

ANSWERS TO Q & A

COURSE 4 – BUYER AGENCY AGREEMENTS

SELLING AGENT VS. BUYER'S AGENT - QUESTIONS AND ANSWERS

I limit my practice to buyer agency only. Is it legal for me to tell a buyer I will not help them find a property unless they sign a buyer agency agreement AND provide a pre-qualification letter or pre-approval letter from a lender?

Buyer's agents may have many requirements for a buyer to meet in order for the agent to agree to work with or represent them. As long as the requirement does not violate the law, e.g. refuse to work with someone in a protected class, the buyer's agent may set requirements. In the situation of a buyer's agent requiring a buyer to sign a buyer agency agreement as a condition of them helping the buyer find a property is permissible, as is the requirement of a pre-qualification or pre-approval letter from the a lender.

AGENCY RELATIONSHIPS - QUESTIONS AND ANSWERS

i. Does every broker/company have to offer designated agency and multiple representation without designated agency?

No, each broker/company may set its own policies as to what varieties of representation will be made available to clients. Some brokers/companies may not be able to provide brokerage services in a multiple representation relationship if the company is very small and others may choose not to engage in multiple representation as a policy decision. In the past, not every broker/company provided brokerage services in a multiple representation relationship, and the situation will be no different after the license law changes became effective July 1, 2006. Brokers/companies are free to continue working with clients and customers in the same agency relationships they used before. Nothing is lost with the agency law revisions. Instead, additional options for agency relationships are available to those brokers/companies which choose to use them. This does not mean, however, that the agents in those companies that do not practice multiple representation do not still have to use the Broker Disclosure to Clients form. They will still need to review the disclosure forms and obtain the signatures of their clients who will be made aware of the other options presumably offered by other companies. This may create a competitive disadvantage, depending upon the policies and practices of other brokers/companies in the market area. The clients of such brokers/companies will execute the Broker Disclosure to Clients form to indicate that they reject multiple representation relationships.

ii. An agent has a buyer agency agreement with the buyer who wants to purchase a property listed by that same agent. Both clients chose to have multiple representation with designated agency. The buyer is willing to have the agent represent both sides of the transaction. Is that possible? Does a buyer-client need to sign anything to accurately reflect the relationship?

A single agent cannot provide multiple representation with designated agency representation in a transaction so something will need to be changed with regard to the agency relationships if this transaction is to be pursued. There are several different ways that this situation might be resolved, depending upon the preferences of the clients and the agent. Some possible solutions include:

1) The buyer or seller (or both) may change his or her consent for representation to multiple representation without designated agency. By operation of law, when both parties have consented to multiple representation (either with or without designated agency) but neither or only one has selected the designated agency component, then the agency relationship for both parties is automatically deemed to be multiple representation without designated agency (dual agency) and the agent may not place the interest of any client ahead of the interest of any other client.

2) Another agent in the company may be brought in to represent either the buyer or the seller in the transaction so that everyone can proceed with the multiple representation with designated agency selected by both parties.

3) The buyer agency agreement may be modified to exclude the listed property from the agreement. The agent may then proceed to work for the seller as the listing agent, and the agent may provide services to the buyer as a subagent or the buyer may work with an attorney.

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4) The listing contract may be modified to make the buyer an exception to the listing and the agent then would work as a buyer's agent. The agent may provide brokerage services to the seller as a customer or the seller can work with an attorney.

READ MORE ABOUT IT: For further discussion of multiple representation, see the June 2006 Legal Update, "Revised Agency Law Implementation," online at www.wra.org/LU0606.

iii. Another agent wrote an offer and indicated she is representing the buyer. Should the buyer's agent have sent a Broker Disclosure to Client along with the offer to the listing agent?

No, buyer's agents are not required to submit a Broker Disclosure to Client with an offer to purchase. A buyer's agent is not a subagent of the listing broker, the buyer is their client.

WHAT IS THE BUYER'S AGENT AUTHORIZATION IN A BUYER AGENCY AGREEMENT? - QUESTIONS AND ANSWERS

A couple contacted the listing broker for a showing after seeing the broker's ad on Craig's List. Afterwards they asked broker to draft an offer on the home and said they signed a buyer agency agreement with another agent, but are not happy with them. Since the buyer's agent had no part in finding the home for them, can the broker draft the offer for these buyers? Does the broker owe anything to the buyer's agent?

Per Standard of Practice 16-13 of the Code of Ethics, a REALTOR® is required to ask a buyer if they are a party to a buyer agency agreement before providing substantive services. Asking before a showing clearly would meet this standard. If the party does have a buyer agency agreement, the broker should ask if the party wants to work with the buyer's agent or the broker in writing the offer, and may still write the offer if that is the buyer's stated preference.

