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Legal Update

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Buyer Agency Practice

In this high-tech world of the 21st century, buyers are Internet-savvy and are likely to come into a REALTOR®'s office with a packet of printouts for properties that interest them. These new world buyers have been reading about real estate and finance and want to work with a buyer's agent who is responsive to their needs.

While it is important to look out for the interests of a buyer/client and optimize their purchasing opportunities and the value that they receive, buyer's agents must not lose sight of the fact that the ultimate goal is to assist the buyer in purchasing the property he or she wants, not to go to war with the listing broker or the seller. While assertive negotiation strategies at times may be useful, overly aggressive tactics may lose the deal for the buyer.

This *Legal Update* examines the WB-36 Buyer Agency/Tenant Representation Agreement and the authorization it provides to act as a buyer's agent. It also reviews buyer agency practice issues and rules, buyer agency compensation and procuring cause, and buyer agency questions and answers from the Legal Hotline.

Authorization to Act as a Buyer's Agent

The buyer agency agreement is the agency contract that authorizes the broker to provide brokerage services to the buyer as a client. In general terms it is the counterpart of the listing contract that the seller executes to authorize the listing broker to provide brokerage serv-

ices to the seller as a client. The buyer agency agreement specifies the extent of the buyer's broker's authority to act on behalf of the buyer/client and the performance required to earn the broker's compensation. No real estate licensee may provide client services to a buyer unless they are working under a buyer contract.

The WB-36 Buyer Agency/Tenant Representation Agreement, the DRL-approved buyer agency contract that must be used by Wisconsin licensees, gives the buyer's broker the authority to act as an exclusive buyer's agent, but does not provide the authority for an exclusive right to locate and negotiate. The form is flexible, however, and may be tailored to provide the desired agency authorization and to create consistency with the desired business practice model.

Exclusive Buyer's Agent

In line 1 of the WB-36, the buyer authorizes the broker to work as his or her exclusive buyer's agent to locate and negotiate the procurement of an interest in property. No one else can be a buyer's agent for the buyer, but the language does not prohibit the buyer from personally working with sellers, seller's agents, and attorneys as the buyer seeks and acquires the desired property. In other words, the WB-36 buyer agency agreement is like an exclusive agency agreement in the sense that the buyer does not have to work only with the buyer's agent and, in fact, can work on his or her own or with others to locate and negotiate for property.



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Lines 26-29 of the WB-36 caution the buyer that:

BUYER MAY WORK WITH OWNER OR AGENTS OF OWNER IN LOCATING AND NEGOTIATING AN INTEREST IN PROPERTY. HOWEVER, BUYER MAY BE RESPONSIBLE FOR BROKER'S FULL COMPENSATION IF BUYER'S CONTACTS WITH OWNER OR OWNER'S AGENTS RESULT IN NO COMPENSATION BEING RECEIVED BY BROKER FROM OWNER OR OWNER'S AGENT.

The upshot is that the buyer's ability to work with others comes with a price: the buyer may have to pay a higher purchase price or additional broker compensation if the buyer works with an agent of the seller. It is very important that the buyer fully appreciate this fact.

Agency Authorization Modifications

The parties to the WB-36 may modify the extent of the broker's authorization and the range of the broker's services to fit the circumstances and the needs of the buyer/client. This flexibility enables a broker to offer different business models and different levels of services to buyers. This is an important capability when working with computer-savvy buyers who may not need the full range of services. They may have completed some of the traditional tasks on their own, most likely online.

Negotiation Services

If the buyer spots a property on the Internet, has taken a virtual tour, and only wants the buyer's agent to help negotiate and implement a contract, the phrase "to locate an interest in property and" may be crossed out on lines 1-2 of the WB-36. This sort of modification must be done very carefully because a licensee cannot lawfully be put in the position of just stepping in to draw up the papers and do the closing. Under Wis. Admin. Code § RL

16.05(3), a real estate broker is only authorized to complete legal contracts on behalf of a party if the form completion is incidental to the broker's legitimate real estate practice. A licensee cannot just "play attorney" without providing other brokerage services such as inspecting the property, making property condition disclosures and negotiating the offer.

