



**Consumer Federation of America**

# **DOES TRANSACTION BROKERAGE IN FLORIDA SERVE THE INTEREST OF HOME BUYERS AND SELLERS?**

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Transaction brokers selling residential properties are facilitators with no obligation of loyalty to either buyer or seller. This brokerage service is available to consumers in 17 states and called, variously, facilitator (MA, MN, NH), transaction licensee (PA), neutral transaction coordinator (RI), neutral licensee (AK), intermediary (TX, WY), or transaction broker (AL, CO, FL, KS, MO, NJ, NM, SC, SD).<sup>1</sup>

In almost all of these states, transaction brokerage is not the dominant form of service relationship between real estate agent and consumer. It is one of several options that include a fiduciary role and dual agency.<sup>2</sup> However, in Florida, transaction brokerage is not only the dominant service relationship of real estate agents to home buyers and sellers; it is also the default relationship and is not legally required to be disclosed to consumers (though a fiduciary relationship must be disclosed).<sup>3</sup>

This report uses newly available data to evaluate transaction brokerage in Florida and assess whether this brokerage serves the interest of home buyers and sellers. The report reveals that transaction brokerage in this state:

- is widespread but not understood by consumers,
- imposes unwarranted financial costs on most buyers and sellers, and
- exposes home buyers and sellers to significant risks related to the quality and/or price of the property being sold that are mitigated somewhat when agents act illegally.

The report notes that transaction brokerage could be structured to serve the consumer interest if it were effectively disclosed and a single transaction broker facilitated the sale of a property at a commission rate well below the current level. However, this option is currently not a realistic one for home sellers and buyers anywhere in the United States.

The report makes several recommendations:

- Florida policy makers should require that agents, working as transaction brokers, effectively disclose to home buyers and sellers at initial contact that the agents are facilitators, not fiduciary representatives.

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<sup>1</sup> Stephen Brobeck, Why Required Real Estate Agent Disclosures about Representation Fail and How They Can Be Improved (Consumer Federation of America, January 2020), especially Appendix C. There, however, is no uniformity in the definition of these roles, which in law and especially in practice, cannot easily be distinguished from the roles of licensee, limited agent, and even dual agent.

<sup>2</sup> Though somewhat dated, the definitive study of agent roles and responsibilities remains: Ann Morales Olazabal, “Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses,” *Harvard Journal of Legislation*, v. 40 (2003), pp. 65-132. For information on changes since then, see: Matt Carter, “From Subagency to Non-Agency: A History,” *Inman* (February 17, 2012).

<sup>3</sup> The 2021 Florida Statutes, Title XXXII, Chapter 475.278.

- Florida’s Department of Real Estate should take the lead in informing home sellers and buyers of this fact.
- Home sellers and buyers should be wary about working with transaction brokers unless these consumers are charged a reduced commission and hire an attorney to represent their interests in the sale.

## Undisclosed Transaction Brokerage Develops in Florida

Until the early 1990s, most real estate agents throughout the nation accepted an industry-constructed subagency system in which all agents, even those working with buyers, were legally obligated to represent the interests of sellers.<sup>4</sup> During this decade, litigation and public exposure, in large part through syndicated columns by housing reporter Ken Harney, convinced the National Association of Realtors (NAR) that the subagency system was no longer viable.<sup>5</sup>

NAR then largely withdrew from national policy discussions about agent representation, allowing industry leaders in each state to advocate their own agency system and related consumer disclosure requirements. The result was different laws in each state and Washington, D.C. in which more than 50 different terms are now used to denote agent relationships to customers ranging from fiduciary to facilitator. A large majority of states required early disclosure of this relationship.<sup>6</sup>

In the mid-1990s in Florida, the industry worked with the State’s Department of Real Estate and legislature to develop a new agency law, which became effective in late 1997 and was tweaked by legislation a year later.<sup>7</sup> The 1998 law:

- Defined only two brokerage relationships between agent and customer – as a “single agent” (fiduciary) and as a “transaction broker” (facilitator), prohibiting “dual agency” in which an agent purports to represent both seller and buyer.
- Limited the confidentiality required of transaction brokers and required no loyalty to their customers.

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<sup>4</sup> Olazabal, “Redefining Realtor Relationships,” loc. cit.

<sup>5</sup> See: Matt Carter, “From Subagency to Non-Agency,” loc. cit. Stephen Brobeck, “Real Estate Brokerage Advocacy,” from Brobeck and Robert N. Mayer, *Watchdogs and Whistleblowers: A Reference Guide to Consumer Activism* (Greenwood, 2015), pp. 399-401.

