



WASHINGTON REALTORS®



Train the Trainer:

Teaching the Revised Agency Law to your Brokers

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Your brokers want to know “why”

- Regulators, lawsuits and innovation drove January 1, 2024 change
- Federal Trade Commission & Department of Justice (federal agencies)
 - Hosted June 2018 workshop in DC
 - “What’s New in Residential Real Estate Brokerage Competition Workshop”
 - Attended by NAR, MLSs, industry innovators, non-traditional firms, consumer advocates, academics, industry lawyers and others
 - How has technology changed home buying?
 - On-line marketing and property exposure, valuation, virtual resources (lending, title, escrow)
 - Has the industry changed in response to technological advances?
 - While property information more easily accessed, information regarding broker compensation is concealed from buyers
 - Commission rates?



Consumer Advocates

- Study looked at 10,000 home sales in 21 cities in Eastern U.S.
 - 8 cities: more than 80% of buyer commission rates were identical
 - 15 cities: more than 88% of buyer commission rates were 2.5%-3.0%
 - In all but one city, at least 72% of the rates were 2.5%-3.0%
- Follow-up study looked at Western U.S. and the data was similar
- Conclusions drawn by Consumer Advocates
 - Commission rates are the product of rules requiring mandatory buyer broker compensation and concealment of commission rates to buyer brokers



Class Action Lawsuits: Sellers

- NAR is the primary defendant
- Additional defendants
 - Anywhere (formerly Realogy)
 - Better Homes, Century 21, Coldwell Banker, ERA, Sothebys
 - Homeservices of America
 - Berkshire Hathaway
 - Re/Max
 - Keller Williams
- Allegations: NAR's mandatory compensation rule obligates sellers to pay buyer broker and franchise defendants conspire to keep rates high by refusing to show seller's property if rate is low



One Buyer Class Action Lawsuit

- Buyers allege unfairness that buyers must fund buyer broker compensation through payment of purchase price when compensation is negotiated between listing broker and seller only
 - Buyer obligated to pay but buyer has no voice in determining amount
- Lawsuit originally dismissed
 - Buyer/plaintiffs have no standing but granted permission to re-file with revised claims; buyers refiled
- New lawsuit filed ... will not be dismissed
- Potentially, as explosive as seller lawsuits



Two Seller Lawsuits

- Moehrl (name of first named plaintiff)
 - First lawsuit filed
 - Filed March 2019
 - Filed in federal court in Chicago, Illinois
 - Large number of plaintiffs (large “class”)
 - Slow moving litigation
- Sitzer/Burnett
 - Copycat lawsuit
 - Filed April 2019 in federal court in Kansas City, Missouri
 - Fewer plaintiffs (smaller “class”)
 - Litigation progressed quickly



Legal Proceedings: Moerhl (Illinois)

- NAR and franchise defendants lost motion to dismiss (October 2020)
 - Plaintiffs argue NAR Rule caused stable, inflated commission rates
 - No incentive for buyer to negotiate, buyer is not paying compensation
 - Regardless, any reduction of buyer broker commission benefits listing firm only
- Typically, a good time to settle ... but how?
 - By admitting the compensation rule is unfair?
 - What about copycat lawsuits all across the country?
- Class Certification granted March 29, 2023
- Trial is likely in spring 2024



Legal Proceedings: Sitzer/Burnett (Missouri)

- NAR and franchise defendants lost motion to dismiss (Dec. 2022)
 - Sample evidence from CEOs of defendant franchises
 - “coupled with the duty to cooperate, th[e] unconditioned offer of compensation is a chief rationale for the existence of the [MLS]” and “a core component of organized real estate”
 - in order to fight threats from disruptors, “Brokers, Agents, Franchises, Independents, the National, State, and Local Associations, the Institutes, Societies, and Councils, and the MLSs” must “ORGANIZE AS ONE AND COMMIT TO EACH OTHER WITH URGENT RESOVLE.”
 - “always thought you could do real estate so much less expensive if” the U.S. adopted an “auctioneering model” that exists in Australia
 - Evidence that defendants provided uniform training to obtain 6% commission rates



Sitzer Status

- Court held, as a matter of law, NAR rule violates federal antitrust law
 - NAR Rule created a system that rewards all buyer brokers similarly despite their skill as a broker or amount of effort expended to find a buyer
- Questions for jury: was there a conspiracy and if so, damages
 - Jury deliberated for only 2 hours before concluding (October 31, 2023)
 - Defendants conspired to cause stable, inflated commission rates
 - \$1.78 billion award; automatically trebles (triples) to \$5.8 billion
 - Defendants must post a bond to prevent collections during appeal



Anywhere and Re/Max Settled

- Anywhere and Re/Max settled and did not participate in jury trial
 - Anywhere = \$83.5 million
 - Re/Max = \$55 million
 - Requires resolution of pending actions and any future nationwide claims
 - Change in business practices
 - No specifics detailed in pleadings filed to date
- Court gave preliminary approval on 11/20/23
 - Plaintiff Class = nationwide sellers who listed with either company during relevant 4 year period, which varies by location
 - Local sellers will receive the “you are a member of a class action settlement” letter
 - Jury award will not impact either of these settled defendants



What Now?

