

Who Owns the Listing?

I have had to address this issue many times in the past and the answer has evolved as the industry has. Sometimes it is time for the licensee to move on to what may be perceived as greener pastures or in today's post-pandemic industry, a decision to open-up their own brokerage at their own house, to save money.

One of the most frequent questions that arises is what happens to existing listings, property management agreements, and pending transactions.

Sometimes licensees crossed the line and found themselves in serious jeopardy in violation of various codes of ethics, statutes and regulations, and contractual commitments.

The answer ultimately is it depends on the situation and the agreements that are currently in place. Over the years, as the industry and consumer relationship has changed from that of agency to designated licensee, sometimes the lines are blurred more so today than they were in the past.

In the old days it was very simple. If you put 100 people in the room, which I have, and asked the question who does the listing belong to, everyone in the room would've said listings belong to the broker. Some of the basis of that answer was based on the old agency law consistent throughout all 50 states which basically established the relationship between the consumer and the brokerage at the broker level, making all licensees at the company sub-agents to the consumer and broker.

20 years ago that consistency started to evolve into multiple variations. In some cases that meant designated licensees or designated agents depending upon whether or not agency law was still in place in that particular state. Additionally, state statutes and regulations would also vary in terms of how the listings were seen in terms of responsibility and ownership.

Other variations could occur because of the nature of different MLS agreements, coupled with various state laws which could cause variations to the answer of the question, who owns the listing, to be answered differently even within the same state.

Another key document to look at in arguments is the contractual agreement signed between the broker and the independent contractor. In many cases, this becomes the control document and can help in avoiding arguments when a licensee is leaving to go to another brokerage or leaving to start their own company.

I can tell you as a broker, it often felt when someone was leaving my company as a betrayal or a personal attack. I know that in a perfect world, I should never have taken it personally, but sometimes, depending on how long somebody has been with you, you can't help but develop a personal relationship, and in some cases, it almost breaks your heart when somebody leaves.

Now I'm a little older, or I should say a lot older and hopefully a little wiser, and I understand it's just business. Sometimes the two parties evolve two different directions and it is no longer a great fit.

I've had new salespeople come to me saying that they would work for me for free because they had so much respect such that I could mentor them, and they felt it would be worth it just to be at the company. They thought they would be with me forever. Here's what I learned over the years: they're all going to leave you. And their perception when they're leaving is often very different from what they tell you when they come to work for the brokerage.

What I learned over the years from my own experience and the experience of other brokers is sometimes we don't respond perfectly when told somebody is leaving. To avoid misunderstandings and minimize

upset, have a written agreement that details the nature of the departure regarding any listings, property management agreements, or pending sales and what the financial arrangement will be.

In property management, specifically, I have seen many times where the broker has a property management company and brings somebody on board to focus on managing that part of their business. Over the years, the person who is handling the day-to-day affairs, develops relationships with the property owners, that in some cases, are more robust than that landlord has with the broker of the firm. That doesn't mean that the property management relationships belong to the licensee. The statutory requirement is that any property management must be done in the name of the brokerage; that is typically how the management contract is structured with the consumer and landlord.

I have seen the situation occur with both salaried property managers and property managers on commission. Both feel that somehow they are now entitled to take that part of the broker's business with them. Mistakes can occur when the licensee decides to start calling the various property owners on landlords in an attempt to encourage them to move the property management contract over to a new brokerage.

The legal issue and exposure here is torturous interference with the contract which can lead to significant legal penalties. Additionally removing proprietary contact information from the brokerage or property management files can also violate Alaska's Fair Trade Practices Act, which can lead to triple damages and significant penalties.

One solution is to put a detailed agreement into the independent contractor's agreement that defines specifically what is to happen financially should the licensee depart the brokerage. This clarification can protect both the licensee and broker. From the broker's perspective this helps protect both parties.

From the broker's perspective, to protect themselves, I have seen significant non-compete agreements and penalties for any attempt made to move an agreement from the old brokerage to the new. I have reviewed liquidated damages provisions as high as \$50-\$100,000 in various agreements. Other options can include, in the property management agreement arena, an agreement to split new contracts using a referral fee based on several months of splitting management fees or flat fee for transfer.

This kind of arrangement can also be used for any sales listings or buyer brokerage listings that are to be moved from the brokerage. Agreeing up front to what referral fee would be paid were that to occur, if it has in fact been agreed to. This also keeps a consumer out of the middle of an argument.

This keeps the departure above board, professional, and in compliance with the Realtor Code of Ethics. I have seen where communications can sometimes deteriorate with the departure to define reasons why the licensee is leaving. Disparaging the business practices of a fellow Realtor can occur towards both sides of the relationship in violation of the Realtor Code of Ethics.

This can all be avoided in a very above-board agreement where the consumer is not put into the middle of financial wrangling between the broker and the licensee who is leaving because of the difference of opinion. This helps us look more professional and avoid any potential lawsuits, Realtor ethics complaints, or damage to the reputation of one or both of the parties.

Remember the Golden rule, treat people the way that you want to be treated and any time there is going to be a split in the relationship, which in many cases can go for years and years, there's going to be a certain amount of hurt. Not everybody will always conduct themselves in a way that, in hindsight, they necessarily believe they presented themselves at their very best.

My age has also taught me that in many cases the upset and the hurt will pass. Having been through a divorce, I can tell you that in some cases it doesn't feel that much different than the split that happens when one of your licensee's leaves.

Key to remember: don't say or do anything that you may regret later. It's a long-term relationship and we see each other in various places and having shared goals and dreams together for years, laughing and crying together. It's a real loss to have to ignore all of those things that we had in common because of a relationship that ended poorly or less effectively than it could have.

So, to avoid that from happening, put the agreement related to the departure in great detail in the independent contractor's agreement and as the years go by, revisit that agreement, to see if there are any mutual revisions that need to be addressed.

This is just one of the areas that we address in our broker prelicensing classes. If you are considering becoming a Associate Broker or Broker, you will find our materials comprehensive and easy to navigate. If you are already a broker, check out our special Broker Packages under Our Products in the navigation.

Best to you.

-Jerry