Representing Family Members — and Avoiding Conflicts of Interest

When considering whether to represent a family member in a real estate transaction, it is important to remain impartial in order to fairly represent the interests of any other clients who are parties to the transaction.

Background:
A real estate professional (the “Broker”) represented both the Seller and a prospective purchaser (“Purchaser”) of a residential property (the “Property”). Several parties were interested in purchasing the Property, and the Purchaser had submitted an offer through the Broker. However, the Seller rejected all existing offers made by the Purchaser and the other interested parties. At that time, the Seller advised the Broker of new contingencies which, if included in a future offer, would likely be accepted. Although the Purchaser had indicated she was still interested in the Property, the Broker did not relay this new information to the Purchaser. The Broker only relayed this new information to another prospective purchaser, who was the Broker’s mother. Ultimately, the Broker’s mother was the successful purchaser of the Property.

While the Seller and the Broker’s mother were in negotiations, the Purchaser contacted the Broker several times to inquire whether the Property had been sold. The Purchaser advised the Broker that she remained interested in the Property and might consider increasing her offer to purchase. However, the Broker did not respond to the Purchaser until five days later — and after the Seller had already closed with the Broker’s mother.

What Happened?
The Purchaser later learned that the Broker’s mother had purchased the Property and filed a lawsuit against the Broker and the real estate agency. The Purchaser alleged the Broker had breached fiduciary duties owed to the Purchaser as her buyer’s representative, acted fraudulently, and violated local consumer and unfair trade statutes. The Purchaser also alleged the Broker’s simultaneous representation of his mother in the real estate transaction was a conflict of interest. The Purchaser argued that she had sought to purchase the Property as a rental property, and that the Broker’s breaches caused her to lose a prospective investment opportunity, and total damages of $750,000.

Unfortunately, the Broker’s transaction file was not very well documented. The Broker did not ask his mother to sign the standard buyer’s representative agreement. The Broker did not disclose to the Purchaser that he was simultaneously representing his mother with regard to purchase of the Property. The Broker’s file did not contain copies of the e-mail correspondence sent by the Purchaser inquiring about the status of the Property and did not reflect that the Broker had advised the Purchaser of the Seller’s unique contingencies.

As information was exchanged during the lawsuit, the Seller confirmed that she knew the Broker was representing his mother, and that the mother’s offer had been accepted because it met the Seller’s specific contingencies. Additionally, the parties learned that the Broker had contributed $50,000 to his mother’s down payment to purchase the property. Collectively, the
evidence supported an inference that the Broker had breached duties owed to the Purchaser in his capacity as the Purchaser’s buyer representative.

Result:
Despite the apparent breaches by the Broker, the Broker argued that the Purchaser’s theory was speculative. Specifically, the Broker argued that the Purchaser could not establish that she would have won a bidding war to purchase the property and would have difficulty establishing her claim for lost rental income. Nevertheless, the parties settled the claim for a confidential six-figure sum above $250,000.

Risk Management Tips:
Many real estate professionals are asked by family members to represent them in the purchase or sale of a property. In these instances, a real estate professional may find himself at risk of a conflict of interest. This is because it is difficult for a real estate professional to serve more than one buyer adequately with respect to purchase of the same property. If you are representing a family member in a real estate transaction, it is best to refer any other party to your broker or another trusted agent. Many real estate brokerages will not allow representation of multiple buyers to the same transaction.

However, recognize the potential risks involved if you do choose to represent a family member in addition to other interested parties. Many states require that you disclose your representation of multiple parties to a transaction, including multiple buyers. Know what, if any, limitations your state may place on your role as a dual agent. Establish a written policy for handling dual agency transactions and be sure to follow your internal policies and procedures. Be sure to fully explain your role and responsibilities to each party, including your family member. Any potential conflicts must be waived by each client.

Even if you obtain a waiver from each client, it is still important to take certain steps to preserve your fiduciary duties to each client. Keep separate lines of communication open with each client to the transaction. Convey any pertinent information to all clients equally, so that your clients can make informed decisions. Finally, preserve any written communications with each client and keep them in your files. If offers are made on behalf of multiple clients, disclose that there is a competing offer submitted by you and another client – or ask your broker or another trusted broker to write the offer on behalf of the second client.

Remember that you have a fiduciary duty to each client and are bound by state laws as well as the code of ethics to fairly represent each client. Taking the above steps will be useful if you find yourself in a conflict situation or if you are ultimately involved in litigation related to the transaction.