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# REALTORS® LEGAL ALERT

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## WORKING WITH CLIENTS OF “LIMITED SERVICE COMPANIES”

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September 10, 2003; Revised July 5, 2007

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### INTRODUCTION

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There are always new business models in the real estate brokerage industry. One of the latest business models is the “limited service” business model. In this business model, the listing agreement between the seller and the broker provides that the broker will perform certain services for the seller that may or may not include the full panoply of real estate brokerage services. These firms may limit their activities to placing the listing on the Multiple Listing Service or having the seller pick from a menu of services provided by the broker. These business models provide “limited services” only in the sense that the full range of brokerage services from marketing advice to payment of marketing expenses to showing the seller's property to negotiating the contract and providing post-contract follow-up is not automatically provided.

This Legal Alert will examine some of the issues involved when a “full service” or “traditional” brokerage meets directly with a seller who is not receiving showing or negotiating services from the seller's listing broker. Those expecting this Legal Alert to be a polemic against different business models than the so-called “full service” or “traditional” brokerage model will be disappointed. The purpose of this Legal Alert is not to disparage otherwise legal and ethical business practices.

The purpose of this Legal Alert, then, is to assist buyer agents who are meeting directly with sellers as a result of the listing agreement with guidance so the buyer agent does not create liability problems for himself or herself.

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### “DIRECT CONTACT” VERSUS “INTERFERENCE”

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Both the Real Estate Commission's Licensing Regulations and the Code of Ethics prohibit a Realtor® from interfering with the agency relationship of another licensee. In addition, the Real Estate Licensing Regulations mandate that negotiations with a seller who has an exclusive arrangement with another licensee must be conducted with the licensee and not directly with the seller. Therefore, a buyer agent who contacts and deals directly with the seller of a property that has been exclusively listed with another firm is violating both the Real Estate Licensing Regulations and the Code of Ethics *unless the listing broker has authorized the contact*.

Obviously, if the listing broker consents to the contact, there is neither interference nor a violation of the prohibition against negotiating directly with the other licensee's client. The difficulty in limited services situations is that the seller selects certain services from a menu. These menu plans may provide the seller with the option of showing his or her own property while having the listing broker present when an offer is presented and negotiations are taking place. Menu plans make it difficult for a buyer agent to know exactly when the buyer agent is engaging in permitted and authorized direct contact with the seller and when that contact is not authorized. A buyer agent should never be afraid to inquire of the listing

agent or the seller as to whether the listing agent will be acting for the seller in negotiations. Since the authorization to deal with the seller directly is important, a buyer agent who has been told by either the seller or the listing broker that offers and negotiations may be conducted directly with the seller should follow up in writing with the listing broker and seller.

Similarly, it would be helpful, although it is not required, if listing brokers authorizing direct contact with their sellers would provide that authorization right in the MLS listing.

Buyer agents who have been authorized to deal directly with the seller should understand that this does not privilege them to be disrespectful of the listing broker's position or the listing broker's business model. It is a violation of the Real Estate Commission's Licensing Regulations to induce or attempt to induce a seller to break a listing for the purpose of substituting a new or different listing. Therefore, buyer agents should stick to the business at hand and not make disparaging remarks about the legal and ethical business practices of others.

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### **KEEPING THE SELLER AT ARM'S LENGTH**

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Assuming that the buyer agent is authorized to deal directly with the seller in offering and negotiating, the next challenge for the buyer agent is in keeping the seller at arm's length. Connecticut's law on agency disclosure has not caught up with these different business models. The agency disclosure laws and the mandated Connecticut agency disclosure forms do not contemplate the situation where a buyer agent may be dealing directly with the seller upon the listing broker's authorization. For example, the agency disclosure law states that agency disclosure need not be provided to a party who is represented by a licensee in a different firm. Therefore, no agency disclosure needs to be provided to the seller when the listing broker authorizes the contact with the seller. In addition, the Connecticut form Unrepresented Persons Disclosure is not suited for this situation since the seller is represented by his or her listing broker with whom the seller has a listing agreement even where a listing broker is not obligated to provide the full panoply of real estate brokerage services.

Unfortunately, it is possible that the seller may begin to cozy up to the buyer agent and may look to the buyer agent for recommendations on attorneys or other service providers or guidance on pricing, inspections, closing dates and other contract matters. While the buyer agent's ultimate goal may be to obtain the property for his or her buyer, the buyer agent should keep in mind that the buyer agent's client is the buyer and not the seller. The seller under these circumstances should be told politely but firmly that the buyer agent represents the buyer and is not in a position to recommend professionals or provide advice and counsel to the seller. The seller should then be referred to his or her attorney or listing broker. Some firms have also found a use for their supply of the old "check the box" agency disclosure forms. They will use that form, "check the box" that they are representing the buyer and have the seller sign it as a way of emphasizing to the seller that the buyer agent represents the buyer and will not provide recommendations, advice, and counsel to the seller.