- Post trial motions in Sitzer
 - Judge will issue final order and judgment
 - Judge will determine amount of bond
 - Defendants will appeal
- Moerhl Trial is likely in first half of 2024
- Copycat lawsuits
 - More than half a dozen filed since Sitzer jury award
 - Texas lawsuit named real estate teams and at least one individual broker



What About NWMLS Experience?

- NWMLS changed its rule in October 2019, allowing sellers to offer zero commission to buyer brokers and essentially, nothing changed
- When NAR made this argument, the court said:
 - “Defendants argue that ... some MLS in the United States do not require compliance with [the rule] but still have similar commission rates. However, Plaintiffs have produced evidence these markets are **infected** by anticompetitive conduct, in that those MLS and applicable state laws encourage cooperative compensation between brokers. See, e.g., Wash. Rev. Code Ann. § 18.86.050.”



Teaching Tool: Teach Good Communication Practices

- Recognize and immediately stop/depart anti-competitive convos
 - Buzz words to recognize describing broker compensation
 - “Industry standard”, “typical”, “required”, “normal”, “what do you charge?”
 - Beware of emails, texts, social media chat rooms, industry gatherings
- What do your own training materials communicate?
 - Do you set an office minimum commission rate?



Teaching tool: Discuss this conversation in an office mtg.

LA texts BA after showing asking if Buyer is interested in the property.

Buyer agent: "Since Buyer's Broker Compensation is only X.X% we have decided to scratch this one off our list. Thanks and Good Luck!"

Listing agent: "You could just write it up with a higher comp or you could have Buyer kick in. X.X% is the predominate listing fee in the area, but there are ways around it if you try."

- Problems: BA says no offer "since" comp only X; implies LB should be offering higher comp/LB describes "predominate listing fee"
- Discuss: BA conversation appropriate with buyer but anti-competitive with LB
- ?s to answer: What should BA say when LB asks this question? Was it okay for LB to suggest that BA write an offer including increased compensation?



What can listing brokers say about BA comp?

- Do NOT say: “No broker will show for less than _____”
 - “If you don’t offer compensation, no agent will show your home”
- Consider: “You may offer no compensation to buyer broker or if you want to offer compensation, you may offer any amount you choose.”
 - Remember ... seller hires listing agent for marketing advice ... give it.
 - CMA: broker’s estimate of the value of the property
 - Presentation advice: ... clean up the yard, declutter the kitchen ...
 - Incentives: ...offer consideration of VA/FHA buyers, share buyer closing costs, offer points to reduce interest rate, offer compensation to buyer broker ...
- After 1/1, every represented buyer will have 3 cash requirements
 - Down payment, closing costs, and buyer broker compensation
 - Few buyers have sufficient funds for all three ... how can you help, seller?
 - Look at comps for home value and consideration of incentives offered by other sellers



What's going to happen in Washington?

- Washington's Agency Law is being revised (SB 5191; unanimous pass vote)
 - Takes Effect January 1, 2024
 - Increases transparency for buyers and sellers
 - Requires brokers to negotiate and enter a written contract with their client
 - Requires consumer consent to dual agency
 - Re-writes the Agency Law Pamphlet into lay terms
 - Clarifies that minimum agency duties are owed to all parties



Increased Transparency

- All brokers must enter a Brokerage Services Agreement with client
 - Before or as soon as reasonably practical after providing brokerage services
 - Equally true for buyer and seller agents
- No services agreement = no compensation
 - Exceptions:
 - BPO/MVA/CMA (so long as no other RE brokerage services provided by agent)
 - Referrals (so long as no RE brokerage services provided by referring agent)
 - Commercial (however, requires separate and additional disclosure)
- This means: Brokers must discuss compensation with buyers asap
 - Amount, who pays, when paid, what if buyer has no \$, what if seller offers no \$



Common Questions

- Who will enforce?
 - Should listing firms demand copy of buyer agency agreement? (no)
 - Will escrow demand copy of buyer agency agreement? (no)
 - DOL will audit and civil lawsuits are possible
 - Meaning: potential regulatory discipline (license suspension) and civil damages including Consumer Protection Act remedy of enhanced damages and legal fees
- Does Firm still get compensation if no BA agreement?
 - No. Without a BA Agreement, the “buyer’s agent” gets no compensation
 - Recall: the buyer’s agent = the firm



What should firm do if file review reveals a lack of agency agreement?

- Before closing?
 - Get the agreement signed asap
 - Impose additional training, closer supervision ...
- After closing
 - What do you do when you are speeding and you pass the stealth WSP car?
 - Pay compensation as normal?
 - Return compensation to buyer? To seller? To listing firm?
 - Any reason to have agency agreement signed after closing?
- Enhance training, demand compliance



What about straddle agreements?

- PSA drafted in 2023 but closing in 2024
 - Does buyer broker have a 2024 buyer agency agreement?
 - How come NWMLS and WR are giving contrary advice?
- Listing agreement from 2023
 - Amend using Form 18 to include consent to limited dual agency
- Buyer agency agreement from 2023
 - Replace with new buyer agency agreement after January 1, 2024
- Teach this AND create mechanism within administration to ensure this is caught in every transaction that closes in 2024.