EXCLUDED PROPERTIES (LINES 11-20) - QUESTIONS AND ANSWERS

The agent wants to sign a buyer agency contract with a buyer; however, there is one listing where the broker is not paying buyer agency commission. Can the agent not be the buyer's agent for that one listing?

The agent may enter into a buyer agency agreement that excludes certain properties. See line 11-12 of the 2000 WB-36 Buyer Agency/Tenant Representation Agreement. The agent must make proper agency disclosure with a Broker Disclosure to Client and Broker Disclosure to Customer if the agent acts as a subagent and the buyer submits an offer on the property. Because the agent is providing services as a subagent only for the excluded property, the agent must be vigilant to act as a subagent and not a buyer's agent when working with the buyer on the excluded property.

EXTENSION OF AGREEMENT TERM (LINES 205-210) - QUESTIONS AND ANSWERS

i. A buyer's agent helped a buyer purchase a property. Afterwards, the agent sent the buyer a list of all the protected properties. Buyer decides they want one of the other properties buyer's agent had shown them and wants to sell the one they bought. Does the buyer agency apply to more than one property? Is the buyer agency still in place for the protected property?

The following new provision was added to the term of agreement section of the 2008 WB-36: "Notwithstanding lines 193-194, Broker and Buyer agree that this Agreement shall/shall not [STRIKE ONE] end [if neither struck, this Agreement shall end] when Buyer procures an interest in property." This new provision will solve the confusion that sometimes arises when a buyer has purchased one property and then purchases another, for example, two small rental properties. The buyer might take this opportunity to assert that the buyer agency agreement ended when the first rental property was purchased and that he or she does not owe the buyer's broker's success fee for the second acquisition. The new provision should definitively resolve any such disputes in the future.

The question of whether the buyer agency applies to multiple properties was not answered explicitly in the 2000 WB-36. Brokers who still have 2000 agreements may amend the WB-36 to specifically address

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whether the purchase (or rental) of one property terminates the WB-36 or whether the agreement is intended to be an ongoing relationship covering multiple purchases (or rentals). If the issue was not addressed, once a property is acquired, the actions of the broker and the buyer may dictate whether it was the intention of the parties to proceed with the buyer agency agreement by the broker's continued provision of brokerage services for additional properties. The compensation provisions provide, in part, for broker compensation either during the listing or extension thereof if the buyer acquires an interest in property. The compensation provisions read in conjunction with the extension of agreement terms would create the buyer agent's claim for commission if a protected property were acquired during the protection period. Whether the previous payment of commission for the first property terminated the broker's right to additional commission could be subject to litigation if the parties are unable to reach a mutually agreeable resolution of the issue. **READ MORE ABOUT IT:** For further information about buyer agency, see the November 2007 Legal Update, "WB-36 Buyer Agency Agreement – 2008 Revisions," online at www.wra.org/LU0711.

- ii. **The agent has listed a property. Before the listing, a buyer's agent wrote an offer and presented it to the FSBO seller, however the offer never came together. Buyer contacted the listing agent and asked her to write an offer. The buyer told the listing agent they will not go back to their buyer's agent and their buyer agency agreement has expired. May the listing agent write the offer for the buyer?**

The listing agent may work with the buyer to draft an offer to purchase on the listed property. Although the agent may draft the offer, if the buyer has any questions regarding their contractual obligations to the buyer's agent the buyer may be referred to legal counsel to review the terms and conditions of their buyer agency agreement. The 2000 WB-36 Buyer Agency/Tenant Representation Agreement provides, at lines 167-171, for the extension of the term of the agreement. Buyers may be subject to the extension of the buyer agency term for those properties that were subject to a written offer to purchase during the term of the buyer agency. Buyer may review the contract with legal counsel and proceed accordingly.

NOTICE ABOUT SEX OFFENDER REGISTRY (LINES 211-213) - QUESTIONS AND ANSWERS

The broker was under the impression that if a registered sex offender lives near the home the buyer wants to purchase, the buyer can get out of the offer if he wants to. How long of a time period do they have? How to address this if the buyer sees the sex offender registry information for the first time when they are writing an offer?

The WB-11 Residential Offer To Purchase does not contain a contingency regarding the proximity of sex offenders to the property subject to the offer. When using the Wisconsin REALTORS® Association Broker Disclosure to Customers or the agency contracts, the sex offender registry information is contained therein. Therefore, unless the broker disclosure is given at the time of the offer, the buyer has time to investigate and make inquiries prior to the time of the offer to purchase is submitted if the location of registered sex offenders is material to the buyers.

WB-47 AMENDMENT TO BUYER AGENCY AGREEMENT - QUESTIONS AND ANSWERS

The agent has a buyer agency contract with a buyer. The agent will be out of town for a short time. Is it necessary to have an amendment to have another agent from the company cover for the broker?

