

Working outside of the box

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Real estate salespersons often have second jobs. Should a broker care? All in unison: “it depends.”

Issues relating to profitability and productivity of a salesperson aside, a broker has reason to be concerned when a salesperson is also employed in a job closely aligned to real estate. There can be unanticipated and negative consequences for the broker and the brokerage.

Recently I was retained to represent a broker sued by the unhappy buyers of new construction. The contractor who built the home was also a salesperson affiliated with the defendant broker though the real estate was never listed with the broker. The broker, however, was aware of the salesperson’s side-business of building homes for buyers with whom the brokerage had no relationship.

Why did the buyers sue the broker in addition to the contractor? On one occasion the buyers met with the contractor at the broker’s office. The purpose of the meeting was to discuss features of the home to be built. Neither the construction contract nor any of the papers that passed between the contractor and the buyers made reference to the broker and the broker never received a fee as a result of the sale of the home or lot. The contractor acknowledged that his construction business was independent of his licensed activity, but the buyers refused to dismiss the broker from their suit.

Ultimately, the court granted summary judgment in favor of the broker. By that time the broker had fully paid the \$5,000 deductible required by the errors and omissions insurance. That too could have been avoided.

What if the contractor provided the buyers with a disclosure at their first meeting describing the contractor’s new home construction business as completely independent of the contractor’s affiliation with the broker? A statement to the affect that the broker has no control whatsoever of the contractor’s business and does not receive any benefit, financial or otherwise, from the construction business could have helped.

Such a disclaimer may go far, but keep in mind that aggrieved parties are always looking for a deep pocket. Contractors generally do not carry any type of malpractice coverage and we know that brokers do. Brokers should consider requiring salespersons to indemnify brokers for liability claims asserted against the broker as a result of salespersons’ outside activities. If the salesperson’s side business is truly independent of the broker’s real estate business, this should not be objectionable. Such an indemnity agreement can be made part of the original broker/salesperson independent contractor agreement or it can be executed separately if supported by consideration. Brokers and salespersons entering into indemnity agreement should seek the advice of their legal counsel.

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