

THE REAL ESTATE REPORT appears monthly in *Berkshire Home Style* and *Capital District Home Style* magazines as a commentary on the real estate market and related issues in the upper Hudson River Valley. Roderic H. Blackburn, is principal of R. H. Blackburn & Associates, Inc.—Real Estate of Columbia and adjacent counties.



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The steps and stones of buying a home

Finding the right place for yourself and family depends as much on introspection as inspection, as we explored in the last article. When the right property appears and you (and partners or family) all agree on it, the experience is not much different from forming a new relationship. The bonding of family members and their bonding to a new home are both based on common interests, complementary needs and a deepening sense of trust. Granted, a home with its land does not communicate verbally, but it does appeal to our feelings, our sense of comfort and our trust that it will always be there for us. Consider how tenaciously so many people clung to their homes in the face of hurricane Katrina, even to their peril. Their emotional ties to their homes were almost as strong as those to their family and pets. It is just as well homes do not talk, don't talk back, don't demand. For all the attention they may require, they are among the easiest of relationships -- all they need is some care.

Once your future home is identified, there are certain steps to be taken, like the planning of a wedding. These steps should get you in the door (or help you realize this place isn't for you and get you out). The first step, which, as it is so frequently ignored, I have emphasized before and will do so again, is to understand who should be holding your hand during this process. Let's start with an analogy. If you were contemplating divorce, would you ask your spouse's attorney for advice or in any way to represent your interests? Of course not! This attorney's loyalty is to your spouse. What a stupid question. But in real estate, buyers make this very mistake most of the time. Let us step back and see why this happens.

When someone chooses to sell a property, he or she can simply put a "for sale" sign out and wait for buyers to come knocking on the door. For various practical, social and psychological reasons (another column) the results are usually disappointing, which is why real estate brokers exist. Like used car and antiques dealers, employment agencies and the Salvation Army, brokers are there to recycle used goods -- even if these "used goods" are usually the most expensive property buy in a lifetime.

So an owner will often enter into a contractual agreement with a broker to sell his property. This agreement is called a listing contract. By law another contract should also be signed, a disclosure of agency. In this short form seller and broker both acknowledge that the broker (and by extension a listing sales associate) will act solely on behalf of the seller to whom is owed the fiduciary (like a trustee) duties of "reasonable care, undivided loyalty, confidentiality, full disclosure, obedience, and a duty to account." When dealing with any potential buyer of a property, the seller's agent also has certain obligations to the buyer (or any prospective buyer): (a) the exercise of reasonable skill and care in performance of his or her duties, (b) honest dealing, fairly and in good faith, and (c) the disclosure of all facts known to the agent materially affecting the value or desirability of the property. That sounds fair and appropriate, but there are slippery rocks on the way to the front door of ownership, rocks of which buyers are not often aware.

The Law of Agency

Most prospective buyers don't know (or, if they have heard the term, don't understand) that the law of agency exists for their protection. Most do not take advantage of it. Here is how it works and doesn't work, at least in New York State. Most buyers look on internet sites, such as those of Multiple Listing Services, or on broker websites (75% use the internet in their home search), or they

look at real estate ad magazines or newspaper classified ads to find the homes they want. To answer their questions, they usually call the advertising (listing) broker, receive answers, and may agree to meet and look at one or more of the broker's listings. A relationship of camaraderie and trust may develop such that the buyer relies on the broker and/or sales person not only for factual answers, but also for advice and even shared confidentiality. Sales often go forth on this basis, usually to everyone's satisfaction. Since it was completed successfully, friends and neighbors will hear how well a sale went, and will follow the same path. What they do not hear, because they have never met the would-be buyer, is when a sale goes bad. There are any number of reasons why a potential sale may not go through, but some of those reasons often have to do with the disclosure of facts and issues. It is for these reasons that the law of agency exists.

