



WASHINGTON REALTORS®

Legal Hotline Q&A of the Week

Question:

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Buyer Brokerage Service Agreement - Pg 3, Item 13 - Other. Why can't a Broker and Client agree to a variable commission/compensation rate? Buyer and Broker agree to X% commission/compensation in BBSA. Language in Other: If seller is offering more or less than the currently agreed X% commission/compensation, buyer and Broker agree to sign an addendum agreeing to the compensation amount being offered by seller. If not allowed, where in the instructions is it written not allowing for variable compensation rate?

Answer:

The notion that broker should be paid more because there is more cash on the table is offensive and it is the way of thinking that led to the DOJ investigation and class action lawsuits. Prior to the NAR settlement, industry members valued their services based on what a seller was willing to pay rather than what the buyer broker's services were actually worth. If a seller will pay X%, then that is what my services are worth even if ... this is my very first transaction and I'm unsure of myself or this is the most complicated transaction ever or buyer is a cash buyer with a 20 day close who found the property herself or buyer is purchasing raw land and I have to hike through rattlesnake territory or buyer needs tons of hand holding as a first time buyer in a seller's market or buyer is a sophisticated investor who needs much less from me, etc. The real estate industry may be the only industry that valued its services based on what a third party was willing to pay rather than the actual value of broker's services. This is what got the industry into trouble.

Instead of drafting the BBSA to reflect buyer broker's value in terms of what a seller thinks buyer broker's services are worth, broker should consider the actual value of broker's services for a particular buyer. Broker should charge that amount. The BBSA should indicate that buyer owes that amount in exchange for broker's provision of services. If the seller ends up offering more, then either seller or buyer will benefit from that but not broker because broker will receive the value of broker's services.

Imagine that you go to the grocery store to buy an apple that costs \$1. When you check out, the cashier asks if you have any spare change. You dig around and find 37 cents and the cashier says, "the apple costs \$1.37. Since you have more money available to you, the apple costs more." You would likely find a different grocer, believing that one to be engaged in deceptive practices. Imagine that buyer and seller negotiate for a \$1500 price reduction based on an HVAC system that needs work and after closing, buyer hires a contractor who charges only \$1270 to make the repair ... until he learns that seller gave a \$1500 price break and then he charges \$1500 because seller put that much money on the table to pay for the repair. Buyer would likely refuse to pay the increased amount, for good reason.



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Answer Continued...

Historically, as an industry, we have allowed sellers and listing brokers to establish the value of buyer broker's services. Because of the nature of a real estate transaction, it is true that a buyer often needs the seller to fund the cost of the buyer broker's services but it makes little to no sense that the seller and listing broker determine the value of the buyer broker's services. Instead, buyer and broker should determine the value of buyer broker's services and enter a contract where buyer agrees to pay the buyer brokerage that amount in exchange for the services and nothing more or less. If it turns out that the seller offers more than the agreed amount, then seller will save some of that money or buyer will negotiate for seller to credit the additional funds for buyer's benefit. There is no business or professional basis, however, for asserting that the broker should be paid more than the agreed value of their services just because seller put more money on the table before buyer entered the picture. If a seller is offering less than buyer broker is owed, then buyer broker, with the consent of broker's DB, can always agree to take less but has no obligation to do so.

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