Location Services Only

If the buyer only needs a buyer's agent to locate a commercial property and the buyer or the buyer's attorney will conduct the negotiations and draft the contracts, the buyer's agent may line out "and negotiate the procurement of" in lines 1-2.

Exclusive Right-to-Locate-and-Negotiate

The WB-36 does not create an exclusive right-to-locate-and-negotiate agency relationship, which would be the counterpart of an exclusive right-to-sell listing contract. An exclusive right-to-locate-and-negotiate buyer agency relationship would require a buyer's agent to essentially be available 24 hours a day to assist the buyer. The buyer's agent would have to be the buyer's constant companion, scouring the market for suitable properties, available at the drop of a hat to write an offer if the buyer falls in love with a hot property at an open house. Buyers would even be unable to ask their attorneys to write the offer for them because the buyer's broker would have the exclusive right to negotiate on behalf of the buyers.

If a REALTOR® wants to offer this business model to consumers, the REALTOR® may modify the WB-36 and establish a true "exclusive right-to-locate-and-negotiate" buyer agency agreement by striking the words "act as buyer's agent" on line 1 of the WB-36 (creating a provision that says, "Buyer gives Broker the exclusive right to locate and negotiate the procurement of an interest in real estate"), or by adding language to that effect in an addendum.

Property Description

The buyer's broker's authorization to locate property for the buyer begs the question: what property? That question is answered on lines 3-10 of the WB-36 with the buyer's designation of his or her target as far as general property types, types of property interest, price range and other property characteristics and transaction terms such as property size, location, seller financing availability and schools. These descriptive items delineate the parameters that the buyer's agent should search when attempting to locate a property, but do not restrict the type of property that the buyer may purchase. In other words, the property description does not limit the buyer's broker's ability to earn his or her fee.

Excluded Properties

If a buyer's agent is aware that a buyer has seen a property prior to entering into the buyer agency agreement, the buyer's agent would be wise to discuss the procuring cause and commission issues which might arise from the prior showing. The broker and buyer should consider whether such properties should be excluded from the buyer agency agreement to avoid disputes later on, provided that all are comfortable with an arrangement that will return the buyer to work with other agents if it turns out that the buyer wants to exclude one or more properties from the scope of the broker's agency authorization. If the buyer acquires an interest in a property listed as excluded on lines 11-12, the buyer's broker will not provide brokerage services or earn his or her fee, just as a sale to an excluded buyer does not earn the listing broker his or her commission.

Agency Disclosure and Consent to Multiple Representation

The agency disclosure information required by Wis. Stat. § 452.135 is incorporated into the WB-36, including

a consent to multiple representation, waiver of confidentiality, and blank lines for listing confidential and non-confidential information. The explanation of multiple representation makes it clear that a broker in a multiple representation situation has been authorized by each party in the transaction to provide client services to each party, and is not allowed to place the interests of either party ahead of the other in negotiations. In other words, the range of services provided to each party is limited.

Legal Hotline Questions & Answers – Buyer Agency Authorization

The following questions concerning buyer agency authorizations were asked of the WRA Legal Hotline.

Multiple Representation

One agent has a home listed. Another agent within the office, who has a buyer agency, has written an offer on that property. Is the offer to purchase drafted as an agent of the buyer or as dual agent?

This is a multiple representation situation. One agent of the broker is the listing agent – an agent of the seller. The buyer wants another agent of the broker to act as a buyer's agent. Thus, this same broker is being asked to represent both the seller and the buyer as clients. The broker arguably cannot offer complete loyalty and obedience to two opposing interests at the same time.

The parties must give informed consent to a multiple representation relationship. The broker must explain the concerns and limitations to each party and ask them to sign a written consent to multiple representation that meets the requirements of Wis. Stat. § 452.137. This may have already been done if each party signed the consent to multiple representation included in the listing contract and the buyer agency agreement.