<sup>6</sup> See: Stephen Brobeck, *The Agency Mess* (Consumer Federation of America, January 2019). Also, Brobeck, *Why Required Real Estate Agent Disclosures about Representation Fail*, loc. cit.

<sup>7</sup> See: H. Glenn Boggs, “Real Estate Agency: Florida Contemplates Change,” *Florida Bar Journal* (February 1, 1997), v. 71, n. 2. Also, Boggs, “Real Estate Brokerage and Agency in Florida: A New Direction for State Laws,” (1999?), available online.

- Required an initial agent disclosure of non-representation, then a later agent disclosure of single agent or transaction broker to the seller or buyer.
- Allowed single agents working with a seller to switch to transaction broker (usually because they found a buyer) provided that was acceptable to the seller.
- Allowed a seller or buyer customer to have no brokerage relationship with an agent involved in a home sale. In relation to this customer, the agent was **not** required to maintain any confidentiality; to use skill, care and diligence; or to present offers and counteroffers in a timely manner.

In the following decade, there was an important change to this statute.<sup>8</sup> In the amended statute, it was presumed that all agents operate as transaction brokers unless a single agent or no brokerage relationship was established. Moreover, agents were no longer required to disclose a transaction brokerage relationship. Unless the customer asked or the agent volunteered the information, the customer would not know whether their transactional broker was acting as a fiduciary or a facilitator. Single agents and non-representatives were still required to disclose their role to customers.<sup>9</sup>

Undisclosed transaction brokerage then grew to become the dominant agent-customer relationship in Florida. One Florida broker summed up the attraction to agents as “really pretty simple – liability and profitability.”<sup>10</sup> But the reality was somewhat more complicated with three factors being important.

First, agents usually found it easier and quicker to make home sales as a transaction agent than as a single agent.<sup>11</sup> Transaction agents were not required to obtain cumbersome disclosures nor were they required to disclose a lack of total agent loyalty. This lack of disclosure gave these agents more flexibility to arrange sales quickly, often reducing their workload and allowing them to be compensated sooner.

Second, transaction brokerage facilitated double-dipping (also called double-ending) where one firm or agent worked with both seller and buyer, retaining the entire commission.<sup>12</sup> For firms, it was much simpler and less risky for all their agents to function as transaction brokers, allowing these agents to work with each other having

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<sup>8</sup> One writer dated the elimination of the disclosure requirement in 2008. Tom Coler, “Florida’s Dirty Little Secret: Transactional Brokerage Leaves Consumers as Clueless as Ever,” [www.PCED.ORG](http://www.PCED.ORG) (Pinellas County Economic Development, March 8, 2018).

<sup>9</sup> 2021 Florida Statutes, loc. cit.

<sup>10</sup> John Woodward, “Representing Sellers,” SarasotaOne.com.

<sup>11</sup> As a buyer agent working with many transaction brokers in another state put it: “It generally takes more time and work to properly represent a client as an agent.” Website of Downtown Real Estate Partners.

<sup>12</sup> Chris Carter, “Florida’s Best Kept Real Estate Secret – Transactional Brokerage,” The Florida Real Estate Blog (June 18, 2021).

fewer conflicts and hurdles to overcome.<sup>13</sup> For individual listing agents who also found a buyer, there was no need to persuade the seller to allow the agent to change their status from single agent to transaction broker. Few listing agents look forward to explaining why a client should approve a change in their listing agent’s role from fiduciary to facilitator.

Third, and even more importantly, transaction brokerage limited the legal liability of agents and brokers. As one Florida attorney wrote: “It is a huge limitation on the liability of a real estate agent, and their broker, to be able to act as a ‘transaction broker’ instead of an agent – fiduciary.”<sup>14</sup> For example, as a fiduciary a buyer agent “bore all the responsibility of due diligence on the property, including uncovering defects that the seller did not disclose.” These buyer agents “did not like hearing all the risk and liability of uncovering hidden defects, especially when everything was caused by the seller not telling the truth.”<sup>15</sup>

Today this dominance is assumed by those writing about Florida’s transaction brokerage.

- “Now every realtor in the State of Florida is a transaction broker.”<sup>16</sup>
- “Most residential real estate sales and purchases in Florida are handled under Transaction Broker relationships.”<sup>17</sup>
- “ALL relationships between agents/Brokers and sellers/buyers in Florida are automatically transaction unless and until a separate written disclosure changes that.”<sup>18</sup>

The dominance is supported by some empirical evidence. One large multiple listing service in Florida uncharacteristically requires agents to report their own agency status on their listings. In an analysis of 500 consecutive sales in Jacksonville in late 2021, CFA found that over three-quarters of listing agents (76%) identified their agency status as transaction broker while only one-fifth of these agents (20%) reported their status as single agent. In the remaining 21 sales (4%), agents listed their status as non-representative, perhaps because they were assisting a for-sale-by-owner.