Just as in a divorce case, a buyer, like a spouse, has the right to his or her own agent, a right which the state encourages, but does not mandate. This is a buyer's agent whose fiduciary responsibilities are to the buyer, just as those of the seller's agent are to the seller. A buyer's agent acts solely on behalf of the buyer and must exercise reasonable care, undivided loyalty, confidentiality, full disclosure, obedience, and a duty to account. But most buyers do not take advantage of their right to an agent and rely on the seller's agent for everything. This creates, in fact or by implication, a situation called dual agency, in which the seller's agent is also acting as if he or she were the buyer's agent - like a defendant in a divorce case relying on the plaintiff's attorney. Curiously, dual agency is allowed in New York State - if both buyer and seller so agree in writing. But this is rarely the case. Usually what happens is what I call "creeping agency by implication" with the buyer increasingly relying on the seller's agent for advice, and even action, on the buyer's behalf. Dual agency diminishes the loyalty of an agent to both parties and creates a conflict of interest which should be avoided, especially by buyers who are not especially experienced in real estate transactions. A very real conflict of interest for a broker is motivated by the opportunity to earn full commission and not having to split it with a buyer's agent.

Here is an actual case which illustrates how a conflict of interest can damage a seller or a buyer, sometimes both at once. Bob, the buyer's agent conveyed an offer for a large property to the Sam, the seller's agent. Bob didn't hear back from Sam and wondered why. Bob knew the seller's attorney and, seeing him on the street, a few days later asked what the attorney thought of the offer. The attorney knew nothing about it. Bob was incensed that his offer had, apparently, not been presented to the seller. He accosted Sam, who said there was another offer on the table being considered first. Bob rightfully insisted that his offer be conveyed to the seller. Under threat of an ethics violation charge, Sam finally did so and it was accepted. It was obviously a higher offer. What Bob guessed was that Sam withheld the higher offer hoping to get the lower offer accepted - because it was his own client and thus he could earn the entire commission, not split it with Bob as buyer's agent. Except for knowing the seller's attorney Bob and his buyer might never have learned they were cheated out of the sale until months later when the sale was published.

From this we learn how 1) a potential conflict of interest can easily become a real conflict, 2) a seller can be unknowingly misled by his own agent, 3) a buyer may only by chance learn that his

offer may have been quietly scuttled, and 4) a buyer's broker might not press ethical charges against a seller's broker, probably thinking that doing so might spoil a future co-broke relationship. In this case the buyer did not immediately benefit from having his own agent, but did benefit from his agent's special knowledge of the parties involved which saved the day. If he had gone directly to the seller's agent to make the offer, he would likely have become involved in a bidding war (to the seller's benefit), with the seller's agent acting as referee for all three parties. A stricter law of agency would have helped.

Finding your own agent

The solution for a buyer is to meet and interview one or more real estate brokers or their sales persons experienced in the region in which the buyer wishes to settle, and to learn about the region, the kinds of properties available, the range of prices, and what would be realistic prices. All of this should be done before any consideration of specific properties. The buyer should form an opinion regarding the knowledge, openness, honesty, and compatibility of the brokers and sales persons interviewed and only then decide on who should be his or her agent. At this point an agency agreement can be signed and the buyer's broker can begin searching amongst other broker's listings, go with the prospective buyer to visit properties, and advise on the seen and unseen qualities and issues of each property, neighborhood and region. The broker should know pertinent facts about people, places and things, facts not necessarily offered by a seller's broker or sales person, such as "is this property really worth what they are asking?" A buyer's agent can recommend local attorneys, inspectors, appraisers, contractors, and even neighbors, from whom the buyer can receive information and advice without conflict of interest. His or her interest (and a buyer should always carefully consider the real interest of each professional he or she deals with) is in finding you a home, not just any home, but the best home for you. The interest of a seller's broker may often be in selling a prospective buyer one of his or her own listings, not the listing of another broker. There is a big difference between the two. Remember, the interest of a spouse's divorce attorney is in getting as big a settlement as possible - out of your pocket. I don't mean to imply that the potential of a conflict of interest always leads to an actual conflict. Most real estate professionals are just that: they follow the rules and are successful in getting buyers and sellers to transact a sale with mutual satisfaction. My advice is to avoid situations which have potential conflicts of interest by being properly represented both by your own agent and by your own attorney.