“As Soon As Reasonably Practical”

- “Reasonableness” standard used frequently to determine if conduct is appropriate. Application requires consideration of surrounding facts.
 - “Reasonable skill and care”
 - “Reasonably prudent driver” used to determine negligent driving
- Application is fact dependent, but brokers **must** understand - agreement is required BEFORE broker provides anything more than introductory services
 - New concept for most brokers
 - Agreement is required before broker or buyer “feel” comfortable



Buyer Agency Agreement is required before buyer or broker is comfortable

- If that is true, how can it be reasonable to expect buyer to enter agency agreement?
 - Agency Agreement forces disclosure of the compensation charged by agent
 - Buyer agency agreement may be:
 - Non-exclusive
 - Short duration
 - Limited “area”
 - Buyer agency agreement can be amended later to make exclusive, extend term and expand area
 - Form 41A



Common Questions RE: Exclusivity

If I have a non-exclusive and I close a transaction, can I get paid?

- Yes. A non-exclusive agreement is still a brokerage services agreement.

If buyer has non-exclusive with another broker and enters an exclusive with me, does that void buyer's non-exclusive agreement?

- No. Both agreements will exist simultaneously.

If buyer has multiple non-exclusives with other brokers, am I doing anything wrong if I enter exclusive with buyer?

- No. If exclusive broker writes buyer's offer, no problem. However, if non-exclusive broker writes buyer's offer on property within "area" of exclusive agreement, buyer will owe 2 commissions. Exclusive broker should educate buyer to that potential outcome



Practice/Illustrative Scenarios

Broker meets buyer at an open house that broker is holding for the listing broker (broker is not the listing broker). Buyer wants to purchase the house. Prior to discussing an offer, broker should:

- Ask if buyer is working with another agent
 - If so, does buyer have an exclusive agreement with other broker?
 - If so, send buyer to buyer's broker
 - If not, is it a non-exclusive agreement?
 - If non-exclusive, broker can proceed with buyer
 - Send follow-up email confirming these conversations!
- Provide buyer with pamphlet; answer questions based on pamphlet
- Enter buyer agency agreement with buyer
- Only THEN should broker ask buyer about buyer's offer terms



Teaching Tool: Multiple choice quiz

You meet buyer at an open house. Identify all true statements below.

- a) Before you show the home to buyer, you must enter BAA.
- b) If buyer does not want to purchase the house and does not want to work with you in the future, you do not need a BAA with this buyer.
- c) If buyer wants to view other homes with you, you must obtain a BAA before showing other homes to buyer.
- d) If buyer wants you to write offer on house, you must obtain BAA before you discuss buyer's terms of offer unless you are the LA.



Bonus Question for Prior Quiz

- If you are the listing agent and buyer wants you to write buyer's offer
 - Do you need a BAA with buyer?
 - If buyer signs BAA, what must be true of both the listing agmt and the BAA?
 - If you do not enter a BAA, have you complied with Agency Law?
 - If so, how?
 - If you do not enter a BAA, what must you give buyer and say to buyer?



Answer Key to 2 Prior Slides

- Multiple choice quiz
 - B, C and D are all correct and should be selected
- Bonus Questions
 - Broker needs BAA only if LB intends to be a limited dual agent
 - If buyer enters BAA, both consumers must have consented to broker serving as limited dual agent
 - LB complies with Agency Law because LB entered a brokerage services agreement with LB's client (seller)
 - Whether LB enters BAA or not, LB must provide buyer with a pamphlet and if LB does not enter BAA, LB must advise buyer that buyer is unrepresented and can seek separate representation from another broker or a lawyer
 - Confirm in writing



Scenario 2

You receive phone call from new buyer about your listing. After discussion, buyer doesn't want to pursue the listing but wants to view other properties with you. You meet buyer in your office later that week to discuss buyer's goals and financial situation before touring homes. Broker must:

- Have asked buyer during phone call "are you working with another agent?"
- Assuming the answer from buyer was "no" or "yes, but non-exclusive only," proceed with the meeting and provide the pamphlet at the office meeting.
- Enter into a buyer agency agreement at the meeting, before touring homes.



Teaching Tool: Multiple choice quiz

You receive a phone call from a buyer regarding your listing. Buyer is not working with another agent. Buyer does not want to purchase but wants to look at other properties in coming days. You should enter an agency agreement with that buyer: (select all that are correct)

- a) By e-signature before you meet with the buyer
- b) At your first in-person meeting, before you show property
- c) At your first in-person meeting, after you show property, assuming you want to work with each other going forward
- d) Within the first few outings and definitely before writing an offer



Scenario 3

You receive a buyer referral from a trusted source. This buyer is going to buy. You talk on the phone and determine buyer is not working with another agent. You agree to meet at a listed property that buyer really likes before meeting in your office. You should:

- Email the pamphlet to the buyer before meeting at the property and invite questions by email or separate phone call.
- Execute a buyer agency agreement at the meeting in your office (after touring the first property) before you provide additional brokerage services.



Teaching Tool: Multiple choice quiz

You receive and accept a buyer referral. You and buyer talk on the phone and buyer provides extensive information regarding goals and financial abilities/limitations. You agree to meet and view one of your listings. You should deliver the pamphlet and enter an agency agreement with buyer: (select all that are correct)

- a) During phone interview, by e-signature.
- b) Deliver pamphlet during interview but no BAA required. I'm already a dual agent.
- c) Deliver pamphlet during interview and enter BAA only after buyer chooses not to pursue my listing.