Daily Buyer Practice Issues

Much confusion often surrounds buyer agency practice. Misunderstood issues include the disclosure of buyer agency status to others, the ability of other agents to approach and work with buyers under a buyer agency agreement, and concerns relating to the buyer's broker's performance.

Disclosure of Buyer Agency

An area where the rules are often not followed involves the disclosure of buyer agency status to listing agents and sellers.

Under § RL 24.07(8)(a)2, "Licensees acting as agents of potential buyers of real estate used or intended to be used principally for one to 4 family residential purposes, who are aware that the owner of the real estate has granted another licensee the exclusive right to sell, shall notify the listing broker of the licensee's buyer agency relationship at the earlier of all of the following:

- a. The first contact with the listing broker where information regarding the seller or transaction is being exchanged.
- b. A showing of the property.
- c. Any other negotiation with seller or listing broker."

Similarly, Standard of Practice (SOP) 16-10 states, "REALTORS®, acting as agents of, or in another relationship with, buyers or tenants, shall disclose that relationship to the seller/landlord's agent or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord's agent not later than execution of a purchase agreement or lease." SOP 16-11 indicates that "On unlisted property, REALTORS® acting as buyer/tenant agents or brokers shall disclose that relationship to the seller/landlord at first contact for that client and shall provide written confirmation of such disclosure

to the seller/landlord not later than execution of any purchase or lease agreement. REALTORS® shall make any request for anticipated compensation from the seller/landlord at first contact.”

All of this indicates that buyer’s agents must tell listing agents and sellers at first contact that they are buyer’s agents and later confirm that status in the offer to purchase. While the Department of Regulation and Licensing (DRL) rule is limited to one- to four-family residential properties and listing brokers with exclusive right-to-sell contracts, the Code of Ethics provisions apply to all properties and all brokers.

REALTORS® must also understand that early in the process a buyer may not have yet decided whether he wants buyer agency. He may start out working with agents as subagents and may later decide that he wants a buyer’s agent. Through no fault of the agent, initial contacts may be as a subagent, but the agent may later request the seller’s consent to shift to buyer’s agency.

Dealing with Buyers under Buyer Agency Agreements

License law does not prohibit agents of the seller from negotiating directly with a buyer who is party to the standard WB-36, although professional courtesy and tradition may cause many brokers to avoid such direct contact whenever possible. REALTORS®, on the other hand, are to deal with the buyer’s broker, and must ask a buyer if he or she has a buyer agency agreement and if he or she wants assistance before providing substantive services to a buyer with a WB-36.

With respect to Wisconsin licensees, § RL 24.13(5) provides:

“NEGOTIATION THROUGH BROKER. A licensee may not negotiate a sale or lease of real estate directly with a party if the licensee knows that the party has an unexpired written contract in con-

nection with the real estate which grants to another licensee an exclusive right to sell, lease or negotiate. All negotiations shall be conducted with the broker holding the exclusive right to sell, and not with the party, except with the consent of the broker or where the absence of the broker, or other similar circumstances, reasonably compels direct negotiation with the party. A listing broker has no duty to investigate whether a buyer has granted a buyer’s agent an exclusive right to negotiate.

Note: The DRL’s approved form, WB-36, does not grant the buyer’s agent an exclusive right to negotiate.”

This rule permits listing agents to negotiate directly with a buyer under the WB-36. The only time that listing agents are compelled to negotiate with the buyer’s agent is when the buyer or the buyer’s agent has made the listing agent aware that the WB-36 has been modified to provide for the exclusive right to negotiate. In addition, § RL 24.13(5) does not obligate licensees to ask the buyer whether he or she has a buyer agency agreement or whether that agreement contains an exclusive right to negotiate.

