

Who controls my fee?

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Broker fees are all over the place. And I am not referring to listing commissions. Rather, I am referring to the many documents that refer to the “fees” to be charged and paid in a transaction. Of course, the listing agreement is principle among these. It establishes the broker’s fee and informs the seller how much the broker will compensate the selling agent who produces the ready, willing and able buyer.

Then there is the multi-list which publishes the co-op fee. Hopefully it is identical to what is stated in the listing agreement. Next, there is the agreement between the buyer agent and the buyer. The standard buyer agency contract says that the buyer broker will accept what the listing broker pays; it also establishes a minimum fee for which the buyer is ultimately responsible. You know how it works: the buyer makes up the difference between what is paid by the listing broker and the amount stated as the minimum fee in the buyer agency contract.

Next are the compensation addenda and forms that ratify, or amend, what a listing broker will pay the buyer broker or what the seller will contribute to the buyer in order to cover the buyer’s fees not paid by the listing broker. And so on.

Okay Goldsmith, we get the point. To which Goldsmith replies, “Oh do you?” Despite these many forms designed to make your fee as solid as bedrock, fees remain elusive, uncertain, fleeting, and seemingly negotiable to the very end. And it shouldn’t be.

This article focuses on the buyer’s broker’s commission. It should be pretty simple. If you are a business person, and I am including buyer brokers and buyer agents as business people, you begin with an agreement. “If I do this, you pay me that.” So simple, a cave man could do it. So, a show of hands: how many of you begin work as a buyer’s agent without having a contract? I know there are more of you who should have your hands up, but don’t. So if you don’t have a written agreement, what happens when the buyer jumps ship and works with another agent? Maybe you can prove you were the procuring cause in arbitration, but you won’t be able to do that if you didn’t “sell” the property. And merely having a hand in the matter isn’t enough. By that I mean, perhaps you did introduce the buyer to the property, but if you weren’t the efficient cause of the sale (procuring cause) you are not entitled to a fee and who knows the outcome of an uncertain arbitration.

The amazing thing is that the Real Estate Licensing and Registration Act (RELRA) makes clear that “the licensee is not entitled to recover a fee, commission or other valuable consideration in the absence of such a signed agreement” (referring to an agreement between the licensee and her client that sets the fee that is to be paid). Why do you risk providing services when you might not be entitled to a fee?

The answer, I think, lies in the fact most of you will ultimately have the buyer sign their agency contract. Many of you still wait until you are preparing an offer for the buyer . . . under the better late than never theory. And to your credit, RELRA allows you to provide services before you have your agency agreement in writing, though it makes clear you can’t be paid. It is also fortunate that listing agents don’t inquire whether you have a buyer agency contract. And if they did, you would probably respond, and correctly so, that it’s none of their

beeswax. If prosecutors for the Department of State learn of this, however, you're taking a fee in the absence of a signed agreement may lead you to disciplinary prosecution. After all, it is fairly clear in RELRA that you can't recover a fee, commission or other valuable consideration unless you have a written agreement with your client.

What is equally remarkable is that so many buyer agents compromise their fees. The buyer agency contract says that you will take what fee the listing broker pays, but it provides language enabling you to lock-in your minimum fee. Some agents still insert zero at this location meaning that they work for free if their buyer purchases a FSBO property or that they will work for a minimum commission if the buyer elects to purchase a property that offers little co-op compensation. And for those of you who put a zero at this location, what do you do with properties that meet your buyer's wish list but that promise little co-op compensation? By law, you are required to disclose conflicts of interest and is it not a conflict of interest to steer your buyers to properties where better compensation is offered rather than less? These are the scenarios that the prosecutors look for.

Most of you insert a minimum fee in your buyer agency agreements. On what do you base that fee? Is it what you are worth, "the going rate," company policy . . .? And how often do you stray from this number? The typical scenario involves a buyer who seeks to purchase a listed property that offers less than the buyer agent's minimum commission. Before submitting an offer, the buyer agent can contact the listing agent and ask if the listing agent would pay the buyer agent's minimum fee. The buyer agent would explain that she charges her buyer a minimum fee and that the co-op compensation will not cover it. The buyer therefore will either have to make up the difference or select another property. Where is it stated that it's the buyer agent who always has to compromise?

Listing agents aren't required to compromise either. Realtors® are allowed to charge reasonable fees and stand by those fees.

Isn't it our duty to advance the interests of our clients? Yes, but that does not mean you have to work for free or compromise an established fee simply because it will make life for your consumer better? Trust me, I am not telling you not to compromise! I'm merely stating that you have a right to charge the contracted fee for the contracted services.

I have similar conversations with my clients when I broach the subject of fees. I'll go so far to tell my clients that they can find other lawyers who may charge less and some who may charge more. I even encourage them to consult with other counsel before selecting me as their attorney. Ultimately, if you provide good services and you work hard for your client, you are justified in taking the fee that you've established as your minimum fee. I'd rather work for fewer clients who pay a fair wage and for whom I am inclined to give the most and work the hardest. It is a lot better than doing a half-a**ed job for more clients for half-a**ed fees! Every situation is unique, every client is unique and obviously you and your broker are the ultimate decision makers when it comes to compromising fees. Rather than it being the norm, I am suggesting you analyze the situation, and where it is appropriate to do so, put your foot down and enforce your fee agreement.