COMMISSIONS, COMMISSIONS, COMMISSIONS!

TEXAS REALTORS® LEGAL WEBINAR SERIES

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OUTLINE

I. INTRODUCTION

II. REPRESENTATION AGREEMENTS
   • LISTING AGREEMENTS
   • BUYER/TENANT REPRESENTATION AGREEMENTS

III. COOPERATIVE COMPENSATION
   • MLS COOPERATIVE COMPENSATION
   • NON-MLS COOPERATIVE COMPENSATION

IV. COMMISSION DISPUTES
INTRODUCTION

• Multiple agreements affect broker compensation
• Explore key concepts in each agreement
• Four types of agreements
  • Listing Agreement
  • Buyer/Tenant Representation Agreement
  • One to Four Family Residential Contract
  • Cooperative Compensation Agreement

There are no “standard” commissions. Antitrust laws forbid brokers of different firms from joining together to fix commissions at a set price.
Representation Agreements should be in writing!

- MLS rules require written authorization from the seller
- Need a signed written agreement to enforce commission
- CoE prohibits interfering with exclusive client relationships
- CoE requires agreements be in writing, whenever possible
Whose Representation Agreement is it anyways?

- TREC requires representation agreements be in the name of the broker.
- Sponsored agents should have a written agreement with broker
- **Independent Contractor Agreement (TXR 2301)**
- What happens when an Agent leaves her broker? Depends on the terms in the sponsorship agreement
Cooperative Compensation

Listing Agent

Buyer’s Agent

Listing Agreement

Residential Listing Agreement, Exclusive Right to Sell (TXR 1101)

Buyer / Tenant Representation Agreement

Seller

Purchase / Lease Contract

Buyer
LISTING AGREEMENT

• Listing broker markets the property, and seller pays broker if the property sells
• Percentage of the sales price or a definite fee
• Seller is agreeing to pay the listing broker
• Commission must be “earned” and “payable”
LISTING AGREEMENT

• Listing Broker’s commission is “earned” when:
  • Seller agrees to sell,
  • A ready, willing, and able buyer is procured, or
  • Seller breaches the listing agreement.

• Listing Broker’s commission is “payable” when:
  • Transaction has closed and funded
  • Seller refuses to sell the property
  • Seller breaches the listing agreement

5. BROKER COMPENSATION:

A. When earned and payable, Seller will pay Broker:
   (1) ________% of the sales price.
   (2) ____________

B. Earned: Broker’s compensation is earned when any one of the following occurs during this Listing:
   (1) Seller sells, exchanges, options, agrees to sell, agrees to exchange, or agrees to option the Property to anyone at any price on any terms;
   (2) Broker individually or in cooperation with another broker procures a buyer ready, willing, and able to buy the Property at the Listing Price or at any other price acceptable to Seller, or
   (3) Seller breaches this Listing.

C. Payable: Once earned, Broker’s compensation is payable either during this Listing or after it ends at the earlier of:
   (1) the closing and funding of any sale or exchange of all or part of the Property;
   (2) Seller’s refusal to sell the Property after Broker’s compensation has been earned;
   (3) Seller’s breach of this Listing; or
   (4) at such time as otherwise set forth in this Listing.

Broker’s compensation is not payable if a sale of the Property does not close or fund as a result of: (i) Seller’s failure, without fault of Seller, to deliver to a buyer a deed or a title policy as required by the contract to sell; (ii) loss of ownership due to foreclosure or other legal proceeding; or (iii) Seller’s failure to restore the Property, as a result of a casualty loss, to its previous condition by the closing date set forth in a contract for the sale of the Property.
LISTING AGREEMENT

The Protection Period

- Prospective buyers whose attention was called to the property during listing
- Seller agrees to sell to a prospect during the protection period
- Broker entitled to commission upon closing
- Doesn’t apply if the seller enters new exclusive listing agreement
BUYER/TENANT REPRESENTATION AGREEMENT

• Help buyer find property, buyer pays if they buy
• Buyer is agreeing to pay the broker
• Broker tries to get paid from the seller/listing broker
• Buyer is still contractually obligated to pay broker
BUYER/TENANT REPRESENTATION AGREEMENT

- Commission is “earned” when:
  - Buyer/Tenant enters into a contract to buy or lease, or
  - Buyer/Tenant breaches the representation agreement.

- Commission is “payable” when:
  - Transaction closes
  - Buyer/Tenant breaches the sales or lease contract, or
  - Buyer/Tenant breaches the representation agreement.
BUYER/TENANT REPRESENTATION AGREEMENT

Protection Period

• Buyer agrees to acquire a property previously identified during the protection period.

• There must be a successful closing.

• Doesn’t apply if the buyer was under new representation agreement
Cooperative Compensation

Listing Agent

Buyer’s Agent

Listing Agreement

Buyer / Tenant Representation Agreement

Sponsor

Purchase / Lease Contract

Seller

Buyer
PURCHASE CONTRACT

One to Four Family Residential Contract (Resale) (TXR 1601)

• No broker compensation

• Use separate agreement for cooperative compensation

• But what about page 9 (Broker Information page)?