Many brokers make it a practice to honor a buyer agency agreement and decline to work with a buyer who is under a buyer agency agreement. This is a professional and courteous practice. In the absence of such gracious brokers, there is no guarantee under § RL 24.13(5) that the buyer agency agreement will be honored unless the buyer or buyer’s agent informs the other agent that there is a buyer agency agreement that has been modified to provide for exclusive negotiation rights, or unless the buyer simply refuses to work with other agents.

REALTORS®, on the other hand, must deal with the buyer’s agent, absent consent from the buyer or the broker to do otherwise. In addition, REALTORS® must ask the buyer if the buyer has a

buyer agency agreement and if they want help from the REALTOR® before providing substantive services to the buyer. Article 16 of the Code of Ethics provides that REALTORS® may not interfere with the exclusive brokerage relationships of other REALTORS®. Article 16 does not allow other agents to freely intervene and undertake the buyer’s broker’s job without first asking the buyer whether he is a party to a buyer agency agreement and if the buyer wants assistance from the seller’s agent.

SOP 16-13 states:

“All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client’s agent or broker, and not with the client, except with the consent of the client’s agent or broker or except where such dealings are initiated by the client.” (Adopted 1/93, Amended 1/98)

“Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospective purchasers, sellers, tenants or landlords (“prospects”), REALTORS® shall ask prospects whether they are parties to any exclusive representation agreement. REALTORS® shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects’ exclusive representatives or at the direction of prospects.”

If a REALTOR® is the agent manning an open house and a house-hunting friend drops by, the REALTOR® may not write an offer for his or her friend without first asking if the friend is a party to a buyer agency agreement. If there is a buyer agency agreement, the REALTOR® may ask the friend if he or she would like the REALTOR® to perform services, for instance, write an offer to purchase, even though the friend is subject to a WB-36.

In some circumstances it may be advantageous to the buyer to accept the assistance from another REALTOR®, such as when the buyer has fallen in love with a hot property and needs to act quickly. But other times it may not be advantageous for the buyer, as when another REALTOR® steps in to write an offer that the buyer's agent could have done in just as competent and timely a manner – the only difference may be that it costs the buyer more to work with the other REALTOR® than with the buyer's agent because both the buyer's agent and the REALTOR® may need to be compensated.

Wisconsin licensees approaching buyers under buyer agency agreements arguably should caution the buyer to check the provisions of their buyer agency agreement to determine whether the buyer may work with other agents and whether the buyer will still be obligated to pay the buyer's broker's fees. Causing a buyer who is party to a WB-36 to work with another agent without cautioning the buyer about the possibility of extra costs may be calling into question the Wis. Stat. § 452.133(1) duties of good faith and fair and honest treatment.

To avoid having another REALTOR® show the property and write the offer, buyer's brokers must teach their buyer/clients that this behavior may lead to additional expenses for the buyer if the other REALTOR® is procuring cause – somebody other than the listing broker may still have to pay the buyer's broker's fee. If the seller refuses, that obligation will fall back on the buyer per the WB-36.

Broker's Performance

The buyer's agent must use his or her professional knowledge and skills and reasonable efforts to locate an interest in property for the buyer and negotiate the procurement of the interest in property desired by the buyer. The buyer's broker

shall give advice to the buyer within the scope of the broker's license, facilitate or participate in discussions about the terms of a potential contract for the acquisition of a property interest, complete appropriate contractual forms, present either party's contractual proposals with an explanation of the advantages and disadvantages, and engage in other efforts as specified in the agreement.

If the broker does not provide good service and perform these functions, the broker will be in breach of the agreement and the buyer will be able to terminate the WB-36 without owing any damages to the broker. A buyer may terminate a buyer agency agreement at any time because it is a personal service contract embodying an agency relationship. Neither the principal nor the agent can be compelled to remain in an agency relationship. If there has been no breach of contract on the part of the broker, however, the buyer's termination will be considered to be a breach of contract and in "bad faith," and the broker may be entitled to damages.

