

GUIDELINES FOR ENTITLEMENT TO SELLING PORTION OF REAL ESTATE FEE

INTRODUCTION

The offer of compensation from a listing broker to a cooperating/selling broker almost always has its source in the MLS rules. In filing a property with the MLS, a broker participant makes a blanket unilateral contractual offer of compensation to other MLS broker participants for their services in selling the property. This offer is accepted by a participant/selling broker by procuring a buyer which ultimately creates a sales or lease contract that results in a successful transaction. In other words, the listing broker's contractual offer is accepted by the cooperating broker "procuring" a buyer. However, when the property is not filed with the MLS, or one or both of the brokers are not participants of the MLS, an offer of compensation must be established with regard to the subject property before compensation can be assumed.

PURPOSE

- To promote and maintain the high standards of conduct in the transaction of the real estate business, but not to limit or restrict the rights of the real estate buying public.
- To promote fair play among its members in their transactions with each other and with the public to the end that membership in this organization may serve as a guarantee of business integrity and responsibility.
- These guidelines are intended for use by all Realtor® members functioning as listing agent, selling agent or buyer-broker in a real estate transaction.
- These guidelines have been an effective educational tool and should in no way be construed as a set of rules which are "etched in stone."

PROFESSIONAL ATTITUDE

Real estate professionals recognize that the buying public is neither aware of, nor concerned about real estate procedures. The prospective Buyer's interest is to find the most suitable property. The real estate firm that has gained the prospective Buyer's trust and confidence is usually the one the prospective Buyer will choose to serve his interest.

DEFINITIONS

- Client: A principal in the transaction, who engages the professional service/advice of a Realtor and whose interests are protected by the specific duties and loyalties of a fiduciary relationship through an expressed agency agreement (written or oral).
- Customer: A principal in the transaction, who receives support services without an expressed agency agreement (written or oral) with the Realtor.
- Prospective Buyer: A party, either client or customer, who is interested in buying real estate.

- Licensee: For purposes of these guidelines, includes any licensed individual of a given brokerage.
- Listing firm: The real estate firm retained to represent the Seller.
- Buyer-broker: The real estate firm retained to represent the Buyer.
- Selling firm: The firm that earns a portion of the real estate fee by functioning as the subagent of the listing firm in the sale of the property, or as a buyer-broker in the sale of the property.

INITIAL QUALIFICATION FOR ENTITLEMENT

In the absence of any prior arrangement, a cooperative fee through subagency or a fee split through buyer brokerage must be offered and accepted through the listing firm in order for the selling firm to be entitled to the selling portion of the real estate fee. Furthermore, the mere submission or introduction of a property by voice, or mail, or other communiqué shall not constitute a valid claim to the selling portion of the real estate fee.

If the property is not listed in MLS or if the Selling Broker does not belong to the MLS in which the property is listed, and independent arrangements for a commission with the Listing Broker have not been made, the assumption would be that no commission is due the Selling Broker. However, if a commission is paid to the Selling Broker, it might be assumed that the Listing Broker somehow agreed to compensate the Selling Broker. In that case, the basis for determining entitlement would need to be established, as well as, the reason the agreement should not be enforceable.

PROCURING CAUSE

Procuring cause has been defined by the Supreme Court of Ohio as a cause directly originating a series of events which, without a break in their continuity, directly result in the producing of a Buyer ready, willing and able to buy real estate on the Seller's terms. A series of events is considered essential by Ohio Courts in determining procuring cause.

Procuring cause shall be the primary determining factor in entitlement to compensation. Agency relationships, in and of themselves, do not determine entitlement to compensation. The agency relationship with the client and entitlement to compensation are separate issues. A relationship with the client, or lack of one, should only be considered in accordance with the guidelines established to assist panel members in determining procuring cause. Improper handling of agency disclosure may affect the relationship with a potential client.

When determining procuring cause, panel members will focus on determining the reason the prospective buyer changed from the broker making the initial showing to the broker writing the contract. Actions of the first broker that can result in the second broker being determined to be procuring cause include abandoning the prospective buyer or creating an estrangement between the broker and the prospective buyer. Actions of the second broker that can result in the first broker being determined to be procuring cause include failure to inquire about the existence of a prospective buyer's relationship with other brokers early in the transaction, inappropriate interference with exclusive agency relationships, or inappropriate instruction to use another broker's services and return to write up the contract. However, if the prospective buyer leaves the first broker for good cause, it is not the second broker's duty to force the prospective buyer back to a broker in which he or she has lost confidence.

FACTORS FOR CONSIDERATION

If a series of events is interrupted by the introduction of another agent (subagent or buyer-broker) it does not constitute a cancellation of the series of events started by the introductory agent.