Bonus Questions for Prior Quiz

- If you selected (a), who do you represent when you show the listing?
- Why is (b) not correct?
- If you selected (c), what was your goal in waiting to enter the BAA?

Answer Key

A or C could be correct answers to the quiz so long as broker recognizes, in bonus questions, that (a) makes broker dual agent at showing and (c) preserves LB as seller's exclusive agent. (B) can never be correct because LB cannot be a dual agent without a written BAA.



Scenario 4

You have a long-term client relationship with a buyer who contacts you to discuss another purchase.

- If you do not have an active 2024 BAA with buyer, you should provide the pamphlet to buyer before providing additional brokerage services to buyer.
- If you do not have an active 2024 BAA with buyer, you must enter an agency agreement with buyer before providing additional brokerage services to buyer.

In this scenario, it is possible that broker enters a 2024 BAA with an enduring client and sets the term for a period long enough that broker would not have to continue entering new agreements every time the buyer is ready to make a new purchase.

- Recall that listing agreements must not exceed five years
 - Considered predatory; violates Consumer Protection Act



Teaching Tool: Multiple choice quiz

You have a long-term client relationship with buyer who wants to discuss another purchase. You've entered an agency agreement with buyer in prior transactions. You should deliver a pamphlet and enter an agency agreement with buyer: (select all that are correct)

- a) Before discussing buyer's new purchase objectives.
- b) After buyer finds property but before writing an offer.
- c) No need for a new agency agreement because I have a standing agreement with this former client.



Scenario 5

You are contacted by former client who wants to sell, in 6 months, but wants to meet now to discuss market value, suggestions for improvements and staging, advice regarding timing the market and the like.

- You should provide the pamphlet to seller now.
- If your MLS rules allow execution of the listing agreement now, execute the listing agmt.
- If your MLS rules do not allow execution now and entry into the MLS 6 months from now, then you need an interim agreement (“consulting agreement”) that you/your firm will have to prepare.



Consulting Agreement?

- NWMLS members cannot enter a listing agreement more than 90 days prior to putting the listing in the computer.
 - Exceptions may be available from NWMLS depending on circumstances
- Other MLS? Consult your MLS rules for information.
- If MLS rules prohibit execution of listing agreement, DB will likely need to create an agreement for use by firm members to bridge the gap from seller consultation to seller listing.



Teaching Tool: Multiple choice quiz

You are contacted by former client who wants to sell, in 6 months, but wants to meet now to discuss market value, suggestions for improvements and staging, advice regarding timing the market and the like. What should you do to comply with the Agency Law? : (select all that are correct)

- a) At first meeting, present pamphlet and get listing signed.
- b) Present pamphlet now, sign listing when seller decides its time.
- c) Present pamphlet now and enter brokerage services agreement with seller. Ultimately, execute listing agreement with seller.



Seller NOT required to offer compensation

- Washington law no longer protects brokers from showing property if there is no written compensation agreement
- Instead, the law presumes there will be a written compensation agreement because all brokers must enter a services agreement with their client as soon as reasonably practical
- Every MLS has re-interpreted their MLS rule as allowed by NAR
 - “NAR’s MLS policy requires MLS participants to communicate an offer of compensation to other participants and that offer can be any amount, including \$0.” (NAR, Aug. 16, 2023)



Do you need to Revise Office Policies?

- Do you currently have an office policy regarding minimum commission requirements?
 - If so, is it consistent with the revised law?
 - Must LBs disclose to sellers that seller may offer no compensation to BB?
 - Listing agreement revised to include that statement at top of compensation provision
 - Work with your firm's legal counsel if you need to revise office policies



What is in a Services Agreement?

- Term of the agreement
 - 60 day default for buyer agency agreement, can be longer by agreement
- **Name of broker appointed as an agent for the principal**
 - Named broker is client's agent along with supervising managing brokers, including DB
- Exclusive or nonexclusive
 - Can client work with multiple firms at same time?
- Principal consent to single-agent dual agency, separately initialed, including acknowledgment that limited dual agent may not advocate on behalf of either party
 - And ... consent to DB and managing brokers (if any) acting as limited dual agent when different brokers in firm represent different parties.



Services Agreement continued

- Terms of compensation, including:
 - The amount the principal agrees to compensate the firm;
 - The principal's consent to compensation sharing between firms and parties; and
 - The principal's consent to compensation by more than one party
- Will buyer broker will show properties if no offer of compensation
 - Requires discussion about what buyer wants when sellers offer is low
 - Show or don't show; recognizing buyer may have to make up difference
- Any other agreements between the parties
 - Such as ... what will broker do for buyer?



Client's Agent is a Term of Agreement

- Big change in law
 - May or may not be big change in *your* practice
- DB no longer has right to withdraw agency and appoint new agent **unless client consents**
 - If broker leaves firm, DB cannot appoint different agent to represent client
 - If broker lacks dual agent consent, DB cannot appoint new agent
 - If broker is uncomfortable with client, DB cannot appoint new agent
 - If broker becomes ill or inaccessible, DB cannot appoint new agent
 - DB or supervising managing broker can assume representation
 - Client can consent to new assignment



What if ...

