

The answer is simple: it depends

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“It depends” is the right answer to most questions. Here the question is whether it is legal to give thank you gifts to people who refer buyers and sellers to real estate licensees. The reason I can’t give a straight answer to this simple question is because it lacks the details that accompany real life situations.

If a salesperson announces that she is offering a \$100 gift card to anyone referring a buyer/seller of a \$100,000-\$200,000 home, a \$200 gift card to a buyer/seller of a \$200,000-\$300,000 home, and so on, my answer is no, it is not legal. If a \$300 gift card was presented to a person who referred a seller/buyer of an average priced home without having forecast this gift then I would be inclined to say it is legal. What’s the difference?

Referral fees may not be paid to persons who refer buyers and sellers to a licensee. Gifts are legal. Referral fees masquerading as gifts are illegal. Announcing ahead of time that you will give a gift for a referral establishes a “quid pro quo” or “this for that.” It is a bargained for exchange of things of value. It is nothing more than a tacit contract for payment for a referral. That the payment is a gift card or something other than cash is of no consequence.

A real thank you gift is not bargained for or exchanged. It is a unilateral act based on appreciation and generosity and not a trade. It is a gesture indicating gratitude and designed to bestow an unexpected pleasure thereby demonstrating appreciation. It is genuine, heartfelt and legal.

There are situations that are very challenging when it comes to the legal/illegal question. For example, what if it is widely known that a brokerage gives substantial gifts to people who refer business? Is the gift no longer a heartfelt thank you and instead a tacit agreement to provide something of value in exchange for a referral? If so, then it is likely an illegal referral fee. That conclusion is even more likely where the company makes an effort to broadcast the message that a referral will yield a gift or when the gift is of unusually high value. A heartfelt thank you need not be expensive, but a payment or referral fee is generally commensurate with the value of the referral given.

Gifts are nice when they are from the heart. That a heartfelt gift might be rewarded by another referral, does not make the gift illegal. It is a combination of intent and execution that may define the gesture as gift or payment. Clearly, when a gift is a dressed-up referral fee it represents a deal or contract, whether expressly or tacitly created. It may be difficult to paint the bright line between gift and referral fee, but you should have enough information from this article alone that will help you clearly stay on the side of right.

NOTE: This article addresses referral fees paid by licensees to those who refer business. It is not illegal for a licensee to provide an incentive to a client or customer. The advertisement of an incentive to be paid or given to a buyer or seller who buys or lists with a licensee is controlled by regulation 35.306 of the Rules and Regulations of the State Real Estate Commission.

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