

Homebuyers Need to Understand the Difference Between a Designated Buyer Agent and an Exclusive Buyer Agent

by **Richard Rosa and David Kres**

If a homebuyer hires an attorney at a law firm to assist in purchasing real estate, another attorney in the same law firm could not represent the homeowner who is selling the home. The reason is obvious. It is a conflict of interest.

On the other hand, the same homebuyer may use a real estate buyer agent that works for the real estate brokerage that represents the seller. A homebuyer should consider the options and decide if this is an ideal situation for him or her.

In a traditional real estate firm, when one agent represents a seller, and another real estate agent at the same company represents a buyer that is purchasing (or making an offer on) the same home, this conflicted representation is called dual agency. Dual agency must be disclosed and consented to in Massachusetts and New Hampshire.

A homebuyer that consents to dual agency gives up his or her right to have their agent be loyal to them, since that agent is now also representing the buyer's adversary. Once a homebuyer gives up that duty of loyalty, the agent can advance interests that are averse to that homebuyer. When a homebuyer consents to dual agency, his or her agent no longer owes the homebuyer important fiduciary duties. For example, a dual agent could know from the seller that a property has a history of water in the basement, and also be aware that the buyer plans to finish the basement. Not only would the dual agent not have a duty to disclose such information to the buyer, but his or her fiduciary duty to the seller might actually prohibit it.

In order to avoid having to disclose dual agency conflicts and obtain written consent, many states, including Massachusetts and New Hampshire, allow real estate companies to "designate" a real estate agent at the brokerage to represent the seller and a different real estate agent at the same company to represent the potential buyer.

A homebuyer must consent to designated buyer agency. The designated buyer agent does owe the homebuyer loyalty, full disclosure, confidentiality, reasonable care, obedience to lawful instruction, or other duties; however, no other agents affiliated with the same real estate company will represent the buyer. In fact, the firm's other agents will not owe the buyer loyalty, full disclosure, confidentiality or the other duties mentioned above.

If a firm declares that it is a designated agency real estate company,

the law allows the firm to be the brokerage on both sides of the transaction, as long as there are different "designated" agents representing the buyer

and the seller. In those circumstances, only the owner/manager is the dual agent. The designated seller agent owes no fiduciary duty to the homebuyer and vice versa.

An exclusive buyer agent is a real estate agent that only represents homebuyers and who works at a company that does not list properties of any kind for sale. To be a true exclusive buyer agent, every agent at the company must be an exclusive buyer agent. In other words, there is not any possibility of designated agency or dual agency.

There are several advantages of working with an exclusive buyer agent. First, exclusive buyer agents focus only on buyer representation and meeting the specific needs of homebuyers. Second, because they never list properties, an exclusive buyer agent has no interest in any particular property on the market, so they can be completely objective about any property their client is interested in, explaining the pro's and con's equally, without the conflicts of interest that are common in designated and dual agency companies. Third, because they work at a company that does not list homes for sale, there are never incentives (tangible or otherwise) to sell a colleague's "in-house" listing. An exclusive buyer agent is always on the homebuyer's side, looking out only for their client's best interests without any regard for what the seller may want or need.

With so much at stake financially, homebuyers should consider carefully what their legal relationship would be before choosing the agent who will represent them on the purchase of a home. Avoiding obvious conflicts of interest and the potential for conflicts of interest is a wise choice.

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Richard Rosa and David Kres are co-founders and co-owners of **Buyers Brokers Only LLC** (BuyersBrokersOnly.com), the largest exclusive buyer agent real estate firm in Massachusetts and New Hampshire. They are both licensed attorneys and real estate brokers.

PRACTICAL MATTERS

By Richard J. Rosa

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In real estate, the adage “let the buyer beware” does not refer only to the condition of a property. Despite the abundance of information available to consumers, many prospective home buyers do not know they can, nor understand *why* they should, use their own real estate agent or broker throughout the home-buying process. But without an exclusive buyer agent, there may be a question of loyalty.

With so much at stake financially, consumers should never assume a real estate professional works for them until they have read a signed agency disclosure form. Massachusetts and New Hampshire real estate agents must provide consumers with an agency disclosure form at their first substantive contact.

In the past, almost all real estate professionals worked for the seller. The compensation for such a transaction is usually a commission

based on the sales price. A seller’s agent, or listing agent, must negotiate the best price and terms for the seller.

Although an agent that lists property may represent a buyer, if a buyer shows interest in a property listed by their agent, the listing agent cannot provide undivided loyalty. To avoid such obvious conflicts of interest, home buyers may use an exclusive buyer agent who works for an agency that does not list property for sale. Among other things, a buyer agent provides the following services to a buyer that the seller’s agent will not:

- analysis of comparative sales and an opinion on the value of a property;
- objective referrals to other necessary professionals, i.e., home inspector and attorney;
- advising even if it means pointing out reasons not to buy;

- disclosure of all research about the property;
- negotiation for the best price and terms on the buyer’s behalf;
- confidentiality of the buyer’s financial situation and thoughts, unless authorized to disclose;
- assistance with contract contingencies
- negotiation of the resolution of home inspection issues in favor of the buyer.

Best of all, a buyer agent receives the same seller-authorized commission split that is offered to any agent who brings a buyer that ultimately purchases a home. For example, the sellers’ agents in the Merrimack Valley typically charge a listing commission from three to six percent, and offer the agent representing the buyer a commission split of 1.5 to three percent. This means that most buyer agents do not collect a fee from the buyer.

Because the seller’s agent is sharing a portion of the listing commission with the buyer agent, the buyer has an easy choice. He or she can work through the seller’s agent, who must be loyal to the seller and will keep the entire commission, or work with a buyer agent, who will not charge him or her any money and remain 100 percent loyal.

A business model surfacing around the country relies on buyers themselves to perform nearly all the work involved in purchasing a home. These Internet-based companies provide minimal services and pay the buyer a portion of their commission after closing.

Choosing to share in the commission in exchange for objective, competent advice can be a costly mistake for a homebuyer. Receiving about 1 percent of the purchase price back from your agent might seem like a great deal, but not so if you paid three or four percent more than the property was worth because no one objectively evaluated the property’s value. **MVM**

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