



# WASHINGTON REALTORS®

## Legal Hotline Q&A of the Week

From Get the Facts | June 25, 2024

### Question:

First scenario: We have a listing agreement that states the seller will pay 10 apples compensation to the listing firm if the buyer is unrepresented. In the MLS, the offer of compensation to a buyer brokerage is 5 apples. We then have an unrepresented buyer make an offer on the property. What do we put in Form 21, specific term 17 since there is technically no buyer brokerage firm compensation. Would it be appropriate to put N/A on that line?

Second scenario: We have an unrepresented seller - a FSBO. We represent the buyer. We have a BBSA with buyer for 5 apples with the box checked indicating that any compensation offered by the seller above the 5 apples is paid to firm. Buyer broker negotiates for 8 apples from seller. How do we document that on Form 21, specific term 17 because technically there was no buyer brokerage compensation "offered in listing" which is what it says is to be entered on that line.

### Answer:

When a listing broker is drafting an offer for an unrepresented buyer, that means that there is no buyer broker and thus, there is no relevant offer of compensation to a buyer broker. It is irrelevant that seller may have offered compensation to a buyer broker because there is no buyer broker. This scenario is akin to a seller offering to pay required closing costs for a VA buyer but then receiving an offer from a conventional buyer. There is no need to make reference to the offer to pay closing costs extended to a VA buyer when that offer has no relevance to the actual transaction. All of this is to say that when the buyer is unrepresented, Form 21, paragraph 17 has no relevance. If it helps to clarify the PSA, then listing broker can strike through Form 21, paragraph 17 and eliminate it from the PSA. Otherwise, listing agent can write "N/A" in the blanks of the provision or simply ignore it.

In the fact pattern regarding the FSBO, there is no offer of compensation. Form 21, line 17 should be completed to reflect that seller's offer of compensation is "0". The box for "other, see addendum" should be marked and buyer broker should attach a Form 41C, marking the first check box provision. In that provision, buyer should ask seller to pay the compensation that buyer owes buyer broker. If seller agrees, then the parties have a PSA in which seller is obligated to pay buyer's broker the amount of compensation identified in the first paragraph of Form 41C.

It should be further noted that based on the facts provided, buyer broker may have acted in conflict with the buyer's interests in the transaction. While the Buyer Brokerage Services Agreement (Form 41) allowed buyer broker to claim any compensation "offered" by seller in excess of what buyer owed, that is not what happened. In this fact pattern, seller made no offer of compensation. Instead, buyer broker negotiated with seller for payment of compensation to buyer broker in excess of what buyer actually owed buyer broker. Said differently, seller was willing to reduce seller's net proceeds by the additional three apples and based on buyer broker's drafting and negotiations, buyer broker benefited from seller's concession rather than buyer. Nothing in Form 41 allows a buyer broker to put broker's interests ahead of buyer's interests by seeking greater compensation from seller than buyer agreed to pay broker. In fact, unless buyer gave broker some authorization other than the boiler plate language of Form 41, buyer broker likely violated the Agency Law by taking an action that was adverse or detrimental to buyer's interests in this transaction. Based on the fact pattern, broker should have secured the benefit of those three apples to buyer's bottom line, not to broker's.

*The Legal Hotline Lawyer does not represent Washington REALTORS® or its members. The advice contained herein does not constitute legal counsel. To browse through our database of past Q&A's, visit [warealtor.org/legal-hotline](http://warealtor.org/legal-hotline). Attorney Annie Fitzsimmons writes the Legal Hotline Question and Answer of the Week. This is a WR members-only benefit so you will be prompted to log in with your MI number and password. Your Designated Broker is cc'd on Legal Hotline inquiries.*