

## Independent Contractor Agreement

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Real estate licensees can be transient. When a sales associate moves on, the broker will likely take one of three paths: 1) congratulate and thank the associate and release her listings and buyer agency contracts; 2) go berserk and escort the associate to the door; or 3) take a path somewhere in between. In general, I am inclined to believe that moves are to be expected and that sales associates will bring and take business and in the long run it all evens out. I suppose if that were true, and brokers always held that belief, then sale associates would be more forthcoming with their plans and mutual respect would prevail and life would be beautiful. But we all know that sometimes departures are horrible for all sorts of reasons.

The fights and litigation that follow departures do not have to be. Brokers and sales associates form relationships knowing they are likely to end, sooner or later. All involved know that when the relationship ends there will be questions of entitlement to files and commissions. So why aren't these inevitable questions resolved before they ever arise?

If you look to the agreement of sale you will see that most of its 13 pages deal with the common issues that may arise post-execution. Maybe notice of a municipal improvement will be issued that no one anticipated when the agreement was signed. We deal with that. Maybe the buyer's lender will reject the loan application. We deal with that, and we deal with many other things as well. So why don't we deal with the questions that will arise when the sales affiliate departs the brokerage?

The obvious manner of addressing these issues is in a broker/sales agent independent contractor agreement and PAR has published such a form. It provides a template for dealing with issues of departure that may or may not suit all situations. Many brokers provide their own such agreements, but not all set forth the path for resolving commissions and other issues that arise with the departure of a sales associate.

There is no better time to negotiate an agreement than at the outset of a relationship. Brokers and associates will never have a better opportunity to chart a mutually agreeable path.

Frequently I am consulted by employers and employees who ask that I review their employment agreement. But rarely am I asked by a broker or salesperson. What comes to my mind is "RELWOC." It is an acronym I use as frequently as "FSBO," but I don't hear it used by anyone else (maybe because I invented it). It stands for **real estate licensee without counsel**. You don't suggest that sellers manage and market the sale of their own property without a licensee so why would you seek to manage your legal affairs without the benefit of counsel?

Back to the question of who gets paid and what when the relationship ends. The argument that brokers will use is that the broker or brokerage owns the listing agreement and the

buyer agency agreement. It is not appropriate to talk about service agreements in terms of ownership. Agreements are between parties and they set forth the corresponding responsibilities. In the case of a listing agreement, the seller has engaged the brokerage under the terms of the contract. This is because affiliates (salespersons and associate brokers) cannot work outside the auspices of a single broker. The services will be provided by an agent of the broker, but nevertheless the broker is the contractor. The name of the licensee, designated or not on the contract, does not establish anything more than that the licensee, as an agent of the broker, will be the primary source of services. Generally then, the broker can hold the seller, or the buyer under the terms of a buyer agency contract, to the terms of the contract. Again, let's not talk about who "owns" the contract, but rather what the contract establishes. Whether a broker will require a buyer or seller to stay with the brokerage when an affiliate departs is a choice the broker will have to make. In many cases it would not make sense to require a reluctant seller to stay with the brokerage when that seller may have only known the affiliate handling his listing. Circumstances vary and the facts in each matter are important.

When attempts to resolve questions of control of the listing or buyer agency contract or the payment of commission post-termination do not resolve, parties find their way to the courts. There are very few appellate decisions that offer guidance. Most post-employment commission cases are borrowed from other industries and prevailing case law suggests that no commission is due post-termination unless a written contract provides otherwise. In rare cases, a contract can be established by "custom and usage," but establishing an obligation by custom and usage is an extremely difficult burden.

Resolving a commission dispute post-termination can be very expensive. Parties frequently forego entitlement to payment for this reason alone. Further, post-relationship litigation leaves indelible bruises and tarnishes the industry. Law suits are not confidential and names are going to appear on the trial list for all to read.

Most importantly, disputes don't have to be. It is all smiles when a new relationship is being forged. Take advantage of that opportunity to discuss the inevitable departure and how it is to be handled. It is the best opportunity to create a path to fairness and post-termination respect.

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*Mr. Goldsmith is an attorney with Mette, Evans & Woodside and serves as general counsel to PAR. A substantial portion of his practice is dedicated to providing advice and counsel to real estate licensees. He and his firm represent and defend real estate salespersons and brokers in civil lawsuits and licensing claims across the Commonwealth. Jim also defends Realtors® in disciplinary hearings conducted by the Real Estate Commission. Jim has been one of the voices of the PAR Legal Hotline since its inception in 1992.*