- Listing broker's client is her mom and LB leaves your firm
 - If no sale pending, you probably let the listing go.
 - You and any supervising managing broker have the contractual right to assume agency
 - If sale is pending, you've already earned commission and incurred liability. If no consent to new agent, you or managing broker handle.
- Broker's buyer wants broker's listing but won't consent to dual agency
 - Either or both parties consent to new agent or your firm cannot proceed
 - This means that original agent may be negotiating against one former client
 - You cannot assume buyer's or seller's representation (other than as supervising managing broker) because then you will be a dual agent without consent



Provide Agency Pamphlet; Get Proof of Receipt

- To client:
 - As soon as reasonably practical but before the party signs a services agreement
- To unrepresented party
 - Before the party signs an offer or as soon as reasonably practical



How to use the Agency Law Pamphlet

- It is written in easy-to-understand language
- It explains terminology and concepts so you don't have to
 - For example: "A written services agreement between the buyer and the firm must be entered into before, or as soon as reasonably practical after, a broker begins rendering real estate brokerage services to the buyer."
- Should you walk your client through the pamphlet?
 - What is your client's level of sophistication?
 - Would the client benefit from an overview of the Agency Law?
 - Would your relationship benefit by ensuring they understand what you do, who you represent, how you get paid, what happens if they don't call you, etc.



Does the pamphlet provide actual education?

- A real estate firm and broker must enter into a written services agreement with a seller to establish an agency relationship. The firm will then appoint one or more brokers to be agents of the seller. The firm's designated broker and any managing broker responsible for the supervision of those brokers _____ agents of the seller
 - “are” or “are not”
- An agency relationship may be terminated by notice from either party
 - True or false
- A limited dual agent ____ advocate terms favorable to one principal to the detriment of the other principal.
 - “may” or “may not”



Teaching Tool

The questions on the prior slide are basic but it could be fun to craft a game around asking questions that can be answered by reference to the pamphlet. Ask the questions but don't tell the brokers that all the answers can be found in the pamphlet. After answers are submitted, give them an opportunity to correct their prior answers, as necessary. Give awards based on broker(s) who answered correctly first time and broker(s) who were able to correct all wrong answers after searching the pamphlet.



Compensation terms Must be Disclosed on PSA

- Any terms of compensation offered by a party or a RE firm to a RE firm representing another party must be disclosed in the PSA
- This is not part of services agreement
 - Necessarily contemplates communication across the parties; not between broker and client
 - Legislates requirement to disclose compensation offered by seller to buyer broker firm
 - Already covered by final provision on face of statewide PSA
 - “Buyer Brokerage Firm Compensation Offered in Listing: \$ or % _____;
 Pay as Offered Other - See Addendum”



Teaching Tool: Hotline Question

The “Amount offered in the listing” auto-fills from the listing (or is inserted by buyer's broker) but some brokers do not check the appropriate box after that, whether it is “Pay as Offered” or “Other – See Addendum”. If the contract is written with no box checked, is it sufficient to conclude that it is “Pay as Offered”?



Answer

Form 21, paragraph "u" says:

"Seller and Buyer shall pay compensation in accordance with any listing or compensation agreement to which they are a party. ... The Buyer Brokerage Firm's compensation offered in the listing shall be paid by Seller as set forth in this Agreement or any Addendum hereto. If there is any inconsistency between the Buyer Brokerage Firm's compensation offered in the listing and the description of the offered compensation stated in Specific Term No. 17, the terms of the listing shall supersede and control."

Seller is obligated to pay compensation to buyer broker "as set forth in this Agreement". If buyer broker fails to direct payment to broker's firm by failing to mark a box on line 17, then it is unclear what a court will do. Broker is held to the standard of care of a lawyer in completing the PSA. If broker fails to mark a box directing payment of compensation to broker, should a judge protect that broker's interests? This is a preventable mistake. It is a mistake made through carelessness or worse, deception.



Teaching Tool: What if line 17 is ignored?

A contract is believed to be fully signed by both parties and mutual acceptance achieved. The property is listed in the MLS and compensation is offered. On Form 21, Section 17, the only thing that has been filled out is the box is checked for “Pay as Offered”. Do we have mutual acceptance? Does a number need to be written on the line above “Amount Offered in Listing”?



Answer

A court may or may not obligate seller to pay. Unquestionably, broker violated the revised Agency Law.

Minimum Agency Law duties include:

“To disclose in writing before the broker's principal signs an offer, or as soon as reasonably practical, but before the parties reach mutual agreement: ... Any terms of compensation offered by a party or a real estate firm to a real estate firm representing another party.” RCW 18.86.030(1)(g).



Common Mistake Made By Brokers

- Brokers attempt to negotiate seller's compensation offer on F21, line 17.
 - ERROR!
 - Form 21, line 17 is ONLY a disclosure of what seller has offered and if that amount is sufficient, the place where buyer gets to accept seller's offer
 - If the amount is not acceptable for any reason (too high or too low), negotiations regarding amount of compensation seller will pay MUST happen on Form 41C
 - This means that on Form 21, paragraph 17, brokers must mark "other, see addendum"
 - Brokers must understand how to use Form 41C
 - Brokers are struggling with this concept. Train around use of Form 41C!