There is an intermediate solution to this potential conflict of interest in dual agency, which is better than no solution. When a buyer comes to a listing broker, that broker may assign the buyer to one of his sales persons, but not the same one who listed the property. Thus the buyer has an agent who owes loyalty to the buyer, yet the broker keeps the sales commission within the brokerage, not co-broking and thus splitting the fee with another firm. It is a partial solution, yes, provided there is no collusion between the seller and the buyer agents who obviously have a vested interest in getting the sale done and might be tempted to share negotiation strategies of the seller and the buyer, a serious breach of ethics.

Agency and Commissions

One last point on agency. All agents perform services for which they expect to be compensated. A listing agreement provides for a commission payable to the listing agent upon sale. A listing agent, with the seller's permission, can hire subagents or broker's agents, or work with other agents, such as a buyer's agent, on a cooperative basis. These are called co-broke arrangements and may help expe-

dite a sale. Thus a selling broker may agree to split a commission with another agent from another real estate brokerage if the latter brings a buyer. That agent could be a buyer's broker, as I have described above, or even a selling broker's subagent, in which case the agent may come with a buyer but is acting on behalf of the selling broker, not the buyer. In either case the broker has likely agreed to split the commission (the amount of split varies) if a sale goes through. So, if a buyer has agreed to have his or her own agent, that agent will likely contact the seller's broker to secure an agreement to be paid a share of the selling commission as full compensation for his services to the buyer. Once in a while a selling broker will not agree to this, in which case the buyer's agent will expect the buyer to pay the equivalent of his or her share of the commission. For the buyer, the small chance of paying anything in compensation is a bargain considering all the good advice and services already received.

Beyond Agency

This is a lot of words on agency, but it is the weakest link in the chain of gaining title to a property. The next steps are more straightforward. The normal procedures in making an offer to buy a property may vary by county. In Columbia County an agent can help you fill out an offer agreement form which describes the property and what the total offering amount will be (usually with a 1% deposit accompanying the offer, payable by check and held in the buyer agent's escrow account), lists contingencies (mortgage, insurable title, attorney approval, inspections, included "chattels" (appliances etc)), plus attorney names, an expected date for contract signing (and payment of a 9% further deposit, held in the escrow account of the seller's attorney), and agreed compensation to the broker or brokers, both seller and buyer agents if that is the case. In some counties (Albany is one) a binder or offer agreement is not usually used; instead brokers themselves make out a contract which is reviewed by the attorneys.

The offer agreement, signed by the buyer(s), with a copy of the deposit check, is given to the seller's broker who then takes it to the seller. The seller may agree to it, counter the offer at a price somewhere between the listing price and the price offered {perhaps changing and/or adding contingencies}, or reject it entirely. Here is where a buyer's agent really earns commission - during negotiation when his or her knowledge of the seller and the seller's agent, the market, funding options and sources, ways of handling contingencies, and innumerable other bits of knowledge and psychology may make a critical difference by working out an equitable agreement, or even avoiding a bad deal altogether.

Upon acceptance of an offer the attorneys begin to hammer out a contract which finalizes the provisions of the accepted offer (although often modifying its provisions as circumstances may arise). The contract should specify how the contingencies (especially those relating to funding and inspections) are to be satisfied. With a contract signed by both parties, a "meeting of the minds" is deemed to have taken place, which means the brokers involved have earned their commission, although they are not actually paid until closing. Even at this point brokers and their sales agents continue to assist their clients (seller or buyer) by advising on or helping to arrange matters necessary for a successful closing. Thereafter the attorneys prepare final paper work and financial determinations required for the "closing" whereat the transfer of title takes place. A broker should be able to furnish a buyer with a checklist of all items necessary to complete a successful offer, contract, and closing.