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<sup>13</sup> John Woodward, “Representing Sellers,” loc. cit.

<sup>14</sup> Larry Tolchinsky, “Are There Dangers with a Florida Real Estate Agent Representing Both Buyer and Seller?” About Florida Law (2014).

<sup>15</sup> Terry Story, “Should You Replace Your Real Estate Agent with a Transaction Broker Instead?” The Steve Pomerantz Show (August 8, 2018).

<sup>16</sup> Story, *ibid.*

<sup>17</sup> Carter, “Florida’s Best Kept Real Estate Secret,” loc. cit.

<sup>18</sup> Tolchinsky, “Are There Dangers,” loc. cit.

## **Most Florida Consumers Believe That Real Estate Agents Work For, Not Just With Their Customers**

Most Florida consumers think that real estate agents are loyal to their customers. Florida real estate experts have observed that consumers think their real estate agent represents their interests. As one noted: “Buyers and sellers assume they have a single agent.”<sup>19</sup> As another wrote: “Buyers and Sellers of Florida real estate, particularly residential real estate, generally assume that their brokers are working exclusively for them.”<sup>20</sup>

These observations are supported by a poll commissioned by the Consumer Federation of America and undertaken by IPSOS, an international research and marketing firm. In early December 2021, IPSOS asked a representative sample of 286 Florida consumers online: “Do you think that most home buyers and sellers in Florida work with a real estate agent who: (1) legally represents their best interests, (2) legally represents the interests of the opposing party in the sale, or (3) legally represents the interests of neither buyer nor seller but just facilitates the sale?”

Nearly half of the respondents (48%) chose option one while just over one-third of respondents (35%) chose option three. In this survey, far more respondents indicated that they thought a real estate agent represents the interests of their customers rather than just facilitating a home sale.<sup>21</sup>

## **Uninformed Home Sellers and Buyers Working With Transaction Brokers Are Exposed to Significant Risks**

Florida law does require that transaction brokers perform the following duties in working with customers:

- deal honestly and fairly;
- account for all funds;
- use skill, care, and diligence in the transaction;

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<sup>19</sup> Email from Tom Wemett, December 3, 2021.

<sup>20</sup> David Blattner, “Is Your Real Estate Agent On Your Side?” Real Estate Law Blog (beckerlawyers.com).

<sup>21</sup> A nationwide Federal Trade Commission survey (published in 1983) found that most consumers believed real estate agents represent the interests of their customers while a nationwide Consumer Federation of America survey (published in 2019) learned that most consumers thought that agents are required to represent the interests of their customers.

- disclose all know facts that materially affect the value of residential property and are not readily observable to the buyer; and
- present all offers and counteroffers in a timely manner.

However, Florida law does not require “loyalty,” complete “confidentiality,” “obedience,” and “full disclosure” from transaction brokers, only from single agents.<sup>22</sup> Florida home sellers and buyers who mistakenly think that their transaction broker is required to provide total loyalty and commitment are exposed to numerous risks related to the quality and/or price of the property sold.

**Legal Restrictions on Transaction Brokers for Providing Information and Advice:** Transaction brokers cannot legally provide their customers with any information or advice that could potentially harm the other party in the sale. Florida law specifically prohibits these brokers from disclosing that the seller will accept a price less than the listed one, that the buyer will pay a price greater than that submitted in a written offer, or the motivation of either party for selling or buying. These restrictions make it illegal for transaction brokers to negotiate the price and terms on a home sale on behalf of their customer.

However, the customers of transaction brokers usually expect this assistance because they think these agents represent their interests. “The consumer expects the real estate agent to provide professional guidance on the houses that best suit their needs. The agent is expected to advise on price, earnest money, and repairs as well as fight for them in negotiations. Under transaction brokerage an agent cannot give advice, counsel or advocate for the consumer.”<sup>23</sup> Buyers are particularly at risk. If they do not receive information and advice they expect from their transaction broker, they are at risk of overpaying for a property that has not been adequately inspected.

**Risks of Working With a Transaction Broker When the Other Party to the Sale is Represented by a Fiduciary:** Customers working with transaction brokers who try to sell to or buy a house from customers with fiduciary agents may face special risks. Transaction brokers have no legal obligation to stand up for their customers and negotiate the “best deal” while single agents have such an obligation. In this situation, customers working with transaction brokers are more likely to end up with a disadvantageous sale price and disadvantageous terms related to earnest money, repairs, and timing of sale, among other factors.

