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Co-brokerage and commissions in conflict

Getting it all beats splitting the commission pie, some unethical agents decide

By Lauren Elkies



Nobody ever claimed New York real estate was an easy game, but only the most unscrupulous agents find ways to increase their bottom line by evading co-brokering.

Cutting a co-broker out of a deal can mean a difference of thousands of dollars to the broker who grabs the sale, but can give the buyer and seller the short end of the stick.

The practice is a breach of an agent's fiduciary responsibility to his client and is most prevalent when the market is tight.

Though the market is strong today, there is more co-brokering than five or 10 years ago, said Neil Binder, principal and co-founder of Bellmarc Realty.

Still, some agents find ways around co-brokering. The acquisition of an exclusive listing requires brokers to disseminate listings to other firms within 72 hours of getting a contract for an exclusive, under the Real Estate Board of New York rules, and to present all offers to the seller. Market observers say there are plenty of less-than-ethical ways to step outside the boundaries of those arrangements.

"There are ways to tweak it," said Kathy Braddock, co-founder of real estate consulting firm Braddock + Purcell and the New York City real estate company Charles Rutenberg Realty.

Agents can steer the seller to a direct buyer offering less money than a buyer with an agent and say the former is more qualified than the latter. Agents can encourage a client to buy an apartment in a more expensive building and area of the city in order to sweeten the agents' portion of the commission.

In other cases, agents with an exclusive listing fail to return calls immediately or show up for appointments with an interested customer who has a broker. Some agents don't show their clients properties being represented by other brokers.

"There are some brokers that just don't call back at all," said Leonard Steinberg, a broker at Prudential Douglas Elliman.

One agent Steinberg deals with, he said, often says he has multiple offers when he actually has a no-broker deal lined up and no other offers.

Richard Hamilton, a senior vice president at Halstead Property, had a different perspective on why a seller's broker may avoid a co-brokering situation.

"Sometimes an agent from the other side doesn't know how to present a deal," he said.

Most agents are on the up-and-up, if the number of official complaints is any indication.

The New York Department of State, which investigates real estate-related complaints and regulates the industry, received only 19 commission dispute allegations out of 1,323 real estate-related complaints filed last year.

Violations of the real estate law constitute a misdemeanor and can be subject to prosecution. The

Department of State can also issue a fine and revoke a license.

Beyond the Department of State, REBNY has its own code of ethics requiring members to adhere to a whole host of standards, in addition to sharing exclusive listings with other member brokerages within 72 hours. That essentially gives an agent three days to bring together a buyer and seller before letting others in the real estate community know the property is for sale.

Agents who violate REBNY rules can be ousted from board membership -- which is tantamount to getting blackballed from the industry.

In a commission-based profession where the stakes are high, it's no wonder that a seller's agent would want to close the deal himself and take home 50 percent of the entire, industry-standard 6 percent commission rather than 50 percent of 3 percent, divided under the co-broking agreement. But if they do not think they can find their client the right buyer, co-broking is a helpful tool.

"Obviously any agent likes when it's a direct deal," said Diane Ramirez, president of Halstead Property. But, she added, agents have a responsibility to get their seller the best possible price in the shortest period of time.

"For the most part, people try to do the right thing," said Braddock, from Braddock + Purcell. In addition, many brokers know they need exposure for their listings and need to respond to requests if they want to find the right buyer for a given property.

And the proof is in the pudding.

"Eighty-seven percent of our market is done in a co-brokered environment. Therefore, you're talking about 13 percent of our market being a direct deal," Braddock said.

When commission scheming occurs, it's difficult to prove, because paper trails are tough to produce.

Manhattan Residential president Shai Shustik and a client recently sued Prudential Douglas Elliman and one of its agents for allegedly preventing Shustik's client from purchasing a Soho apartment in order to avoid splitting the commission. The case was first reported by *The Real Deal* on its daily Web site.

The lawsuit claims that the listing broker for the property declined to present Shustik's offer to the seller. The plaintiffs charged Elliman with taking "a look-don't-tell policy," said Marc Held, the attorney for the plaintiffs and a partner with Lazarowitz & Manganillo.

"This is not a unique situation," Held said. "What makes this unique is Shai has undeniable proof" in the form of e-mail correspondence.

Steven Ganfer, who heads the real estate practice at the law firm Ganfer & Shore and has no involvement in the case, noted that failure to present an offer is not necessarily a failure on the part of the seller's agent.

"As the seller's agent, you have a fiduciary responsibility to the seller," Ganfer said. "The problem with the Elliman suit is that we don't know what the arrangement was between the seller and his agent." He added, "You're not necessarily obligated to accept the higher offer."

Bellmarc's Binder said the lawsuit sounded weak because the buyer and the buyer's broker do not have a contractual relationship with the seller or the seller's broker. Therefore, they do not have the right to recoup money from them. The seller, on the other hand, could successfully sue Elliman and the associate broker for failure to co-broke if it resulted in a less-profitable deal for the seller, Binder said.

Some real estate companies have steered their clients away from co-broking by providing financial incentives.

More than five years ago, Ramirez of Halstead said, her company offered agents a larger piece of the commission pie if deals were done in-house. Since the company made more money from working on both sides of a deal, Halstead figured, the agent should too. "We stopped doing that because we didn't want anyone in the community to think we were incentivizing the agents," Ramirez said.