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### **DON'T I HAVE TO BE "FAIR?"**

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Some buyer agents believe that they are placed in a difficult position when dealing directly with the seller because they must be "fair" to both sides. These buyer agents are misinformed as to their obligations. There is no obligation to be "fair" to people whom the agent does not represent, and in fact, misguided attempts to be "fair" may actually be a breach of the duty of loyalty owed to the buyer agent's client. The buyer agent's is to their buyer client to obtain the property at the best possible price and terms. While this is not a reason to be dishonest or to lie to a seller, there is no general obligation to be fair to a party that the agent does not represent nor is there any limitation on strong advocacy for one's client. Every business model from "full service" to "MLS-only" has advantages and disadvantages. While "limited service" business models are legal and ethical, a buyer agent has no obligation to try and protect a seller from perceived disadvantages to the business model with which the seller has chosen to deal.

Buyer agents therefore should strive to keep the seller at arm's length and not provide the seller with recommendations, advice, and counsel. Buyer agents should also keep their primary obligation to their buyer in mind at all times. In addition, CAR has a purchase and sale agreement form specifically for use in limited service and FSBO situations. While not being oppressive to sellers in these situations, this form agreement contains many provisions that would be advantageous to the buyer. The form is available at the CAR website [www.ctrealtor.com](http://www.ctrealtor.com) and from those local boards who have adopted CAR forms.

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### WHY DO I HAVE TO DO ALL THE WORK?

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Some buyer agents believe that they must perform more work in a transaction that has been listed with a "limited service" company. This is really a matter of individual business judgment and buyer education.

Fortunately, Realtors® have the means readily at hand in Connecticut to address issues of scope of work when representing a buyer. That vehicle is the buyer representation agreement. If a broker representing a buyer wishes to make allowances in the buyer representation agreement for any additional work that the broker perceives is required in order to represent a buyer in the situation where the buyer is interested in purchasing a property listed by a "limited service company", the broker may include provisions regarding the scope of this work and any payment therefore in the buyer representation agreement. Furthermore, and in keeping with the buyer agency's representation of the buyer, the buyer agent can again politely and firmly tell the seller that a particular item is the seller's responsibility and direct the seller to his or her attorney or listing broker for assistance in completing that item.

Prior to showing a limited-service listing, the buyer agent should manage their buyer's expectations also. The buyer agent should tell their client up front about the limited service listing and that the seller has undertaken to perform certain functions such as provide property disclosure forms. Explain that as the agent for the buyer, it is not in the buyer's interest for the buyer's agent to undertake these functions. In this way, if the seller does not provide forms, transfer utilities, schedule agreed-upon repairs or complete other functions in a timely manner, the buyer is not blaming the agent or looking to the agent to undertake these functions without compensation.

At any rate, buyer agents should not feel that they have been forced into a position of performing the "seller's work" as it is a matter of the buyer agent's business judgment as to whether to include these additional items in the buyer representation agreement, make provisions for compensation, if desired, insist that the seller complete these items or perform them anyway.

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### COMPENSATION

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At times, the agreement between the limited service listing company and the seller will provide that the seller will compensate the cooperating broker directly. The listing is then made available to potential cooperating brokers through the Multiple Listing Service. Some cooperating buyer agents may believe that the direct payment from the seller makes these listings different than other Multiple Listing Service listings with regard to compensation. This is not the case.

Any listing on the Multiple Listing Service carries with it a blanket offer of cooperation and compensation made by the participant placing the listing to the other participants on the Multiple Listing Service. In other words, the MLS participant placing the listing on the Multiple Listing Service pledges the participant's full faith and credit for payment of the cooperating broker's compensation to a cooperating broker who meets all of the qualifications to collect compensation through the MLS. In other words, it is the listing broker's problem if the seller is in a limited-services situation does not pay the compensation to the cooperating buyer agent. Enforcement of that compensation is done through the same arbitration process as is used in any other MLS situation. There is therefore no reason to place additional compensation provisions in the purchase contract or for a buyer agent to attempt to obtain a listing from the seller when acting as the cooperating broker on a property listed in the Multiple Listing Service by another participant in that service.

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## ADVICE FOR REALTORS®

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1. Do not be afraid to contact the listing broker to determine the scope of services that the listing broker is providing a seller or to ensure that the buyer agent may deal with the seller directly.
2. Remember that the buyer's agent's fiduciary obligations are to the buyer, and there is no obligation to be "fair" to a seller conducting his or her own negotiations. A buyer agent who is asked for recommendations, counsel or advice by a seller should tell the seller politely but firmly that the buyer agent is unable to provide that sort of assistance and that the seller should contact his or her attorney or listing agent.
3. Consider using the old "check the box" agency disclosure form especially in those cases where the seller appears to become too cozy with the buyer's agent. Also consider using the CAR form purchase and sale contract for these situations.
4. Remember that compensation on listings placed in the MLS continues to be the responsibility of the participant who placed the listing in the MLS even though that compensation is to be paid directly by the seller.

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## CONCLUSION

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Dealing with a listing by a limited service company should be viewed as an opportunity to make a sale and not as a source of trial and tribulations. Realtors® already have mechanisms in place to deal with scope of work and compensation issues. The Realtor® who keeps the seller at arm's length and remembers his or her fiduciary duty is already equipped to handle anything that the limited service situation may produce.

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**THIS LEGAL ALERT FOR REALTORS® IS INTENDED FOR GENERAL INFORMATION PURPOSES AND IS NOT INTENDED TO PROVIDE LEGAL ADVICE ON ANY SPECIFIC FACTS. IF YOU HAVE SPECIFIC QUESTIONS CONCERNING YOUR OWN SITUATION, PLEASE CONSULT YOUR ATTORNEY.**

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