

## “TO BE OR NOT TO BE” A REAL ESTATE PROFESSIONAL

Real estate brokers in Florida are professionals, a fact confirmed by the Florida Legislature in F.S. 475.01. That recognition evokes notions of the proverbial two-edged sword. The benefit--a shortened two-year statute of limitations for professional malpractice. The obligation--to perform services not as a tradesperson, but as a professional.

### The Statutory Right to Renege

F.S. 475.278(3)(b)2 authorizes a broker agent to convert the relationship with the client to that of a transaction broker. The Statute provides that the transition can only be obtained by the broker with the written consent of the client, but can occur even at the time of the initial listing agreement. This provision is occasionally referred to as a “*renege clause*.”

### Agent or Transaction Broker?

The relationship of a real estate agent to the principal, the seller, is a solemn one. The agent, as a fiduciary, is obliged to advance the interests of the principal even over those of the agent, to make full disclosure, and to keep the confidences of that principal. The agent's fiduciary responsibilities, because he generally gets paid only when he brings a transaction to closure, are difficult and often impossible to fulfill.

The transaction broker on the other hand, does not have fiduciary obligations. The transaction broker acts simply as a middleperson to create and facilitate a transaction. Given the difficulty of brokers to comply with an agency relationship, the Florida Legislature enacted in F.S. 475.278 which created a presumption of transaction brokerage relationship with members of the public. An agency relationship is authorized only when dignified by a written agreement between the agent and the client.

Why would a client wish to give up the fiduciary benefits *purportedly* afforded to him by agency in exchange for a middleperson with no special allegiance to either side? On reflection, the answer is quite simple. The right of transition was created for the benefit of the real estate broker and not for the client. When a seller's agent processes an offer presented by a buyer whom the seller's agent himself represents or by an associate in his own office, that would constitute dual agency, a relationship which is not authorized under Florida law. However, if the broker's relationship is converted to that of transaction broker, no dual agency occurs.

### What Were They Thinking?

Laws for the benefit of Realtors are not wrong nor are they suspect as long as they are not abusive, are not used in an unprofessional manner, and do not injure the public.

It is difficult to identify what beverage may have been served on the floor of the Florida Legislature when it included the authority for a broker to transition from agent to transaction broker, especially in the initial listing document. A total change of relationship between two parties in the middle of a transaction does not bode well. Even worse, the Florida Association of Realtors, in its Exclusive Right of Sale Listing Agreement, provides a form for a seller's consent in the very instrument that commences the relationship between the seller and the broker. The broker doesn't even have to tell the seller when the broker decides to abandon the fiduciary responsibilities of his agency relationship.

### Nobody Escapes From the Bad Idea Poorly Implemented

Brokers have a professional responsibility to the public and to themselves to view transition from agent to transaction broker as the dangerous prerogative that it is. Who is it, other than the broker, who gets sued when the seller wakes up to find that his team captain is no longer on his team and that the seller's confidences can be revealed to the other side?

What's wrong with pre-consent to transition? Simply:

1. At the time of the agency listing agreement, the seller did not know what confidences would in the future be disclosed to its agent. Does the seller know at the time of the signing of the listing agreement that, upon transition, his agent is no longer bound to hold these confidences and that they can be used to the seller's disadvantage?

A spurious argument can be made that the broker must respect those confidences received while he functioned as an agent but, how does the seller prove, or even know, when the broker opted out of his agency commitment?

2. At the time of the signing of the listing agreement does the seller know whether the transition to transaction broker will ever occur, or even when it will occur? The decision for transition is subjective, in the mind of the agent, and may not be able to be determined. How then does the seller know when to stop giving confidences to his fiduciary agent? How does the seller know when his agent stops looking out for the seller and starts looking out for himself?

3. Most unsettling, notwithstanding the statutory definitions, is the sobering fact that the seller may not even understand or appreciate the difference between an agent and a transaction broker. Sadly, many real estate licensees may be similarly afflicted.

Transition from agent to a transaction broker is a gift that was requested from the Legislature by the real estate professionals. It is a gift which calls to mind the old adage “be careful what you ask for, you might indeed get it.”

### A GPS Back to Professionalism

Transition from agent to transaction broker is itself a time bomb that should never have been approved by the Legislature. Transition by pre-consent makes that of nuclear proportions which should not be encouraged by any professional organization. The Florida Association of Realtors should immediately eliminate pre-consent to transition from its forms. Professionals have to act as professionals despite poorly enacted or implemented legislation. A professional real estate broker cannot *renege* on obligations owed to his clients.