What is purpose of Form 42C?

- Broker must disclose, on PSA, any compensation offered by party or firm on the other side of the transaction (revised Agency Law).
- F21, line 17 provides place to disclose seller's offer of compensation
 - What if the parties are not using Form 17?
 - Builder PSA, commercial PSA, Foreclosed lender PSA
 - What if listing firm offers incentive along with seller offered compensation?
- In both cases, attach Form 42C to buyer's offer
 - Make full disclosure of compensation offered by seller and/or listing firm
 - Form 42C is unnecessary if parties use Form 21 AND listing firm offers no compensation additional to seller's offer of compensation



Common Question

- When sharing compensation with another broker, such as a referral or teammate, must I disclose that to my client or the other party?
 - No. Recall requirement: “Any terms of compensation offered by a party or a RE firm to a RE firm representing another party must be disclosed in the PSA.”
 - Seller/listing firm paying buyer broker firm -or- buyer/buyer broker firm paying listing firm
 - When broker shares with team member, that is not an offer to another firm
 - When broker pays referral fee, the referral source does not represent the other party
- But ... Listing agent refers buyer to another agent (same or different firm) and receives referral fee from buyer broker’s “firm”, that must be disclosed to seller (offer of compensation from the firm on the other side of the transaction). [Ouch! This makes my brain hurt!]



Help Your Brokers Create Their Pitch For A Written Agreement And Practice

- Ideas only ...
 - Everything in RE is done in writing, including our relationship/agreement
 - Now required by law
 - We both know, we can count on each other through the process
 - You should have the terms of our agreement written out
 - You and I should both know what to expect of each other
 - Once compensation is established, I can negotiate payment by seller
 - You will instruct me whether you want to see listings with less SOC/BAC
 - If so, you can direct me to negotiate with seller for seller to pay your obligation
 - If not, I will reach out to those LB and advise why you are not looking at their home
 - They may increase their offer of compensation



Broker must establish Broker's Value

- You Should Be Able To Spontaneously Identify Your Value
 - When you hire me, I am liberated to put all of my experience, training and the resources of my firm to work for you
 - I will search for properties that meet your needs and send you information on them
 - I will show homes on your schedule (even if you find a FSBO on a weekend/evening)
 - When you select a neighborhood, I will research what winning offers are including locally
 - I will provide you with a MVA so you know the price/range to offer
 - I have/will cultivate good working relationships with brokers (LB) to smooth negotiations
 - I will refer you to capable industry professionals who want us to succeed
 - I will help you through the inspection process and contract renegotiations
 - I will help you problem solve inevitable, un-anticipatable challenges



Develop and practice your actual pitch

- Get to know the person across from you; genuinely listen to them
 - Set aside time for a meeting
 - If this person is a stranger ... is your best friend ... a former client
 - What are they looking for – take notes
 - What are their goals?
 - Can you help them?
 - FYI: You can't help every buyer. Some are unrealistic. Educate and move on as necessary.
- Sell yourself ... and the experience you will create for your client!
 - Who are you, what will you do for them?
 - Why is it important for them to commit to you?
 - What are you and your services worth?



Why should a client hire you? What is your value?

- Explain Market Knowledge
 - Local community
 - Seasonal impacts, types of properties selling, time on market, negotiability
 - Broader market – state and nationally
 - Interest rates, lender requirements, transactional trends
 - Help client understand that your job is to be the expert who empowers them with knowledge so that the client can make good personal decisions
- Expert Service
 - For sellers: effective marketing, property showings, staging
 - For buyers: available properties, inside information on properties, expanding search based on buyer criteria



Your Value ...

- Community Intel
 - What are sellers in this specific neighborhood experiencing and hearing
 - Development of relationships with brokers working this community
 - Conversations with brokers involved in recently closed transactions
 - For buyers – are there off-market properties you can present?
- Provide CMAs
 - For buyer and seller – your client will never have to guess at property value because your expertise will give them hard data and information
 - For buyer: compare your ability to give CMA versus what listing broker can say about the value of seller's property



Your value ...

- Creating offer terms
 - How should you structure an offer/counteroffer
 - Prioritizing deal points: price, closing date, payment of broker compensation, etc.
 - How important are contingencies?
 - Pros and cons
 - Amount of earnest money
 - Forfeiture or election of seller remedies?
 - How to write an offer so that buyer broker's compensation can be paid
 - Be prepared with response to buyer who says: "I can't pay you"
 - What if buyer is a VA buyer?



Your Value ...

- Negotiating
 - Relationships with other brokers
 - Do other brokers respect/like you and want to see you and your client succeed?
 - How do you interact with other brokers?
 - What has your client learned about your negotiation skills during their negotiation with you?
- Handling low appraisals
 - What are the options?
 - What forms should be in the transaction anticipating potential appraisal outcomes?
 - Additional buyer funds? Seller price reductions? Alternate appraisals?
 - Providing comps to appraiser in advance to avoid low appraisals



Your Value ...

