



Corporate Real Estate Scope

How to Select the Best Commercial Real Estate Agent

Commercial Tenants and Buyers frequently complain that *their* supposed Real Estate Broker or Salesperson seems more motivated to close a lease or purchase and collect the commission check than in helping them to find the best building or space at the lowest price.

So whose Broker, Salesperson or Agent is whose?

And what the heck is really going on?

This troubling issue for Tenants and Owner-Occupants is critical enough for the Office of General Counsel in the New York Department of State to issue a notice to the Public. The warning is titled "[Be Wary of Dual Agency](#)" and you can read it for yourself.



Shockingly, what Landlords and Tenants or Buyers and Sellers may not comprehend or appreciate is that in many cases, Commercial Real Estate Brokers and Agents in the US actually have no (zero) legal obligation to look out for their best interests. Laws in 25 or more US states allow Commercial Brokers, Salespeople or Agents to provide real estate services to Landlords, Tenants, Buyers and Sellers as "Transaction Brokers" or "Facilitators" or "Intermediaries," without having legal fiduciary duties of loyalty and obedience to their supposed "Clients."

A consumer/client should not assume that his Broker, Salesperson or Agent is obligated to represent his or her interests, and his interests alone, until they have seen a written disclosure describing the agency relationship under which real estate services are being delivered. Landlords and Tenants, as well as Sellers and Buyers, looking to negotiate the best commission rate, obtain the highest level of service and protect their legal rights in the event of a dispute should start the process by making certain that they understand the form of representation their Broker, Salesperson or Agent is providing.

Is it a "Single Agency" relationship, which is the most ideal relationship for the Consumer? That is The Gold Standard of Representation for Tenants and the Buyers that are Owner-Occupants.

Or is it a legal relationship that leaves the door open for a Broker, Salesperson, Agent or his company to double-end the deal and double-dip on the commission?

TYPES OF AGENCY RELATIONSHIPS

Agency relationships get created when one person agrees to act on another's behalf, or to represent them in dealings with a third party. Once an agency relationship is established, Brokers, Salespeople and Agents owe their clients "fiduciary duties" of loyalty and obedience. In Single Agency

relationship, Brokers, Salespeople and Agents are typically required to place their clients' interests ahead of their own, providing services with honesty and good faith while carefully avoiding conflicts of interest or "self-dealing."

But the rules governing agency relationships between consumers, Real Estate Brokers, Salespeople and Agents vary from state to state, and all have been rewritten in the last 25 years. Depending on the laws of the state in which they are licensed, Brokers, Salespeople and Agents provide services through one of six (6) relationships:

#1) Single Agency: A Broker, Salesperson or Agent represents only the interests of the Landlord or the Tenant (or the Seller or Buyer) in a transaction -- either as the "Listing Agent" for the property or as a "Tenant's Agent" or a "Buyer's Agent" for the Occupier. Consumer advocates maintain that Single Agency is the optimum form of representation.

#2) Designated Agency: This occurs when a conflict of interest arises within a Brokerage Company and one Broker, Salesperson or Agent is in a position to represent both parties on opposite sides of a transaction; for example, both the Landlord and the Tenant on lease. To seemingly remove the conflict of interest, the Employing Broker of the Brokerage Company separately designates two (2) of his In-house Brokers or Salespeople, one each to represent the Landlord and the Tenant.

When states require that Employing Brokers implement safeguards to protect a client's confidential information, academics and consumer advocates say that Designated Agency is the next best alternative to Single Agency. But we maintain that there's a giant drop off between #1 Single Agency Representation versus #2 Designated Agency. That is particularly true for the Tenant, which only needs one lease at a time as compared against a Landlord that requires assistance from its Listing Broker, Salesperson or Landlord's Agent with multiple leases in a single building or maybe even in multiple buildings.

#3) Disclosed Dual Agency: A lone Broker, Salesperson or Agent provides services simultaneously to both the Landlord and Tenant (or the Seller and Buyer) in a limited agency relationship, without an obligation to represent the best interests of either the Landlord or Tenant (or the Seller or Buyer). In states with no provisions for Designated Agency by the Employing Broker, when two (2) Brokers, Salespeople or Agents affiliated with the same Employing Broker's Company represent both sides of a transaction, the lone Broker or Agent may be considered a Dual Agent.