A buyer also may assert a buyer's broker's failure to perform as a defense if a broker sues to collect a success fee in a scenario where the broker hasn't been doing his or her job. In other words, a buyer can resist and defeat a buyer's agent who tries to collect a fee without having done anything. However, if the agent had been performing but the buyer went off to an open house and wrote an offer without giving the buyer's agent a chance, the buyer's broker's fee would arguably still be legitimately due.

Legal Hotline Questions & Answers – Buyer Agency Practice Issues

The following questions concerning buyer agency practice issues were asked of the WRA Legal Hotline.

Internet Buyer

A buyer called and apparently had found a property on the Internet and went to an open house. He liked the home and set up an appointment with the agent who hosted the open house for another showing. That agent did not have the buyer sign an agency disclosure. A couple of days later, the agent left the buyer a message saying that he had taken time out of his schedule to show them the property and he wished he would call him back. This upset the buyer and he now wants to work with a different broker and possibly write an offer. If the second broker wants to work 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.

In-House Exclusive

An agent has been working with a buyer under buyer agency on a particular property. The buyer's agent found out that 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

of Article 3 of the REALTOR® Code of Ethics.

▣ **Incentive for Personal Transaction**

Is it illegal to accept a buyer's broker's fee when a licensee is purchasing property for him or herself?

Under the law of agency, the agent is prohibited from competing with the principal. A licensee can be either a principal or an agent in a transaction, but conflicts of interest occur when a licensee tries to be both. When acting as a buyer of real estate, the licensee is a principal in the transaction and not the agent for anyone. Therefore, the buyer/licensee cannot collect a commission from the seller because the buyer/licensee cannot perform services on behalf of the seller with undivided loyalty when the licensee has his or her own interest as the buyer at stake. It is also inconsistent for a buyer/licensee to act as his or her own agent and collect a commission for representing oneself. Instead, a buyer/licensee can negotiate a buyer's incentive to be paid by the listing broker or the seller. This incentive can be for the amount of the co-broke commission that would otherwise be paid to the selling broker in the transaction.

The buyer's incentive should be properly documented in writing before closing, preferably before the offer to purchase is executed. There is no "secret" form or language for the incentive agreement. However, the agreement should identify the parties and the transaction, and indicate how the incentive is earned, when it will be paid, and who will pay it. For example, an incentive agreement might provide: "As an inducement to Larry Licensee to purchase the property at 123 Main Street, Salestown, Wisconsin, Real Good Realty, Inc., promises to pay to Mr. Licensee an incentive in the amount of \$2,000 at the time of closing provided the closing occurs on or before December 31, 2005. It is agreed that this incentive shall be paid in lieu of any commission

offered on the MLS or otherwise, any commission being hereby declined due to Mr. Licensee's status as a principal/party to this transaction."

When drafting the offer, line 1 of the offer should be crossed out because the buyer/licensee is acting as a principal/party and not as a licensee. In addition, the buyer/licensee must disclose his or her licensee status as required by § RL 24.05(5). The licensee may wish to write in the offer that he or she is a licensed real estate agent purchasing the property for personal use/investment/speculation/resale, as the case may be.

▣ **No Agency Disclosure to Listing Broker**

Re: Buyer agency agreement. The listing broker is requesting a copy of the agency disclosure the buyer's agent provided to the buyer. Is this mandatory?

No. Wisconsin law does not require a buyer's broker to provide the listing broker with evidence of the agency disclosure. In fact, because the agency disclosure provisions are part of the WB-36 buyer agency agreement, the buyer's agent arguably is prohibited from providing a copy of this form without permission from the buyer, due to the confidential nature of its contents. The listing broker does not have a right to see the actual buyer agency agreement, but may request a written statement from the buyer's broker confirming that the broker is working under a current buyer agency agreement.

▣ **Switching Agency**

Is it possible to change an agency relationship midstream? If an agent discloses his subagency to the listing broker (and shows a house) and now the buyers want to do a buyer's agency with him, is this okay?

Pursuant to § RL 24.07(8)(a)3, a selling agent switching to buyer agency must disclose the change in representation to the listing broker and the seller. In addition,

the written consent of the seller must be obtained if the agent is to become a buyer's agent.

