

BROKER RISK MANAGEMENT TIP

Questions and Answers From Buyer Representation Agreement Webinar

On February 5, 2024, Broker Risk Management held a webinar exclusively for its clients to discuss the buyer representation agreements, NAR litigation, and related issues. The following are questions and answers, which did not get addressed during the course of the webinar, but we thought would be of interest to our clients.

Question: What if a buyer signs a buyer representation agreement, but subsequently works with another agent and does not tell that agent of the agreement? Do I still get paid and by whom?

Answer: Your remedies will be against the buyer and you will likely be entitled to payment of your commission from the buyer, if the property is purchased within the terms set forth in the buyer representation agreement representation such as time frame, geographic area and price range and the buyer representation was exclusive, or if non-exclusive, you provided documented "Broker Involvement."

Question: I have a buyer broker agreement requiring payment of a 2.5% commission from the buyer. The MLS is offering 2%. The seller and listing agent refuse to pay the .5% gap. Will I get paid the extra .5%?

Answer: Yes. Under the buyer broker agreement, the buyer will be responsible for paying your .5% provided the property purchased meets the criteria identified in the above answer.

Question: I understand that commissions should now be disclosed to clients. However, is it necessary to disclose the breakdown of compensation between an agent and the agent's broker?

Answer: No. It is recommended that there be transparency as to the amount paid to the listing broker and broker representing the buyer. However, it is not necessary to disclose the compensation paid by a broker to an agent and any/or internal related fees.

Question: How do we tell if a buyer has already signed a buyer broker agreement and what it covers?

Answer: Before working with a buyer, ask the buyer if the buyer is working with any other agent. If so, ask if the buyer signed a buyer broker agreement and request a copy. Ensure this communication is confirmed in writing.

Question: Who are the plaintiffs in the *Sitzer/Burnett v. NAR* case?

Answer: The plaintiffs are approximately 500,000 sellers who sold properties during a seven-year period in the State of Missouri.

Question: If the MLS publishes a satisfactory buyer's agent's commission, then we do not need to do anything extra for the time being, correct?

Answer: You do not need a separate agreement with the listing agent for payment of a commission. However, it is still recommended that you use BRM's Buyer Advisory Regarding Real Estate Broker Compensation, a copy of which is attached.

Question: Are you seeing sellers refusing to pay buyers' agents?

Answer: Some agents report that some sellers are refusing to offer compensation to the Buyer's Broker through the MLS. This is becoming a point of negotiation between listing agents and sellers as to how much, if any, a seller is offering a listing agent and the buyer's agent. It is recommended that listing agents properly educate their sellers on the advantages and disadvantages of paying a buyer's agent.

Question: What are the advisories that we should use representing buyers and sellers to address compensation with clients?

Answer: BRM published a tip addressing this issue, a copy of which is attached. BRM also drafted advisories to provide to buyers and sellers, which are also attached. When CAR publishes comparable advisories, BRM will defer to the industry standard forms where possible.

Question: If both buyer and seller refuse to pay a buyer broker commission, are we obligated to write an offer for a buyer we are working with?

Answer: No. You are not required to work for free on that property. If the buyer is insisting on purchasing a property where seller is offering no compensation to Buyer's Agent and buyer will not sign a buyer representation agreement, you can terminate at your relationship with the buyer; being sure to do so in writing notifying buyer and documenting your decision.

Question: For purposes of procuring cause, how are we supposed to properly document buyer broker involvement when showing properties to buyers?

Answer: Ensure that you document that you physically showed the property to the buyer. You should also document that you located the property for the client, assuming the client did not find it themselves. You should also document any research or investigation you performed relative to the property. See, e.g., paragraph 4B(1) of CAR's BRBC form for details.

Question: Do you expect CAR to create a form in which the buyer authorizes the buyer's agent to request compensation from the seller/seller agent?

Answer: That form has already been created in the form of seller payment to buyer's broker (SPBB). If you have a buyer broker agreement and you wish to request compensation from the seller, you can discuss it with the buyer and use the SPBB form.

Question: How do I request additional compensation from the seller if the commission in the MLS is less than my buyer broker agreement?

Answer: Follow the following steps:

1. Discuss the issue with your buyer and obtain your buyer's permission to request additional compensation from the seller in the RPA.
2. Assuming your buyer agrees, in writing, mark the box 3G3 on the RPA.
3. Use the SPBB form as follows:
 - (a) in Paragraph 1, insert the amount the buyer has agreed to pay you in the BRBC;
 - (b) in Paragraph 2, insert the amount the seller's broker has offered as the buyer's agent compensation in the MLS or otherwise; and
 - (c) complete Paragraph 3 inserting the difference that seller is being asked to pay (Paragraph 1 minus Paragraph 2).

For example, if your buyer broker agreement provides for a 3% commission, but the Multiple Listing Service only provides for payment to you of 2%, proceed as follows: (a) advise the buyer that the amount of the commission in the buyer representation agreement is more than being offered in the MLS and ask permission to request that the seller pay the difference in the RPA; (b) document the buyer's; (c) mark the box 3G3 on the RPA; (d) insert in Paragraph 1 that the buyer has agreed to pay you 3%; (e) insert in Paragraph 2 that the seller, through the Multiple Listing Service, has offered to pay you 2%; (f) in Paragraph 3, insert 1%, which is the difference between the commission being offered and the commission in the buyer broker agreement.

Question: The seller has agreed to pay an additional .5% commission because the buyer broker agreement provides for payment of the additional .5%. The listing agent has requested a copy of my buyer broker agreement. Do I have to provide it?

Answer: You are required to provide seller or their agent a copy of the "portion of the written agreement between Buyer and Buyer's Broker identifying the amount of compensation Buyer has agreed to pay Buyer's Broker." (See RPA paragraph 18A and SPBB paragraph 4.) The buyer's broker should also ask to see the effective dates of the agreement to confirm if the purchase falls within the buyer representation period of the agreement.

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