

ROLE OF A TRANSACTION COORDINATOR

I. INTRODUCTION

Assume that a friend of yours calls and asks you to assist him on the sale of his cabin to his neighbor. Since he already has a buyer, he does not need to list the property, but he does need help putting the transaction together and getting the sale closed. For many Realtors®, the difficult question here is not how to put the deal together, but rather in what capacity the Realtor® should serve. Obviously, the friend does not need a traditional listing agent, but should the Realtor® set up some type of agency relationship with the seller? Or should the Realtor® act as a transaction coordinator? Can the Realtor® charge for his/her services? As will be discussed below, while in this scenario it is certainly possible for the Realtor® to help his friend (and get paid for his work), because of its limitations, a transaction coordinator role may not be the best choice.

II. DISCUSSION

A. Background

In order to understand the limitations of the role of a transaction coordinator, it may be helpful to understand how this status originally came about. In 1993 NAR imposed a new requirement whereby MLS's were required to permit participants to offer cooperation and compensation to buyers' agents. Prior to this time all cooperating agents acted as subagents of the seller and thus Michigan Realtors® had no experience acting as buyers' agents in residential transactions. Faced with NAR's new rule, MR established a task force to address the implementation of buyers' agency in Michigan.

One of the members of the task force was a representative from a large real estate brokerage firm. This representative advised the task force that once the new rule was in place,

his firm was no longer going to offer compensation to subagents to MLS participants. Instead, this firm was going to offer cooperation and compensation only to buyers' agents in order to protect its sellers from potential liability for the misrepresentations and other wrongful acts of a subagent.

While it was certainly legally permissible for a firm not to offer cooperation and compensation to subagents, the MR task force was concerned that this firm's position was going to create a real, practical problem for firms who did not practice buyers' agency or who represented buyers who did not want to enter into a buyer agency relationship. For these reasons, the task force wanted to find a way for a cooperating Realtor® who was working with a buyer as a customer to show that buyer a listing which did not offer compensation to subagents.

MR communicated with NAR as to the possibility of offering cooperation and compensation to non-agents. NAR agreed that it would be permissible to offer cooperation and compensation to non-agents in Michigan only if it could be demonstrated that it was lawful to practice real estate in Michigan as a non-agent.

It was discovered, based on law that originated in the 1880s and the 1890s, that there was precedence in Michigan for a real estate licensee to act as a non-agent. It was determined that a Realtor® could act as a non-agent, but only on a very limited basis. These cases from the 1880s and the 1890s had a very similar fact pattern. A real estate broker had contacted a farmer, and the farmer agreed to pay the real estate broker a commission in the event the real estate broker found a buyer for the farmer's farm. In turn, the same real estate broker had approached a man in the city, and the man in the city agreed to pay the real estate broker a commission if the real estate broker could find a suitable farm for the man to purchase. The real estate broker put the farmer and the man from the city together, and they ultimately reached a

deal. The farmer and the man from the city each paid the real estate broker a commission without notice that the other was paying the real estate broker a commission. In other words, the real estate broker did not disclose to either party that he was also receiving a commission from the other party. Upon learning of the payment of the two commissions, the farmer and the man from the city sued the real estate broker to require him to pay back the commissions based on a claim of undisclosed dual agency.

The Michigan Supreme Court determined that in these cases, the real estate broker had acted as a “middleman.” The Michigan Supreme Court determined that the buyer and the seller did not rely upon or use any of the professional skills of the real estate broker. In other words, the real estate broker did not negotiate on behalf of either party or otherwise assist them in reaching an agreement and closing the transaction. The real estate broker simply introduced the two parties to one another. Thus, as a non-agent, the Michigan Supreme Court determined that the real estate broker could lawfully take commissions from both the buyer and the seller.

Based on these 1880 and 1890 cases, the status of “transaction coordinator” arose in Michigan. This status, again, was created primarily as a vehicle by which Realtors® could produce buyers who were not clients and obtain compensation from Realtor® firms that were not offering cooperation and compensation to subagents.

In the two decades since the task force looked at this issue, buyer agency has become standard operating procedure. For this reason, currently the transaction coordinator role is rarely used in the manner originally anticipated by the task force as almost all firms offer buyer agency, and almost all buyers seek representation. Realtors® who discover the transaction coordinator role today – particularly if they are unfamiliar with its origins – sometimes view it as an alternative to an agency relationship – *i.e.*, as a means of working with buyers or sellers

without assuming any fiduciary responsibilities. This is simply not the case. While there are isolated instances in which the transaction coordinator role is appropriate, its limitations are such that it is not appropriate for adoption as an overall business model.