▣ **Brokerage Service Must Be Provided**

Re: Buyer agency. An agent lists a property that is an estate and procures a buyer. The buyer decides to write an offer to purchase while the agent is out of the state and has someone else handling her transactions. The buyer writes his offer with his brother who is a licensee in Madison instead of with the agent assisting the listing agent. The agent who wrote the offer says that he is a buyer's agent, and the offer calls for the seller to pay the buyer's agent's fee. The buyer's agent had never seen the property. Can an agent just step in like that?

The buyer's agent never inspected the property (even though he had access if he wished), in violation of § RL 24.07(1)(c). The buyer's agent may also be engaged in the unlicensed practice of law if the buyer's agent "just wrote up the offer" without providing any legitimate brokerage services, as required by the Wisconsin Supreme Court in the *Dinger* case. An agent cannot "play attorney" and write an offer to purchase under the guise of a buyer agency agreement without providing brokerage services. The seller or the listing agent may wish to file a complaint against the "buyer's agent" for these apparent license law violations.

▣ **Failure to Ask**

The buyer's daughter attends an open house and then returns with the buyer. After the buyer looks at the home, he tells the open house agent that he wants to write an offer. The agent, the buyer and the buyer's daughter go to the office and write an offer, which is accepted. The agent finds out that the buyer has a buyer agency agreement with another agent. What liability does the agent have for not asking the buyer about having a buyer agency relationship?

Although not prohibited from drafting the offer to purchase upon the buyer's request, SOP 16-13 requires the agent to first ask the buyer if he was a party to a buyer agency agreement. The agent may be subject to discipline and sanctions for violation of Article 16 of the Code of Ethics if it is found that the agent failed to inquire.

▣ **Property Protection**

The buyer's agent wrote an offer on a FSBO that was accepted. The buyer has told the agent that he just doesn't want to work with the buyer's agent any more because he doesn't want to pay the 2.4 percent commission. Will the buyer's agent earn the success fee stated in the WB-36?

The WB-36 buyer agency agreement provides for property protection. (See lines 167-171.) In the case where the buyer's agent submits an offer to purchase, that property will automatically be protected for one year after the buyer agency contract terminates. If the offer had not been submitted, then the buyer's agent would have had to submit the property description to the buyer no later than three days after expiration of the buyer agency contract in order to protect the property.

If the buyer cancels the buyer agency agreement and closes the transaction, the buyer's agent earns his fee. If the buyer and seller agree to cancel the offer to purchase but then the buyer buys the property during the protection period on his or her own or working with another agent, the buyer will still owe the buyer's broker's fee per the WB-36 compensation provisions. Since this property is protected under the WB-36 in the current situation, the buyer will owe the buyer's agent his fee, regardless of who writes the offer or who is procuring cause.

▣ **Providing Services for a FSBO Seller**

What information and advice can the broker give a FSBO seller? Can the bro-

ker interpret the contract for the sellers?

The buyer is the agent's client. The FSBO seller is the customer and is owed the duties owed to all parties in a transaction under Wis. Stat. § 452.133(1). The agent must disclose material adverse facts, provide accurate information about market conditions upon request, and present all proposals in an objective and unbiased manner. Like all licensees, regardless of agency status, the agent cannot give advice or opinions regarding the legal rights and obligations of a party, the legal effect of a contract or conveyance, or the status of title to a property, per § RL 16.05. The agent may give a general explanation of the provisions in approved forms when completing or delivering a contract to a party.

The buyer's agent, based upon the agency relationship created by the buyer agency agreement, may draft the offer, any counter-offers and any other transactional documents needed by the buyer and seller. Buyer's agents working with FSBO sellers must be sure to give the seller an agency disclosure form indicating that the buyer is the agent's client. If the FSBO seller is not comfortable with this arrangement, the seller may draft his or her own transactional documents or hire an attorney to handle this task.

