



# WASHINGTON REALTORS®

## Legal Hotline Q&A of the Week

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### Question:

One of our brokers filled out the BBSA and made a change to line 35 (under Term 5 Compensation section a). They filled in the buyer broker compensation is to be X%, and then proceeded to cross out the other in the line and write in "Or amount offered by seller". This seems wrong and I would love to give them the whole explanation of why this is legally incorrect when filling out the BBSA.

### Answer:

The short answer is because NAR rules prohibit use of a range or other non-specific methodology for establishing broker compensation in the buyer broker agreement. But if brokers need more than a "because NAR said so" response, there is a simple fairness that drives the prohibition.

Buyer and buyer broker negotiate for the terms of their agreement just like the listing broker and the seller or the seller and the buyer. The same is true in every service agreement. When broker hires a car mechanic, they typically do so based on an agreed price for the repair. The same is true for lawyers and contractors and yard care providers and almost every other service provider. With this agreement, the two contracting parties each know what they can expect from the other. The consumer will get the described service and it will cost them the agreed amount ... and no more.

Imagine if BB suffered damage to BB's home that was covered by insurance. BB's insurance company pays \$10,000 for the claim and writes a check to BB. In the meantime, BB hires a contractor to make a full repair but the contractor's price is only \$8,000. BB and contractor enter a contract for contractor's services in exchange for \$8,000. Then, contractor learns that the insurance company paid BB \$10,000 for the damage and demands \$10,000 compensation. The contractor is not doing any additional work. There is no reason to believe that contractor's work is suddenly worth more or should cost more than it did when BB and contractor entered their agreement. Nevertheless, contractor now demands \$10,000 compensation.





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## Answer Continued...

It should be easy to agree that contractor's actions would not only be a breach of contract but fundamentally unfair. The cost of services provided is not based on the amount of funds available to pay for the services but rather, the value of the services as established by agreement between the consumer and the service provider. In the example given, BB should benefit from the additional funds paid by the insurance company. BB should keep the extra \$2,000 rather than have to give it to the contractor. The same fundamental fairness applies to BB compensation.

Buyer and BB negotiate for buyer's payment of compensation in exchange for BB's provision of brokerage services. BB's services are worth whatever the the buyer and BB agree they are worth. If buyer does not agree to compensate BB in an amount that BB believes is deserved, then BB does not have to enter an agreement with the buyer. But, if buyer and BB enter an agreement, which must (as a requirement of Washington law) state the amount of compensation broker will earn, then buyer and BB have established the cost of BB's services. BB may not, thereafter, demand compensation greater than the cost of BB's services as agreed between buyer and BB. Not only does that violate NAR's policy, it is fundamentally unfair and it has the potential to put broker's interests ahead of buyer's interests creating a conflict of interest argument.

If buyer is in a position where seller is offering more compensation than buyer owes BB, that gives buyer something to negotiate with seller ... for buyer's benefit and not for BB's benefit. Would seller be willing to spend the offered cash on something other than BB's compensation since buyer and BB agreed that BB would be compensated less than what seller is offering? Would seller be willing to pay some of buyer's closing costs or reduce the purchase price? Just like the consumer dealing with a contractor following an insurance claim, the buyer should benefit from the extra cash on the table, if there is extra cash on the table. It is entirely possible that the seller refuses to make the additional funds available to buyer but if the seller is willing to negotiate and spend that additional amount, it should be spent for buyer's benefit and not for BB's benefit.

BB provides the same service that BB agreed to provide regardless of whether buyer finds a house where seller is offering X% or more than X%. BB provided brokerage services to assist buyer in purchasing the home buyer wanted to purchase. BB's service is not worth more or less depending on the compensation offered by seller. BB's service is worth what buyer and BB agreed it was worth in the BBSA. Simply put, a broker should not agree to work for less than broker believes broker is worth. A BB and firm can always agree to take less than they are owed, if they choose to do so, but cannot demand more than buyer agrees, by contract, to pay.

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