No, the agent's WB-36 Buyer Agency Agreement is a contract between the buyer and agent's broker/company. Thus, another agent from the company may assist the buyer in the agent's temporary absence. It may be wise for the agent to have a written agreement with that agent to assign the responsibilities and rights of the agent during that time. The agent must also be sure to give the buyer clear instructions about who will assist the buyer during agent's absence.

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BUYER AGENCY DISCLOSURE ISSUES - QUESTIONS AND ANSWERS

i. If broker is a buyer's agent, can she write in an offer that the seller will compensate the buyer's agent 2.4% of purchase price?

A buyer's broker may ethically suggest or recommend that the buyer ask the seller to pay some or all of the buyer's broker's fee pursuant to Article 16 of the Code of Ethics and NAR Case Interpretation #16-17. The buyer may condition the offer upon the seller paying the buyer's broker's fee on behalf of the buyer, as a seller's expense at closing. Wis. Admin. Code § RL 24.05(1) provides that the buyer's broker must have the prior written consent of the buyer and seller to collect the fee from the seller because the seller is not the buyer's broker's client. The WB-36 buyer's agency agreement must also authorize the buyer's broker to accept compensation from the owner/seller. **READ MORE ABOUT IT:** See Legal Update 05.09, "Buyer Agency Practice," @ www.wra.org/LU0509, and Legal Update 99.06, "Revised WB-36 Buyer Agency/Tenant Representation Agreement," @ www.wra.org/LU9906, for further discussion of the issue.

ii. Does a buyer in a buyer agency agreement owe a success fee if buyer purchases a property with a seller's agent at a price significantly outside the range stated in the buyer agency agreement?

Yes, per lines 19-23 of the 2000 WB-36. There it basically says that the buyer's broker earns the success fee if the buyer purchases any property, at any terms and price acceptable to the buyer and seller. The broker's authorization to act on behalf of the buyer on lines 1-2 is limited to the property described on lines 3-12, including price, but the earning of the fee is not. To put a geographical limitation on a buyer agency agreement, the broker may write in the offer that the broker is authorized to act only with respect to properties located in Dane County, and will earn a fee only with respect to properties the buyer purchases in Dane County.

iii. Buyer's agent has a buyer agency agreement calling for 2.4% success fee. After looking at 40 houses, buyer found one they liked and made an offer. However the listing agent offered a 2.0% co-broke fee and the buyer's agent did not notice until after offer was accepted. Does the buyer owe the other .4%?

The broker is referred to the compensation terms, specifically line 25 of the 2000 WB-36 Buyer Agency/Tenant Representation Agreement. The general provisions of the buyer agency agreement provide that the buyer will pay broker's compensation unless reduced by any amounts received from the owner or the owner's agent. Therefore, unless the agent has made representations that the buyers will have no out of pocket costs they will be responsible for the remainder of the commission. When taking a buyer agency agreement, the possibility of buyer owing the buyer's agent's commission should be addressed as a material fact under Wis. Stat. §452.133(2)(b).

REALTORS® are required, by the Code of Ethics, and Standard of Practice 1-13 to advise buyer clients about company policy relating to commission. Standard of Practice 1-13 follows for your review. Standard of Practice 1-13 When entering into buyer/tenant agreements, Realtors® must advise potential clients of: 1) the Realtor's company policies regarding cooperation; 2) the amount of compensation to be paid by the client; 3) the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties; 4) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g. listing broker, subagent, landlord's agent, etc., and 5) the possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. (Adopted 1/93, Renumbered 1/98, Amended 1/06)

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- iv. **A buyer found a property on the Internet and went to an open house. After the open house buyer set up an individual showing with the listing agent. The listing agent and buyer did not enter into a buyer agency agreement. A couple of days after the showing, the listing agent left the buyer a message saying he had taken time out of his schedule to show them the property and he wished he would call him back. This message upset the buyer and he now wants to work with a different agent and is considering writing an offer. If the second agent works with the buyer, how will she get paid?**

The second broker may contact the listing agent or broker to negotiate a compensation agreement despite concern over services provided and procuring cause. The second broker may enter into a buyer agency agreement. If buyer agency is pursued, the second broker should tell the buyer that the buyer's cost may increase if neither the listing broker nor the seller can be persuaded to pay the buyer's broker's fee.

- v. **An agent has buyer agency with a buyer for a particular property. The buyer's agent found out the buyer was contacted by another company who told her that the "property was up for bids." The other agent told the buyer's agent that she has an exclusive office contract and anyone can sell the property, but no one will get paid except her company. Is this legal?**

If the buyer will pay the buyer's broker's fee, the agent need not worry about not getting paid. The buyer could ask the seller to pay the buyer's broker's fee in the offer. Arguably, the listing agent's policy may not serve the best interests of her client because this practice may limit market exposure dramatically and the seller should be informed of this impact. If this is a consistent practice, it may constitute a failure to cooperate in violation