A typical series of events could include *any, all or a combination* of the following steps and factors for consideration. However, it is important to remember the definition of procuring cause as stated herein and that *the following list is not intended to be exclusive.*

1. Discussion of agency relationships and presentation of Ohio Consumer Guide to Agency as required by law. You may also take this time to discuss payment of commissions (procuring cause) and buyer agency agreements. *If agency is discussed prior to providing services, as required by law and buyer are advised of commission responsibilities and procuring cause, less weight shall be given to a prospective buyer's request for separate representation than if these issues are discussed after a showing or not at all.*
2. Determination of prospective buyer's relationship with another licensee, i.e. Exclusive Buyer Agency Agreement, Non-Exclusive Agency Agreement, non-contractual agency relationship. *If a prior relationship is determined, real estate practices should be explained to the prospective buyer. If the prospective buyer is subject to an Exclusive Buyer Agency Agreement, the prospective buyer should be advised to contact that licensee with regard to the property.*
3. First inside inspection of improved property or on-site inspection of unimproved property by a prospective Buyer accompanied by a licensed individual.
4. Demonstration to the prospective Buyer, by the licensed individual, the benefits and desirability of the property in relation to the prospective Buyer's needs, including providing information about property value; determine prospective Buyer's ability to purchase said property; and fully explain available financing. *(If buyer is dissatisfied with introductory licensee's professional abilities or conduct in the transaction, e.g. misrepresentations or failure to disclose, lack of knowledge, being non-responsive to the client/prospective buyer by failing to return phone calls, a determination should be made as to whether there is "just cause" for the relationship to be terminated ([abandonment/estrangement]). Personality conflicts alone are not to be considered "just cause."*
5. Selling licensee never showed the property. Or, a significant amount of time elapsed between the time of the first showing and showing by the Selling licensee. *(Showing a property is not mandatory for being determined to be procuring cause. However, if the Selling licensee did not show the property, sufficient evidence must be provided to support the justification that a personal showing of the property was not necessary. If the claim is that a significant amount of time elapsed between showings by the introductory and selling licensees, support must be provided.)*
6. Did licensee instruct a prospective buyer to go to open houses, or was licensee aware that the prospective buyer would be going to open houses, and did not instruct the prospective buyer to view houses only with him/her unless prior arrangements had been made by the licensee? Did licensee instruct prospective buyer to shop with other licensees and return once prospective buyer found a property of interest or was ready to make an offer?
7. The licensee who maintains continual contact with the prospective Buyer and promptly and effectively answers the prospective Buyer's questions and objections relative to the purchase of the property.

8. Licensee who completes the prospective Buyer's purchase offer and obtains escrow deposits (earnest money).
9. Introductory licensee wrote and presented an offer on the property that did not close. Selling licensee wrote and presented an offer on the property on behalf of the buyer that was **substantially similar** to an offer written by the introductory licensee **within a short period of time**.
10. Prompt delivery of the offer to the listing firm by the selling firm.
11. Acceptance of the Buyer's offer by the Seller.
12. Licensee who has made concerted effort to assist the prospective Buyer in obtaining financing.
13. Licensee who assisted with preparation for closing.
14. Transaction closes.

PROFESSIONAL RESPONSIBILITIES

- Ethics, courtesies, and fair play must be extended to each other in the industry.
- Licensed individuals of a firm should inquire whether or not a prospective Buyer has an exclusive contractual agreement with another broker or if the prospective buyer has previously inspected properties which they intend to show the prospective Buyer and, if so, determine the date of showing.
- If the prospective Buyer confirms a previous inspection with another firm the Realtor should determine whether the prospective Buyer has been abandoned or some other form of break in the series of events has taken place.
- If no break has occurred in the series of events, real estate ethics, courtesies, and fair play are to be explained fully to the prospective Buyer and the prospective Buyer should then be urged to negotiate the purchase of the subject property through the firm making the first showing.
- If the prospective Buyer, for reasons of his own, chooses to negotiate the purchase of the subject property through a firm other than the firm making the first showing and no break in the series of events has been confirmed, the agent, broker or office manager may contact the agent, broker or office manager of the firm making the first showing to discuss the situation and determine if a resolution to the matter can be reached.
- If an agreement is reached, it should be reduced to writing in order to avoid any confusion later.
- In the event a dispute arises with this agreement in place, then it is necessary for an Arbitration panel to base an award on the terms of the agreement, rather than the issue of procuring cause.

HOW TO AVOID ARBITRATION

The following procedures are suggested to help prevent commission entitlement disputes and subsequent arbitration:

- DO: discuss commission and procuring cause with buyers.
- DO: caution a prospective Buyer not to inspect homes (listed or open houses) unless you accompany him, or unless you have made arrangements in advance with the other agent for him to inspect the property.
- DO: in the event that you cannot accompany a prospective Buyer to an open house, call the agent holding the open house in advance to determine if he will protect you and show the prospective Buyer the house in your absence.
- DO: if a dispute between companies arises, try to settle the dispute with the other company before filing for arbitration. This way you can avoid the loss of your time, your broker's time, and the mental anguish involved with arbitration.
- DO: if a settlement agreement is reached, reduce the agreement to writing and have both brokers sign the agreement.
- DON'T:** send a prospective Buyer to an open house with instructions to tell the agent holding the open house that they are working with you. Sending a prospective Buyer with a handful of your business cards is only to be considered as a *last resort effort* to communicate your relationship with the Buyer to the listing agent and will not guarantee that you will be paid a commission.
- DON'T:** send a prospective Buyer to inspect homes (listed or open houses) with another agent and to return to you once a desirable property has been found.

ARBITRATION GUIDELINES

- There is no predetermined State law or Board rule or policy attempting to establish absolute entitlement to a disputed commission.
- An award in arbitration will not be made on the basis of an alleged or determined violation of the Code of Ethics.
- An award in arbitration must not violate state law.
- The objective of a hearing panel is to carefully and impartially weigh and analyze the whole course of conduct of the parties and render a reasoned peer judgment with respect to the issues and questions presented and to the request for award.

CONCLUSION

The conclusion to these Guidelines can best be summarized by:

"Do unto others as you would have them do unto you."

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