

Teams

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Dramatic advances in technology over the past two decades have changed the way Realtors conduct business. Just twenty years ago, multiple listing services were still printing books of listing data and hand held mobile computing devices were not yet commonplace. Market trends in the real estate industry resulted in larger and larger firms and the day of the small boutique brokerage enterprise seemed to be dying.

The most significant change however, came about just at the turn of the 21st century with the proliferation of real estate teams. Keller Williams and other market innovators promoted the concept of teaming real estate licensees so that the licensees could create brand identification and expertise in multiple disciplines that make real estate sales profitable. The old model of hiring assistants became a costly option in the real estate recession which began in 2004. Realtors have always been creative and the team concept has been one which enabled brokers to form multi-person teams (a thirty person team is not unheard of) which have become significant in the marketplace.

Traditional brokerage firms have not received the “team concept” easily. Efforts to brand the team rather than the brokerage firm and the significant income that a team can generate, represent a significant threat to the way business was conducted in the past.

What is a Team?

Essentially, a “team” is two or more real estate agents or a group consisting of licensed and unlicensed agents and assistants who work together contractually with the goal of providing higher levels of service to consumers, greater expertise in initiating and completing transactions and significant economic power within the brokerage firm for which the team works.

The current team concepts have replaced husband and wife teams and teams with a star broker with assistants. Rather, teams now consist of individuals with significant skill levels so that transactions are supported by different people at different stages of the sale process. One person may take a listing, another member of the team may sell the listing, another may coordinate the contract and financing and a fourth may facilitate and coordinate closings. In New York City, some of the teams work with ten different agents, some responsible for signing and showing exclusives, some handling buyers, some handling only the listings and all participating in the total profitability of the team effort.

The Need to Regulate Teams

Many people are averse to change. When change comes too quickly, there is often a reaction seeking to regulate the new methodology. Nothing crushes innovation faster than regulation.

Maryland, Alaska and many other states have implemented laws, rules, regulations and standards of practice by which teams must conduct themselves. New York is about to do so with the adoption of new advertising requirements under Regulation §175.25 of the Department of State's Regulations. It is anticipated that these regulations will become effective in 2013 and as currently generated, will significantly change the way teams operate in New York. Under the proposed regulations, a team is defined as follows:

“Team’ means two or more persons, one of whom must be an associate real estate broker or real estate salesperson, associated with the same real estate brokerage who hold themselves out or operate as a team.”

In the current environment, many teams have already chosen names, advertised heavily, promoted and branded a particular image. This has been a source of fear by principal brokers concerned that the team will generate the goodwill that the broker enjoyed in the past. Supported by DOS in this process, principal brokers will have under proposed Regulation §175.25 significant confirmation of the right to have only the principal real estate broker “place or cause to be published advertisements related to the sale or lease of property.” Teams will be required to identify their principal broker in all advertisements and even the team name will be regulated. The proposed Regulation indicates as follows:

“1. Team Name. Team name shall either: (i) include the full licensed name of the real estate brokers, associate brokers or real estate salespersons who are part of said team; (ii) if the names are not included, the team name must be immediately followed by “at/or (full name of the broker/brokerage).” Team names may use the term “team”. The use of any other terms besides “team” such as “associate”, “realty” or “group” is prohibited. The use of the name of a non-licensed individual in a team name is prohibited. For twelve months after the adoption of this regulation, teams that have changed their names to comply with this provision shall be entitled to state in advertisements under their new name that they were “formerly known as” their prior team name.

2. Unlicensed Team Members. If any unlicensed individuals are named in advertising for a team, the advertisement must clearly and conspicuously state which individuals are real estate licensees and which ones are not.”

Commercial Free Speech

The First Amendment to the Constitution of the United States essentially restricts Congress from making any law which abridges freedom of speech. Most legal scholars interpret this First Amendment right as one which protects political speech, which is what the writers of the Constitution were concerned about. Over the past several

decades, the concept of commercial speech has been extended to commercial interests. For the first 200 years following the creation of the Constitution, advertising and other profit-motivated communications were rarely, if ever, considered by the courts. The tide turned in the 1970's. Since that time, advertising and commercial free speech have received greater and greater protection from the courts. In that light, whether a state agency, such as the New York State Department of State, has the right to regulate how a group of real estate agents choose to market properties and to brand themselves, may be subject to challenge. In the event that the Department of State brings its new Regulation into effect as anticipated, a commercial free speech challenge may ensue. The proposed advertising regulations, which were published in the fall of 2012 for public comment, contain many provisions which instruct real estate licensees about the content of advertisements, signs, inclusion of phone numbers, insistence on the placement of firm names as well as team logos, etc. Whether these restrictions will stand the scrutiny of the courts cannot be determined.

Other States

New York is not the first state to address concerns about teams and groups. The State of Maryland began to regulate teams and groups on October 1, 2010. The law in Maryland requires that all team advertising contain the full name of the brokerage firm, the name of at least one of the licensee members of the team, the telephone number of the broker or branch manager and further requires that the team work together on a regular basis within the same office or same branch office.

The State of Alaska recently established new regulations which require that a licensee may act as a licensed assistant to a another licensee only if (i) both are employed by the same broker; (ii) the assistant only works for one broker; (iii) the arrangement is in writing and the licensed assistant is an employee; (iv) the broker approves of the arrangement and agrees to be liable for the licensed assistant's actions; and(v) the salesperson pays the assistant's wages and withholds taxes therefrom.

Does the Team Concept Warrant Such Regulation?

A thoughtful review of how teams operate, as well as the ownership of listings by real estate brokerage firms, raises many thought provoking questions. Examples are:

1. If a single real estate team is representing both the buyer and seller in the transaction, what is the role of the principal broker to supervise and approve of dual agency, designated agency or some other format for the transaction?
2. Should a member of a team be required to disclose that he or she is a member of a team?
3. Can "designated agents" permitted under New York Law (Section 443 of the Real Property Law) be designated by the team leader?

4. Who is to supervise potential conflicts of interest when team members receive the confidences of buyers and sellers in transactions handled by the team? Is the team leader to supervise this or is this only within the purview of the supervising licensed real estate broker?

5. Can a team separately incorporate or set up a limited liability company and still work under the license of the principal broker?

6. Does the creation of a team and the existence of a team leader leave the principal broker exposed to liability because the principal broker is not likely to be kept fully informed of each transaction the team is handling?

7. What disclosures to clients and customers must team members make regarding how they share compensation within the team structure?

8. Can a principal broker comply with the supervisory requirements of Regulation §175.21 which require “regular frequent and consistent personal guidance, instruction, oversight and superintendence...”?

Teams as a Threat to the Principal Broker

It is well known that a single team can generate more than 1,000 transactions in a single year. Such a feat would be virtually impossible for a single salesperson, even one with multiple assistants. The potential therefore, is for a team to become so powerful within an organization that ultimately, it can dictate its requirements to the principal broker. While principal brokers recognize the benefit of capable individuals working together, they also have legitimate concerns that a particular team will, as a result of its success, become more significant than the brokerage firm itself.

While there are some answers to the issues described above, there are issues which are not readily resolvable. How teams will continue to impact the marketplace is a story that will unfold over the coming years.

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