- Working with Inspectors and Contractors
 - Duty to advise client to seek advice of experts in areas exceeding expertise
 - Because of your/firm's relationship with contractors, you will help client gain access
 - FYI: build those relationships! Take care of your contractors.
- Problem solving with third party professionals
 - Title, escrow, lenders, attorneys
 - Crisis resolution: lender solutions, escrow officer favors, title workarounds
- Managing Communications
 - Does client have time to field scheduling calls from escrow, from the other broker, status updates from lender, etc?



Your Value ...

- Showing up
 - Opening the property for third parties who need access
- Knowledge of customs and industry practices
 - You are part of the “club” but client is not so you know the lingo and the customs that will make the transaction smoother
- What else is on your list? What do you do for your clients?



Discussing Actual Compensation

- Ideas only ...
 - Compensation paid only on a closed transaction
 - If you terminate prior to closing, no compensation
 - If you look for three months without finding your home, no compensation
 - All of that is great, because finding the home you want is most important
 - You won't lose me through all of that because we'll be partners in this process
 - I and my firm charge __% or \$_____ per transaction
 - When you see the SOC/BAC on the MLS, I get part of that and my firm gets the balance
 - Often, seller will offer compensation sufficient to pay me and you need do nothing more than agree to seller's payment of my compensation
 - If seller offers less, then you would need to make up the balance
 - We'll talk about how that can happen
 - If seller offers more, that gives options as well



Revisions to the NWMLS Listing Agreement

- Four pages, not including the data input sheets
- Stand alone statement that seller received agency pamphlet
- Paragraph 2 addresses only the term of the listing agreement
- Paragraph 3 creates agency with firm and listing broker
 - Supervising brokers represent seller; no other broker represents seller
- Limited Dual Agent: describes limitations of representation
 - Requires seller's initials to consent to listing agent serving as dual agent
- Seller may limit marketing (conceal address, limit internet ads, etc.)
- Compensation provisions on page 2
 - Includes reminder that seller can offer any amount to BB, including zero



Non-NWMLS MLS's will be using Form 1A-SWF

- **BRAND NEW FORM FOR Non-NWMLS offices!!!**
- Seller's offer of compensation is de-coupled
 - Commission sharing is no longer part of listing agreement
 - Seller makes distinct offer of compensation to listing firm and to buyer firm
- Get Training!
 - WR offering a one-hour zoom on 12/18 at 11 am
 - It will be recorded and provided upon request if you cannot attend the presentation
 - Offered only to non-NWMLS DBs and managing brokers who train
 - If you are a NWMLS office, then you are already familiar with the form



Revisions to the Buyer Agency Agreement

- Default expiration of 60 days, based on statute
 - Notice of right to terminate has been removed
- Option to select exclusive or non-exclusive with explanation of each
 - Defaults to non-exclusive unless box for exclusive is checked
- Offers limited dual agency with buyer initial spaces
- Paragraph 5 identifies amount of buyer broker compensation
- Paragraph 6 = agreement if seller offered compensation is different
- Paragraph 7 = terms: due/exclusive vs non-exclusive/tail provision
- Parties negotiate what happens if seller offers no compensation



Buyer Agency Agreement, para 6

- Parties agree to the amount of compensation in paragraph 5
 - Percentage, flat fee or other
- 6(a) - If seller offers that compensation, buyer must accept on PSA
- 6(b) - If seller compensation is greater, buyer and broker direct:
 - Difference is paid to buyer brokerage firm, or
 - Difference is paid to buyer, if allowed by lender, and if not, to firm or
 - Difference is paid to seller
- 6(c) - If seller compensation is less, buyer and broker direct:
 - Buyer makes up the difference at closing (deliver Form 40A to escrow)
 - Buyer instructs broker to negotiate for seller payment



Buyer Agency Agreement, para 7

- Compensation is owing when buyer purchases property in “Area”
 - “Area” is defined in introductory paragraph
- If relationship is exclusive, compensation is due at closing
- If relationship is non-exclusive, compensation is due at closing **IF** the purchase agreement identifies the firm as buyer’s agent
- If agency agreement expires, buyer liable for compensation
 - Exclusive: if broker brought the property to attention of buyer
 - Non-exclusive: if firm presented an offer from buyer to seller



Hotline Question

I have an exclusive buyer agency agreement with my buyer. Buyer entered into a mutually binding purchase agreement. It is pending closing. I am identified as the buyer's agent. It is not my listing or office listing. The buyer is now unhappy with my services and wants to terminate agency, which also terminates with the firm. What happens now with the purchase and sale agreement and with the compensation payable to buyer's broker?



Before buyer signs the PSA ...

- Buyer will see the amount of compensation offered by seller to buyer's broker, published in the MLS
- Buyer Broker will complete the blank on Form 21, para 17 using the information from the MLS printout

“Buyer Brokerage Firm Compensation: _____; Pay as offered or
\$ or % Amount Offered In Listing

Other – See Addendum”

- Boilerplate on Form 21 says:
 - If the amount written in the blank is different from the amount offered in the MLS, the amount offered in the MLS is the amount that gets paid



Teaching Tool: Hotline Question

How should I complete Line 17 of Form 21 if the agency Disclosure is Dual Agent and I agreed with buyer or seller that the amount of compensation to “buyer broker” would be different than published SOC if I am a dual agent?

What if I reached a different agreement with seller than I did with buyer?