B. The Role of a Transaction Coordinator Today

A transaction coordinator cannot work for the benefit of either party. A transaction coordinator must be a neutral party. It is often stated that his/her role is simply to bring the parties together. When acting as a transaction coordinator in its traditional form, a Realtor® simply introduces the buyer to the seller, and the parties conduct any negotiations or other activities necessary to acquire the property. If a transaction coordinator accidentally slips out of his/her neutral role, then he/she forfeits any right to a commission.

A transaction coordinator cannot list property for sale. In order to list property for sale in an MLS, a Realtor® must be an agent of the seller. A listing agent can be a limited services agent – but would still be acting in an agency capacity. Since 2008, the law in Michigan has permitted listing agents to provide limited services to their seller-clients so long as the listing contract expressly describes the limitations.

Even when a seller has a listing agent, a transaction coordinator can introduce the buyer to the transaction. In this case, the transaction coordinator is still a neutral party. Here, the transaction coordinator is, in effect, bringing the buyer and the listing agent together so that they can make the deal.

Since a transaction coordinator's role was developed from century old case law, the parameters of the service that may be provided are not clearly defined. As stated above, applicable case law speaks only of bringing the parties together and letting them put together the deal. In today's world of much more complicated real estate transactions, as a practical matter, it

is seldom the case that once introduced, a buyer and seller can simply put the transaction together on their own. Questions often come up as to what additional assistance the transaction coordinator can provide, if any. While it is certainly the case that a transaction coordinator cannot be involved in the price negotiations, are there other, more administrative-type services that a transaction coordinator can provide? For example, can a transaction coordinator assist the parties in completing the purchase agreement? Order title work? Locate an inspector? There are no definite answers to these questions, and it is certainly true that the more assistance that a transaction coordinator provides, the more likely he/she will be deemed to have stepped out of his/her neutral role and have forfeited his/her right to a commission. One suggestion that may assist a Realtor® in maintaining his/her neutrality is to adopt a policy by which the Realtor® does not ever meet with or correspond with either party separately.

Finally, a broker should NEVER attempt to act as a transaction coordinator if one of the parties is a friend or relative. A Realtor® is unlikely to be perceived to be acting in a neutral role if the Realtor® has an existing relationship with one of the parties in the transaction. If a friend asks you to "fill in the forms," the better course is to work for the friend as a limited services agent.

C. Realtors® Do Not Have to Be Agents in Order to Get Paid

For many years, the rule of law was that Realtors® could not charge a fee for assisting buyers and sellers in filling out a purchase agreement. This rule arose out of a 1955 case in which an attorney organization asked the court to prohibit Realtors® from helping their clients "fill out forms" on the theory that such work actually constituted as the practice of law. The Michigan Supreme Court disagreed and held that Realtors® could fill out forms so long as the work was incidental to their agency transaction, and so long as they did not charge a separate

fee for this service. *Ingham County Bar Assoc v Walter Neller Co*, 342 Mich 214 (1955). In 2003, the Michigan Supreme Court changed its mind and held that a non-lawyer could charge for assisting in filling out a form so long as such person does not "counsel or assist in matters requiring legal discretion or professional legal knowledge." *Dressel v Ameribank*, 468 Mich 557 (2003).

III. CONCLUSION

In most instances, it is easier and safer for a Realtor® to act as an agent for one of the parties to the transaction rather than try to serve two masters equally. In this way, acting as a transaction coordinator is quite similar to acting as a dual agent. In both cases, the Realtor® must maintain neutrality at all times, and if he/she fails to do so, the Realtor® will be deemed to have forfeited his/her right to a commission regardless of whether either party to the transaction was actually harmed. A Realtor® who has a close relationship with one of the two parties should never attempt to serve as either a dual agent or a transaction coordinator.

Serving as a transaction coordinator has an additional burden in that the case law upon which we rely speaks only to bringing the parties together. Until we have additional guidance from the courts, any assistance beyond that introduction runs the risk of forfeiting the commission. For these reasons, Realtors® should enter into transaction coordinator relationships only in the limited circumstances in which it is appropriate.