At Citi Habitats, the company gives agents that co-broke in-house an additional 5 percent commission, one

agent said. A spokesperson for Citi Habitats did not confirm that the firm provided any incentive.

According to the Department of State, the size of commissions is not regulated. But company-sanctioned incentives, of course, can hurt the client.

"It's not really about the person you're supposed to be serving. It's about how much money are you going to make in the end," one real estate agent said.

Most agents, however, would acknowledge that it's better for them financially to do a direct deal rather than to co-broke, but better for the longevity of their business to do right by their client.

Greasing the wheels

Kickbacks and referrals go hand in hand in NY real estate

The difference between school and real life, a cynic will tell you, is that it's not what you know, but who. That's never truer than in New York real estate, where a person seeking a contractor, electrician or moving company can get a referral informed more by kickbacks than real expertise.

Real estate companies and individual agents can earn extra money through referrals to service providers they know, although failing to notify a client about such an arrangement is an ethical lapse, according to the state agency that regulates brokers.

It is common practice at some real estate companies that vendors -- such as movers, furniture rental outfits and locksmiths -- pay a monthly marketing fee, and/or a one-time commission to an agent that sends a client their way.

The monthly marketing charge -- which could be a couple of hundred dollars -- often gives the merchant access to the real estate company's offices to solicit business, as well a presence on the real estate company's Web site.

The payout to the agent -- sometimes \$100 -- keeps the referrals coming.

Clients look for referrals from their real estate agents for myriad services, from babysitters and cleaning services to painters and art appraisers, as well as architects and interior decorators.

With their industry knowledge, agents can be a big help to customers when it comes to vendor services.

There is nothing illegal about these kickbacks so long as the referring agent discloses their arrangement.

According to the Department of State, which licenses real estate agents and brokers, "If a broker/salesperson is receiving a fee from a vendor to whom a client is referred, that relationship should be disclosed, in full, either prior to or at the time of the referral. A breach of fiduciary duty is a demonstration of untrustworthiness and incompetency" pursuant to real estate law, and could result in revocation or suspension of a license, a fine or a reprimand.

Unfortunately, there are unscrupulous brokers who make referrals solely for kickbacks. They either make the decision based solely on their cut or fail to tell their client they are receiving a take of the commission.

"I know some people do it [just] for the money. I think it's disgusting," said Leonard Steinberg, a broker at Prudential Douglas Elliman.

A real estate agent at another company expressed a similar sentiment.

"This kind of practice is unsurprising when you commonly have brokers who see taking kickbacks as nothing more than simply 'networking,'" said Brian Johnston, an agent at Citi Habitats.

Mike Thiel, an attorney with the National Association of Realtors, said most brokers are on the up-and-up. The agent is "making a judgment on quality of service rather than the referral fee. Under a worst-case scenario you'd see someone refer based on fee. I don't think that's particularly prevalent."

Gary Malin, chief operating officer at Citi Habitats, said the practice has been going on for many years, as a service to the customers.

"We used to have a motto: 'our job doesn't start until you have your key,'" Malin said. Citi Habitats charges moving companies, locksmiths, furnished rental companies and interior designers a flat marketing fee, but the fee does not extend to attorneys and mortgage brokers.

Citi Habitats has such relationships with Marrins' Moving Systems, Manhattan Mini Storage and Cort Furniture, Malin said. "The amount of money we make is not a lot of money compared to the revenue of the organization. We're not doing it to make the money but to provide an extra value to the customer," Malin said.

Requiring a fee also makes the vendors more accountable, Malin said.

David Don, a dispatcher at Quality Locksmith, said after six referrals an agent gets a \$75 gift certificate at a restaurant. "It's the hand shaking the other hand, but in a nice way," Don said.

Marrins' Moving Systems pays Citi Habitats a monthly fee and compensates a referring agent with a percentage of the cost of the move.

Refined Maintenance, a wall-building company, works with real estate agents at many companies. "We pay a fee to Citi Habitats to refer clients to us so that we can service them," said Carol Thomas, president of Refined Maintenance.

When an agent at Citi Habitats, or any real estate company, refers a client to Refined Maintenance, the agent gets a 5 percent "reward" and the customer gets a 5 percent discount.

At Halstead Property, agents get a nominal fee for a referral to a moving and furniture store, said the company's president, Diane Ramirez.

Halstead maintains an agent-driven "service directory," where agents post the names of vendors with which they are pleased. Generally, an agent gives a customer more than one name of a company within a given category, Ramirez said.

Churchill Corporate Services, a furniture rental and corporate housing company, pays Bond New York a fee to be its exclusive furniture rental company, said Gina Iacobellis, manager for Churchill's furniture rental department in New York and Connecticut.

The company also gets referrals from agents at Halstead, the Corcoran Group, Elliman, DJ Knight and City Connections Realty, Iacobellis said. Churchill compensates all referring agents with a commission.

Even if the agent loses the deal, Churchill will pay for the referral, Iacobellis said. "Sometimes it's nice to pick up the fee here or there."

She said there is nothing underhanded about agents' recouping a fee for a referral. She said it was similar to the commission a salesperson gets when a customer buys a product from them in a store.