Teaching Tool: Hotline Question

Form 21, paragraph 17 is filled in with \$5,000 and “pay as offered” is checked. But the listing agreement says that seller will pay \$7,500 to buyer broker. Which prevails?



Teaching Tool: Hotline Question

Seller offered compensation of \$2500 in the MLS. Buyer's broker has a buyer agency agreement for \$3,000. On Form 21 line 17, the buyer's agent checked the box "\$" and wrote in 3,000. Also included is a form 41c stating that the sellers are paying total compensation to buyer broker of \$3,000. Is this correct?



Form 41C: Buyer Brokerage Firm's Compensation Addendum

- Mark “pay as offered” and do not include Form 41C ...
 - If seller's offered compensation is the same as buyer's obligation
 - Mark “pay as offered” on F21 and skip F41C
 - If seller's offered compensation is less than buyer's obligation and buyer wants to pay the difference
 - Mark “pay as offered”
 - Deliver Form 40A (Buyer's Commission Disbursement) to escrow
 - If seller's offered compensation is more than buyer's obligation and buyer agreed that the overage would be paid to buyer broker's firm



Form 41C: Buyer Brokerage Firm's Compensation Addendum

- Identify SOC on PSA, mark “other-see addendum”, attach 41C ...
- When SOC is less than the buyer's obligation and buyer wants seller to make up the difference
 - Seller offers zero compensation to BB (checkbox 1)
 - Seller offers some but not enough compensation (checkbox 2)
- When SOC is greater than compensation agreed with buyer and ...
 - The difference is paid to the buyer (checkbox 3), or
 - The difference is paid to the seller (checkbox 4)
- Requires signature of buyer broker



Let's practice.

- Broker consults with VA buyer who wants assistance finding a home. Buyer has no cash.
 - Looking for a zero down/zero closing cost purchase
- During consultation, broker must:
 - Provide Agency Pamphlet and Explain buyer broker compensation
 - Establish broker's value to buyer
 - Discuss filtering of listings
 - Obtain buyer's signature on Buyer Agency Agreement
 - Discuss importance of including mortgage rep in offer strategies



Buyer Enters Agreement

- You Must Be Prepared
 - To give buyer good advice regarding negotiations
 - To have conversations with mortgage representative
 - How should the offer be drafted to appeal to seller and satisfy lender's requirements?
 - By knowing the forms so well that you can write the offer resulting in your compensation getting paid (by complying with lender's requirements) and explain buyer's offer to listing broker so that LB understands buyer's offer including price, buyer request for closing costs and BB compensation



Counseling your buyer regarding negotiations

- Buyer wants to purchase property with a low SOC/BAC
 - Negotiate with listing broker?
 - Just make an offer?
 - Most brokers agree that making an offer reaches seller most effectively
 - Write offer at desired price including BB compensation?
 - Go in low and prepare to increase based on seller's response?
 - Increase price and include compensation with original offer?
- Broker should counsel buyer to balance wish for low price against desire to get the property
 - Consider the market generally and the property specifically



Conversation with buyer's mortgage Rep

- Buyer has obligation to pay compensation of ____ amount
 - If buyer could ... “Can buyer pay the compensation directly?”
- What is the max amount seller may pay for buyer's closing costs?
 - VA/FHA/Conventional: range between 3-6% depending on price/down
- Will lender treat BB compensation as buyer closing cost?
 - Unlikely for VA/FHA/Conventional
- Every lender interprets guidelines differently
 - NEVER assume you know lender requirements
 - ALWAYS ask mortgage rep and press the rep to get answers from the underwriter before you rely on them



What if SOC is more than BB compensation?

- What was agreement in Form 41? If overage to buyer ...
- Talk to mortgage rep: can buyer take overage at closing?
 - In almost every case, the answer will be “no”
 - If not, can broker: pay down points, pay buyer credit cards, pre-pay buyer property tax/HOAs ... ?
- If not, will overage go to buyer broker firm or seller?
- If to seller, should purchase price be reduced?
 - If not, use seller credit to negotiate acceptance of buyer's offer



Writing the offer (DBs: You should frequently train/offer practice sessions writing offers based on different scenarios and fact patterns.)

- You are BB and agreed to total compensation of \$10,000
- List price is \$500,000, compensation offered to BB is \$5,000
 - You need seller to contribute an additional \$5000 or 1% of the purchase price
- VA buyer wants zero down/zero closing costs
 - Assume buyer closing costs are roughly 3% of purchase price
- Which forms will you use in offer regarding buyer's financing contingency, seller payment of buyer cc and extra compensation?



Writing the offer: seller paying buyer cc

- You will use Form 21 to write the offer
 - Line 17: seller offered compensation = \$5,000
 - Mark “other – see addendum”
- Which form will you use to obligate seller to pay buyer closing costs of at least 3%?



Writing the offer: seller paying increased comp

Which form will you use to obligate seller to pay/increase buyer broker compensation to include the total compensation to you?



Absolutely Critical ...

... If you write the commission obligation on the wrong form, you may create a transaction that lender cannot fund, based on lender's guidelines.

Seller obligations written on Form 22A as buyer closing costs will appear in buyer's column on the settlement statement. Buyer broker compensation written on Form 41C will appear in seller's column on the settlement statement.



Questions?





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THANK YOU

