

## INSIDER OUTLOOK

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### Why hire exclusive broker?

A real estate broker is typically classified as either a "broker" or an "agent." A "broker" represents someone (a "prospect") looking to occupy or buy premises (like a tenant or buyer), while an "agent" represents someone (a "principal") seeking to sell or lease premises (like a landlord or sublessor).

However, regardless of whether the need is for a broker or an agent, it would be advisable under most circumstances for the broker or agent to be retained on an exclusive basis. Some of the key reasons why are as follows:

**Focus:** A broker who has been hired exclusively is much more likely to focus on the assignment than a non-exclusive broker ("broker" is hereafter used interchangeably with "agent" unless otherwise specified). The most valuable commodity a broker has is its time, and a broker cannot afford to spend it working on a transaction where the odds of success are low. If a broker is protected by an exclusive brokerage agreement, the broker will be much more willing to concentrate on an assignment, since the probability of consummating a transaction will be substantially higher than if an exclusive arrangement did not exist.

Ironically, most prospects or principals who refuse to hire brokers on an exclusive basis do so for fear that, once hired, the broker might drop the ball. Exactly the opposite is true; the exclusive broker has an incentive to focus its attention and work hard. Although there is no empirical evidence to prove it, it is probably true that one exclusive broker will put more effort into an assignment than the aggregate effort of numerous non-exclusive brokers.

If fear of hiring a "lemon" is preventing a prospect or principal from exclusively hiring a broker, there are a number of ways for such prospect or principal to protect itself. Firstly, it can incorporate into the exclusive brokerage agreement the exact duties it would like the broker to carry out and by when. For example, a tenant can impose deadlines for specific activities (such as carrying out surveys and inspections) and require its broker to provide it with periodic status reports. Further, the term of the exclusive agreement can be kept short or a right to terminate at any time without cause can be incorporated. In addition, the broker can be restricted from working on similar assignments unless the broker agrees to notify its prospect or principal, before it

notifies others, of potentially acceptable situations.

**Parallel Interests:** Exclusivity keeps the interests of the broker and its prospect or principal aligned. Since brokers only get paid if they produce a deal, a non-exclusive broker's objective will be to get a deal done quickly even if it may not be the best deal for its prospect or principal. On the other hand, an exclusive broker is protected by its ex-

clusive brokerage agreement and therefore can spend more time shopping around and negotiating in an attempt to obtain the best transaction possible.

Some prospects or principals try to carve out of their exclusive agreements transactions that they might procure themselves. For example, a landlord may think that it might be able to save on commissions by attracting some tenants to its building without its agent's assistance. Employing a carve-out, however, is rarely a good idea since it causes a divergence between, rather than an alignment of, the interests of the parties. If an agent, for instance, thinks that its landlord principal might claim a pre-existing relationship with a prospective tenant, the agent may try to steer such tenant to another building. It is, therefore, not a good idea to incorporate a carve-out into

an exclusive unless the specific prospects or premises to be carved out are listed.

**Services:** A non-exclusive broker is not likely to commit the resources of its firm to assist a prospect or principal. As transactions have become more complicated, good brokerage firms have begun to provide architectural, project management, legal, financial and capital markets services. These services can save a principal or prospect substantial sums in deal and transaction costs, and they are typically provided for free. A prospect or principal who refuses to engage a broker exclusively will probably not enjoy the benefit of a brokerage firm's expertise in these other disciplines.

**Control/Lawsuits:** By definition, a non-exclusive broker has less control than an exclusive broker over the decisions of its

prospect or principal. Therefore, parties dealing with non-exclusive brokers have less confidence that such brokers can produce a transaction. For example, a landlord will not be willing to spend much time entertaining offers from a prospective tenant's non-exclusive broker. This typically makes it harder for a prospect or principal to consummate a deal.

Further, the risk of a lawsuit by another broker claiming a commission is usually greater when dealing with a non-exclusive broker. If a prospect or principal has been using a number of brokers, the chances increase that if a deal is consummated the prospect or principal may have been introduced by another broker to the premises or

tenant involved. Obviously, no one wants to increase their chance of buying into a lawsuit.

**Saves Time:** By hiring an exclusive broker, a prospect or principal saves time by shifting to its broker the responsibility for qualifying leads and prospects. This allows the prospect or principal to focus on its core business. Since the incentive of a non-exclusive broker is to close a deal quickly, the prospect or principal must carry out a greater degree of due diligence to determine if a proposed deal makes sense.

The foregoing are some of the reasons why it makes sense to hire a broker on an exclusive basis. While many owners, tenants and buyers are hesitant to do so, the benefits substantially outweigh the costs. Even an exclusive that has been highly negotiated and "watered down" is better than no exclusive.