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<sup>22</sup> Found by comparing duties of a transaction broker and single agent defined by Florida law in The 2021 Florida Statutes, loc. cit.

<sup>23</sup> Gary Pickren, “What are the Problems with Transaction Brokerage?” Legal Tips (August 4, 2016).

**Legal Remedies Limited When Working With a Transaction Broker:** When consumers working with transaction brokers think they have been wronged, these customers have severely limited legal remedies available to them since their brokers have no fiduciary duty. As one attorney noted: “Transaction Broker relationships ... unfortunately offer a lot less legal protection for the real estate buyer or seller when they end up harmed and needing to assert claims against that transaction broker... Given all the bad acts that have happened in the Florida real estate market in recent years, having an agent with the legal duty to act as a fiduciary can make the difference in whether or not someone who has been wronged gets compensated for their damage.”<sup>24</sup>

These consumers will even have difficulty finding an attorney to represent them: “Currently attorneys just won’t take a case of consumer harm if the consumer worked with a transaction broker. The extra step of proving ‘implied’ agency just isn’t worthwhile for them to pursue.”<sup>25</sup> As one agent put it: “Transaction brokerage can enable incompetence to be obscured through lack of accountability.”<sup>26</sup>

## **Home Buyers and Sellers Are Overcharged for Transaction Broker Services**

There has been mounting criticism about real estate agents being over-compensated for their services, especially on higher-priced properties given the fact that compensation usually represents a percentage of sale price.<sup>27</sup> Typical commissions, for example, still range from five to six percent, at least in the eastern half of the country. These rates are among the highest in the world. Average commissions in Great Britain, for example, appear to be less than two percent.

Regardless of the higher rates charged in the United States, transaction brokers here should be receiving lower compensation than single agents because these brokers have fewer legal responsibilities and less liability. In the past, the industry has recognized this difference.<sup>28</sup> Yet, in almost all sales examined in Florida, these brokers (facilitators) were offered the same compensation as fiduciary agents.

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<sup>24</sup> Tolchinsky, “Are There Dangers,” loc. cit.

<sup>25</sup> Email from Tom Wemett, December 23, 2021.

<sup>26</sup> Email from Christopher Carter, December 11, 2021.

<sup>27</sup> See: Panle Jia Barwick and Maisy Wong, Competition in the real estate brokerage industry: A critical review (Economic Studies at Brookings, December 2019), p. 8. “The Cost of Buying and selling Homes Is Too High: Ending America’s Real-Estate Racket,” *The Economist* (February 15, 2020).

<sup>28</sup> In 1993, the National Association of Realtors released a consumer survey revealing that 72 percent of sellers and 44 percent of buyers felt that facilitators should be compensated less than traditional agents. Thomas J. Miceli, Katherine Pancak, C.F. Sirmans, “Restructuring Agency Relationships in the Real Estate Brokerage Industry: An Economic Analysis,” *Journal of Real Estate Research* (February 2000), p. 45. One conclusion of this article was that moving from a fiduciary to a purely transactional relationship with customers would likely reduce the compensation of brokers.



CFA obtained multiple listing service data on 500 residential properties sold consecutively in late 2021 in each of four major Florida markets – Jacksonville, Orlando, Naples, and Miami. These sold properties listed the commission rate (or in a few instances, dollar amount) offered to buyer brokers working either as single agents or as transaction brokers before the sale. In 98 percent of the sales with listed compensation, the rate was the same for single agents (fiduciaries) and for transaction brokers (facilitators). In only 24 of the 2,000 sales – six in Naples, four in Orlando, two in Jacksonville, and 12 in Miami -- did the compensation differ.

There is no easy explanation for the difference in these 24 sales. In six Miami sales, compensation was listed for single agents but not for transaction brokers, while in a seventh Miami sale, the reverse was true. In five Florida sales examined, compensation was higher for the transaction broker than for the single agent, yet in the remaining 12 sales, the compensation offered was higher for the single agent. Double-ending – an agent working with both seller and buyer – complicates the picture if in fact the listing agent (responsible for submitting information about the sale to their multiple listing service) changed the listed commissions after the sale.

## **Harm to Home Buyers and Sellers is Mitigated Somewhat by Illegal Agent Practices**

As defined by law, Florida’s real estate system, dominated by undisclosed transaction brokerage, poses significant risks and unfairness to home buyers and sellers. In practice, does this system carry as much risk and unfairness to consumers? Several longtime real estate brokers and attorneys suggest not.

