker. Yes the buyer is responsible to see that the agent is paid for the brokerage services performed, but in almost every closed transaction the selling broker is paid by the seller or the listing broker and the buyer is thus assured of the agent being duty bound to protect the interests of the buyer. This is a pre-arranged agreement between brokers affiliated with the National Association of Realtors, of which nearly 90% of all agents are members. In the event the buyer wants to see a property offered "for sale by owner", the agent can comfortably show the property to the buyer and represent the buyer's interest. If then the buyer chooses to submit an offer on the property to the "for sale by owner", then the buyer may ask the seller to compensate the buyer's agent. In truth, this is only another element of the negotiation process between a buyer and seller and as such is very much an accepted practice.

While this article is not intended to be a course in the "law of agency" as realtors and lawyers know it, it is intended to inform the general public in advance of their decisions when choosing an agent. The process of buying and selling a home is overwhelming enough without adding to it uncertainties about the role, duties, responsibilities, and obligations agents have to the public. The bottom line is simply that a buyer wants to buy a home and a seller wants to sell a home. Buyers and sellers only expect that the agent they are working with to be honest, informed, and knowledgeable when representing their interests. It is your responsibility to choose your agent carefully, as you would any other professional to guide you through one of the most important decisions you will ever make. Real estate agents don't simply "show" you homes. They have many other responsibilities to you in the course of a real estate transaction, and you want the agent you select to always remember that fact through the closing. If and when an issue comes up during the course of the real estate transaction, and most do, you want an agent who is competent, knowledgeable, and capable of presenting to you the choices you have and the procedures to resolve those issues. That's why you hire the professional in the first place. The agent will need to insure that you are satisfied with inspection results, explain the maze of financing and closing costs, assure you of a clear transfer of title to the property, remind you of your obligations in a purchase contract, and much more! So in the interest of "protecting your interests" don't short change yourself. Remember, nobody really "works for free". If you would like to know more, then ask your agent, a lawyer, or call the Colorado Real Estate Commission at 303-866-2166.