Listing Broker has agreed to pay Other Broker _______________________ of the total sales price when the Listing Broker’s fee is received. Escrow agent is authorized and directed to pay Other Broker from Listing Broker’s fee at closing.

• Separate agreement between brokers controls if conflict

• Some contracts have provisions for broker compensation
  • The Farm and Ranch Contract (1701) and Texas REALTORS® Commercial contracts
COOPERATIVE COMPENSATION

• Compensation listing broker pays the cooperating broker
• Commissions offered on MLS listing
• Other written agreement
  • Texas REALTORS® Commission Registration Agreements.
COOPERATIVE COMPENSATION

Multiple Listing Service

- MLS rules and policies create binding agreements between brokers.
- Percentage of the gross sales price or as a definite fee.
- Compensation is being offered and paid by the listing broker, *not* by the seller.

Broker to Broker transaction
Multiple Listing Service

Blanket unilateral offer to compensate the cooperating broker

- Unilateral Offer can only be accepted by performance
- *Performance* means being the “procuring cause” of the sale
- Offer (MLS Compensation) + Acceptance (procuring cause) = Binding Agreement
COOPERATIVE COMPENSATION

Multiple Listing Service

Procuring Cause

“The uninterrupted series of causal events which results in the successful transaction.”
COOPERATIVE COMPENSATION

Multiple Listing Service

Procuring Cause factors

• Who first introduced the buyer to the property, and how was the introduction made?
• Was the series of events starting with the original introduction of the buyer to the property and ending with the sale hindered or interrupted in any way?
• If there was an interruption or break in the original series of events, how was it caused and by whom?
• Did the action or inaction of the original broker cause the buyer or tenant to seek the services of a second broker?
• Did the second broker unnecessarily intervene or intrude into an existing relationship between the buyer or tenant and the original broker?

COOPERATIVE COMPENSATION

Multiple Listing Service

Procuring Cause v. Agency

• Listing broker only obligated to pay the procuring cause broker, not necessarily the broker that has a buyer rep.

• Agency relationships do not automatically determine procuring cause
COOPERATIVE COMPENSATION

Multiple Listing Service

• Offer to compensate is unconditional.

• Listing broker is not permitted to state:
  • “3% buyer’s agent commission only with a full price offer”
  • “buyer’s agent must accompany buyer on first showing to receive commission”
  • “commission equal to one month’s rent only with 12-month lease.”

• Sellers trying to set conditions
COOPERATIVE COMPENSATION

Multiple Listing Service

• **Bonuses** are part of the blanket unilateral offer of compensation.

• What’s the difference? Condition or Not a Condition
  • “$2,000 bonus if property closes within 30 days.” ✗
  • “$2,000 bonus if offer received within 30 days.” ✓

• Home Builders – Take care when signing a listing agreement!
COOPERATIVE COMPENSATION

Modifying the MLS compensation

- Listing broker sets the amount of compensation
- Can only unilaterally be changed before an offer to purchase
- After an offer, listing broker and cooperating broker must agree
- Agreement to change the MLS commission must be mutual and voluntary.

MLS is prohibited from setting rates of compensation!
COOPERATIVE COMPENSATION

Modifying the MLS compensation

• Listing brokers – Don’t reduce the commission because you feel the cooperating broker has not done their fair share of the work.

• Cooperating brokers – Don’t dictate how much the listing broker must pay you, even if your buyer’s representation agreement has a different amount than what’s offered on the MLS.

• Cooperating broker – Don’t coerce the listing broker into changing the MLS commission by using the terms of an offer, or refusing to submit an offer, as leverage.
COOPERATIVE COMPENSATION

Separate Written Agreements

- Not listed in an MLS
- Cooperating broker not participant of MLS where property is listed
- Commercial Transactions
COOPERATIVE COMPENSATION

Texas REALTORS® Commission Registration Agreements

• *Registration Agreement Between Broker and Owner* (TXR 2401) A versatile form that can be used when the broker represents either the owner or the buyer. Especially useful in a for-sale-by-owner transaction. (Commercial version available)

• *Registration Agreement Between Brokers* (TXR 2402) Used when the property is not listed in the MLS or the cooperating broker is not a participant of the MLS in which the property is listed. (Commercial version available)

• *Agreement Between Brokers for Residential Lease* (TXR 2002) Used when the property for lease is not listed in the MLS or if the cooperating broker is not a participant of the MLS in which the property is listed.
COMMISSION DISPUTES

• Remember your Fiduciary Duty!

• Texas REALTORS® offers ombudsman, mediation, and arbitration

• Mandatory Arbitration - Disputes between REALTORS® with different firms

• Voluntary Arbitration - Disputes with a non-REALTOR®, between REALTORS® in the same firm, or between a broker and a sponsored agent,
COMMISSION DISPUTES

Arbitration Hearings

• Main issue is usually Procuring Cause
• The cost to request arbitration is $400 per side.
• The burden of proof is on the complainant
• Standard of proof is a preponderance of the evidence
• Must be filed within 180 days after the closing of the transaction, or 180 days after know of dispute.
THANK YOU

LEGAL HOTLINE 800-873-9155

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