Although controversial even among Real Estate Brokers and Agents, Disclosed Dual Agency does present opportunities for experienced Landlords and Sellers to negotiate discounted or "variable rate" commissions in advance, primarily because the Landlord or Seller would be getting a lesser standard of representation than in a Single Agency relationship. But for Tenants and Buyers in the US, who don't pay the commission to their Brokers or Agents since it's paid by the Landlord or Seller, all Tenants and Buyers receive in Dual Agency situations are lower standards of representation.

The practice of Dual agency is currently being reviewed by the California Supreme Court in what could be a landmark case as noted in our ITRA Global article [California Supreme Court Challenges Ethics of Dual Agency](#) published last month.

#4) Transaction Brokerage: One (1) Broker, Salesperson or Agent or two (2) Brokers, Salespeople or Agents at the same Brokerage House/Company may provide services to the Landlord or Tenant or to the Seller or Buyer, or both, in a non-agency relationship, owing no fiduciary duties of loyalty and obedience to the Landlord, Tenant, Seller or Buyer.

A Broker or Agent that performs Transaction Brokerage is called, as one might expect, a "Transaction Broker" in some states but a "Facilitator" or "Intermediary" in other states. Transaction Brokerage has the same disadvantages as Dual Agency because neither the Landlord nor Tenant (nor the Seller or Buyer) can expect a Broker, Salesperson or Agent to represent its interests during any negotiations. As a result, clients served by Transaction Brokers, Facilitators or Intermediaries have little latitude to file claims for professional negligence by any such Broker or Agent. And some Brokers, Salespeople or Agents dodge having the higher standards and duties owed to a client under

a Single Agency relationship by actually preferring to act as Transaction Brokers (Facilitators or Intermediaries, too), which gives them much more "wiggle room."

#5) Providing "Ministerial" Services to Unrepresented "Customers": A Listing Broker for a property may avoid splitting a commission with a Cooperating Broker by providing limited services to an unrepresented Tenant or Buyer.

#6) Sub agency: The Listing Broker for the property represents the Landlord or Seller in a declared Agency Relationship. "Selling Agents" or "Selling Brokers" who work with Tenants or Buyers are legally "Subagents" of the Listing Broker for the property. Likewise, "Leasing Agents" who work with Tenants are also legally "Subagents" of the "Landlord's Agent or Broker." All of the Brokers or Agents involved in a Sub agency Transaction owe their allegiance to the Landlord or Seller, and the Tenants and Buyers are actually legally unrepresented altogether.

Although Sub agency was previously a standard industry practice for most of the last century, this form of representation has largely fallen out of favor because of legal risks for Brokers, Salespeople, Agents, Sellers and Landlords. But Sub agency is still the default relationship in a few states where nothing is in writing between a Broker, Salesperson or Agent and the Tenant or Buyer. Texas is still one such state.

CONCLUSIONS

Hiring a 100% Tenant/Buyer Representative is the best way for Commercial Occupiers to win when negotiating with Landlords and Sellers and to be assured that their interests are their Agent's primary objective. All of the other types of agency noted in this article have inherent risks for troubling and even damaging conflicts of interest to arise.

Even though laws in the US allow commercial brokers and agents to represent multiple parties in the same transaction, we strongly believe that it's not in our client's best interests and is a flawed recipe for terrible tasting conflicts of interest to occur. This is why true, 100% Tenant and Buyer Representatives, like ITRA Global advisors, practice only Single Agency Brokerage, The Gold Standard, and never consider trying to represent two clients in any one transaction. We simply won't do it.

For more information about this topic please contact Beth Wade, ITRA Global Executive Director, at 706.654.3201 or email bwade@itraglobal.com.

[ITRA Global](#) is an organization of real estate professionals specializing in representing commercial tenants and buyers in the leasing, acquisition and disposition of office, industrial and retail facilities. With coverage in major markets around the world, ITRA Global is one of the largest organizations dedicated to representing tenants and occupiers of commercial real estate. Clients benefit by having an experienced professional as their trusted advisor, providing conflict-free representation with total objectivity. To learn more about conflict-free representation and ITRA Global locations, please visit the ITRA Global web site.

Note: Reprinted with permission of William Gary, MBA, MIM, based on Canonical Reference to ITRA MacLaurin Williams' blog article, *How to identify the best Commercial Tenant Agent*, dated January 15, 2017, posted at <http://maclw.com/blog?post=How-to-identify-the-best-Commercial-Tenant-gent&xid=040700-01>.