- One exclusive buyer broker who practiced in Florida for decades observed: “All licensees are actually functioning as a single agent....I always had a transaction broker on the other side, and they negotiated hard on behalf of the sellers.”<sup>29</sup>
- Another broker who works solely as a single agent noted: “Most agents regularly overstep their Transaction Broker relationship by offering suggestions and engaging in outright negotiation on behalf of the principal (not the client).”<sup>30</sup>
- A real estate attorney agreed: “Our experience is that agents [transaction brokers] still call themselves agents, and in fact do negotiate on behalf of their buyers and sellers in violation of the law.”<sup>31</sup>

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<sup>29</sup> Emails from Tom Wemett on December 22 and 23, 2021.

<sup>30</sup> Email from Christopher Carter, December 16, 2021.

<sup>31</sup> Coler, “Florida’s Dirty Little Secret,” loc. cit.

To what extent does this mitigate the risk and harm caused by undisclosed transaction brokerage? The exclusive buyer broker, single agent, and attorney quoted above typically interacted with transaction brokers when the fiduciary agents had a client whose interests they were seeking to advance. Those situations would seem likely to elicit behavior from opposing transaction brokers that sought to protect their customers. It would also seem likely the brokers would be less proactive in advancing the interests of their customers if, instead, they were dealing with another transaction broker. Nevertheless, as one real estate attorney noted: “It is extremely difficult not to interject your advice in a transaction. It is even harder to tell a consumer you cannot answer their question because that would be providing a client service.”<sup>32</sup>

On one point, though, all of the experts quoted above agreed: Consumers have much more difficulty seeking redress from a transactional agent than from a fiduciary agent. Moreover, without legal fiduciary responsibilities and liability, transactional brokers would in general seem less likely to proactively, let alone aggressively, seek to promote the interest of a home seller or buyer in the sale. This lack of proactive representation could well result in a less determined negotiation of a favorable sale price for their client or perhaps, when working with a buyer, less effort to identify defects in the property not disclosed by the seller. After all, this proactivity is not legally required of transaction brokers. All the while, according to previously cited survey data, many (and probably most) sellers and buyers operate under the misapprehension that their agent is a fiduciary, not a facilitator (who must break the law to provide them with representation).

## **Florida Consumers Should Be Told the Truth About Transaction Brokerage**

Transaction brokerage can benefit some consumers if it is effectively disclosed, drives down transaction costs considerably, and these cost savings are shared with consumers. If a transaction broker is simply a facilitator, it makes little sense for two agents to be involved in a sale, greatly increasing transaction costs. At some point in the future, it is likely that some brokers or companies will choose to offer this type of service for a much lower commission. That would be most likely to occur if a firm with many listings and a discount mentality decided to offer this service.

However, transaction brokerage in Florida bears no resemblance to this ideal system. Instead, the Florida brokerage system:

- greatly limits broker responsibilities and liability,

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<sup>32</sup> Pickren, “Problems with Transaction Brokerage,” loc. cit.

- is not disclosed and therefore is not understood by most consumers,
- consequently exposes consumers to risks related to the sale price – and for buyers, quality – of the property,
- greatly limits consumers in obtaining redress if treated unfairly,
- over-compensates transaction brokers by over-charging their customers, and
- appears to survive in part because many transactional brokers break the law by providing some of the representation required of fiduciary agents.

Florida consumers should be told the truth about the State’s transaction brokerage.

- The Florida legislature should re-enact the original 2008 legislation that required early and effective disclosure of all agent roles – single agent (fiduciary), transaction broker (facilitator), and non-representative.
- The State’s Department of Real Estate, as have agencies in many other states, should take responsibility for informing consumers about the different roles of real estate agents. At present, the Florida agency appears to see its mission only as providing services to Florida’s real estate industry.<sup>33</sup>
- Consumer educators and the news media should assist in this education. Several billion dollars in commissions annually are at stake.<sup>34</sup>

At present, Florida home sellers and buyers should consider protecting themselves.

- Before signing any agreement, these consumers should discuss the role of their agent and not be content with the response, “I’ll work as a transaction broker but help you get the best deal.”
- If they choose to work with a transaction broker, home sellers and buyers should also consider hiring a lawyer to ensure that their interests are protected.

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<sup>33</sup> Stephen Brobeck, State Real Estate Commissions: Do They Serve the Consumer Interest? (Consumer Federation of America, October 2021).

<sup>34</sup> There appear to be about 400,000 home sales annually in Florida. At an average price of \$345,000 and an average commission rate of five percent, residential real estate agents/brokers in Florida would receive about seven billion dollars annually in commissions. That figure represents seven percent of all commissions paid to residential real estate agents throughout the nation in the past year.