Legal Matters®

Real Estate
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Dual agents: When the same realtor represents both the seller and buyer

When you sell your house, your real estate agent usually represents you throughout the process. And your agent has a fiduciary duty to you, which means he or she has a responsibility to act in your best interest.

It is possible for the seller's agent to represent the buyer as well. But how does that work in practice? The idea is that the "dual agent" manages all negotiations and paperwork between the buyer and seller and acts as a neutral, with no fiduciary duty to the buyer or the seller.

This is a little complicated because it can create a conflict of interest, and as a result it brings certain rules along with it.

For starters, in order for an agent to function as a dual agent, both the buyer and the seller must give consent.

In January 2019, the Consumer Federation of America released a report arguing that states should ban dual agency, claiming that it benefits agents by giving them a full commission at the expense of consumer confusion and confidentiality.

Still, dual agency is against the law in only eight states: Alaska, Colorado, Florida, Kansas, Maryland, Oklahoma, Texas and Vermont. In some states where it is allowed, certain realty companies don't allow it.

If you live in any state where dual agency is allowed, it's helpful to understand the pros and cons.

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The real challenge of 'neutrality'

Even if an agent agrees to fairly represent both parties in a home sale, it's not always so easy in practice.

In fact, in some cases, it might make the deal feel rather lopsided. Imagine a sale in which the buyer requests certain repairs and/or a lower price. And on top of that, imagine they ask the seller to cover the closing costs.

In such a case, it's easy for the seller to feel shortchanged by not having an agent of his own to support his side of the deal.

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Fix in stimulus law gives tax benefits to real estate owners

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Commercial real estate owners can now get big tax benefits, thanks to a fix of a glitch from 2017 contained in the economic stimulus measure passed in late March.

A provision in the new law fixed a typo in the 2017 Tax Cuts and Jobs Act, which was intended to allow certain real estate businesses and retailers to write off the costs of certain property improvements right away, instead of over time. However, due to a typo, the 2017 measure accidentally failed to have the intended effect.

Under the law known as the CARES Act, real estate owners can now write off the costs of Qualified Improvement Property (QIP) in the first year in which the improvements are made. This is called "bonus depreciation," as opposed to spreading out the write-off over the useful life of the improvements. Prior to the passing of the new law, the Internal Revenue Code stated that most improvements on QIP could be written off only over a period of 39 years. Under the Code, QIP is any improvement to an interior portion of non-residential building, as long as the improvement is placed in service any time after the building itself was first operational.

The CARES Act also removed a $500,000 limit on the amount of business losses a tax payer can deduct from their taxes on non-business income.

Bill pending in Congress would allow remote online notarizations

A bill pending in Congress would approve the use of remote online notarizations, making it easier to close on houses even if you cannot meet in person.

The measure, called the "Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020," would allow every notary across the country to perform remote online notarizations. The bill was introduced by Sens. Mark Warner (D-VA) and Kevin Cramer (R-ND).

At the current time, nearly half of the states allow remote online notarizations, where a notary and signer of a legal document execute documents electronically from different locations. Iowa, Maryland and Wisconsin recently authorized remote notarizations in response to the pandemic.

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Under the bill, the use of electronic notarization would require tamper-resistent technology and multi-factor authentication.

"Americans shouldn't have to risk their health or safety to execute important financial or legal documents, especially when they could do so from the safety of their own home," Cramer said in a statement.

While the coronavirus might encourage this measure to move forward more quickly, the issue has been on lawmakers' radar for a while.

One challenge associated with the bill is that each state has different rules on what is considered a legally executed, remotely notarized document.

The bill, if passed, would not preempt state laws on the matter. Rather, it would complement existing state laws, and allow states to implement their own standards for remote online notarization.

The bill would allow signers outside of the U.S., such as military personnel and their families, to easily and securely notarize documents.

The measure is based on the Interstate Recognition of Notarizations (IRON Act of 2011), but adds additional consumer safeguards.

The American Land Title Association, Mortgage Bankers Association, and the National Association of Realtors have all indicated their support of the measure.

Diane Tomb, CEO of the American Land Title Association, said that the organization "want[s] to provide options to consumers to close their transaction remotely nationwide. … The strong standards in this bill are important to prevent fraud and offer consumers a more secure alternative rather than FaceTime or Skype when buying property or refinancing a mortgage."

When the same realtor represents both the seller and buyer

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Sometimes, lawsuits can arise against an agent if either the buyer or the seller feels the agent acted in favor of the other party.

The benefit of each having your own agent

The process of buying and selling a house brings with it a host of uncertainties and reasons to negotiate. Everything from the price to the terms is up for discussion, and it's your real estate agent that acts as your advocate throughout.

If you're a seller, your agent knows the positive and negative elements of your home, and knows the key things about you, including your willingness to give and take, and where you stand on a price that's comfortable for you. With such an important asset, you want someone acting in your best interest to ensure you get the best deal you can get.

If you're a buyer, your agent knows what you can afford and how willing you are to negotiate when you have certain requests or concessions you're seeking.

These are some of the reasons why a dual agent plays a more removed role in the process, to avoid taking any one side. That means the buyer and seller end up working out the details more closely with each other and each loses the benefit of an agent's experience and direct help in the process.

The benefits of dual agency

While there are clearly several drawbacks, there are also some benefits to having a dual agent.

First, having one agent handle the sale can streamline the process. It avoids a waiting game with phone call chains that usually include your agent calling the buyer's agent, who calls the buyer and then call your agent back again each time there is something to decide.

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Also, with one single agent receiving commission on the sale, it's likely you can agree to a lower rate.

Designated agency is another option

Dual agency sometimes arises when the listing agent also has a client who is a buyer that wants to buy your home. Instead of serving as a dual agent, the listing agent can pass the buyer off to another agent to represent them, often in the same brokerage, or the brokerage can assign another agent to the buyer. This arrangement is known as designated agency.

While this gives each party their own representative, it also allows two agents who work for the same company to possibly negotiate terms that benefit the company.

Another concern is that the designated agent might feel like he or she owes something to the listing agent, given the referral.

No matter the arrangement, it is important to consult a lawyer when you're selling or buying a home to ensure you understand the legal implications and the details.

New electronic tools coming into use

The exploration of digital tools is expanding in ways that that are likely to continue well beyond the current world of social-distancing. The situation is creating change for types of transactions that have traditionally been focused on many in-person meetings and rounds of paperwork and walk-throughs.

Sellers, real estate agents and landlords are using a Zillow feature that allows them to create virtual 3D home tours using a panorama of the home taken on a smartphone.

Realtors are also conducting some showings on Zoom or FaceTime.

The Federal Housing Finance Agency, which regulates Fannie Mae and Freddie Mac, has begun to allow alternative methods for appraisals that don't require someone to be in person at the house.

Some appraisers are conducting "drive-bys," during which they drive by and walk through a neighborhood and by the house without going in. In some instances, they are using online research and public information to determine a home's value.

Home inspections are being conducted without anyone else in the house, and relevant stakeholders dial in by videoconference.

For a closing, a company called eOriginal will provide digital ways to close on a mortgage. The company launched in 2018.

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More time for 1031 exchanges, opportunity zone investors

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The IRS is giving investors with like-kind exchange or opportunity zone investment deadlines between April 1 and July 15 more time to complete their deals.

The deadline is extended to July 15 for all taxpayers, including trusts, estates, corporations and other non-corporate tax filers.

Like-kind exchanges under Section 1031 allow real estate investors to sell a single asset, such as condominiums or an office building, identify another property with a similar value to buy with the proceeds from the first within 45 days, and close on it within 180 days. Such a like-kind exchange allows an investor to avoid paying capital gains on the sale of the first property.

The new guidance extends both the 45-day and the 180-day deadlines to July 15 if the dates fall between April 1 and July 15. However, it is likely that if an investor has until July 15 to identify the second property the 180-day deadline for closing on it would stay the same.

Several commercial real estate groups had petitioned U.S. Treasury Secretary Steven Mnuchin to extend the deadlines for purchasing replacement properties by extending both deadlines by 120 days.

Many legal experts expected the extension to be longer, given past experience. The situation is in flux and it is possible that additional guidance will be issued, depending upon what happens with the COVID-19 pandemic.

The National Association of Realtors applauded the move by the IRS.

"During recent weeks, NAR strongly advocated for tax payment deadline extensions — including for 1031-like-kind exchanges and Opportunity Zone investments — as this pandemic left small businesses and independent contractors particularly vulnerable," said National Association of Realtors President Vince Malta, a broker at Malta & Co., Inc., in a statement.