▣ **Termination of Buyer Agency**

A REALTOR® is working with a buyer. The REALTOR® found out that the buyer has a buyer agency agreement with another broker, who has not done anything for the buyer. The REALTOR® told the buyer that the buyer agency agreement may be canceled. The buyer has a friend who tried to do this and was sued by the agent. If the buyer cancels the buyer agency contract, can the broker sue the buyer?

Buyers have the power to revoke a buyer agency contract at any time. This is because an agency contract, such as the WB-36, is a personal service contract based upon a special relationship of trust

and confidence in the broker. When a buyer directs a broker to stop searching for property, the broker must obey the instructions. The buyer can revoke this contract simply by verbal notice, by written letter or notice, or by amendment to the contract, which would also be signed by the broker.

The power to revoke, however, is not a right to do so. Canceling a buyer agency contract may violate the broker's rights under the contract. In that event, the broker may demand compensation for the damages sustained as a result of the cancellation. The broker's damages, in general terms, might include reimbursement for expenses incurred by the broker, for example, mileage, newspaper advertisements and a reasonable amount for the broker's time and services.

A licensee who coaches a seller about how to terminate a listing or a buyer about how to terminate a buyer agency contract may be accused of license law and ethical violations and sued in court for damages. Such conduct may be viewed as giving legal advice in violation of § RL 24.06(1) and Article 13 of the Code of Ethics. It also may be seen as interference with the other broker's agency contract in violation of Article 16 of the Code of Ethics. A person who interferes with a contract may also be sued in civil court if damages can be proved.

Buyer's Broker's Compensation

The buyer's broker earns the success fee if the buyer, or any person acting on behalf of the buyer, acquires an interest in property or enters into an enforceable contract to acquire such an interest during the term of the WB-36. This is true even if the buyer's agent did not help locate the property and was not involved in negotiations, and even if the property purchased does not fall within the property description parameters outlined at the beginning of the WB-36.

This provision parallels the commission provisions in the DRL-approved listing contracts, which do not require the listing broker to procure the buyer in order to earn a commission. Similarly under the WB-36, the buyer's broker's fee is due if the buyer purchases a property during the term of the WB-36 regardless of whether the buyer worked with the buyer's agent, seller's agents or others in that transaction.

SOP 1-13 provides that, "When entering into buyer/tenant agreements, REALTORS® must advise potential clients of: 1) the REALTOR®'s general company policies regarding cooperation and compensation; and 2) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g. listing broker, subagent, landlord's agent, etc." SOP 1-4 provides that "REALTORS®, when seeking to become a buyer/tenant representative, shall not mislead buyers or tenants as to savings or other benefits that might be realized through use of the REALTOR®'s services."

Accordingly, the buyer needs to be educated by the buyer's broker about agency relationships, compensation alternatives and possible consequences before he or she can make informed choices and decisions regarding the buyer's broker's compensation. The broker should help the buyer understand how different compensation amounts and collection strategies might play out before setting the buyer's broker's compensation and before an offer to purchase is written.

The buyer and the buyer's broker agree contractually upon the buyer's broker's fees. At lines 24-25 the buyer's broker and buyer may indicate whether or not the buyer's agent may accept compensation from the owner or the owner's agent. If the buyer agrees to this, the amount the buyer owes for the buyer's broker's compen-

sation will be reduced by any amount received from the owner or owner's agent. If no selection is made, the broker may accept compensation from the owner or owner's agent. However, the buyer's broker is not authorized to unilaterally determine who will pay his or her fee. Some buyer's agents add additional protections for the buyer by indicating that the buyer's agent's total compensation will be whatever can be collected from the seller or seller's agents. This is perfectly legal and ethical.

Collecting the Buyer's Broker's Fees

There is no legally preferred method for the payment of buyer's broker's fees. A buyer's broker's fee may be paid by the buyer, the owner or seller (if authorized in the WB-36), the owner or seller's agent (e.g., the listing broker, if authorized in the WB-36), or by a combination of these. These options all involve various pros and cons for the parties and the brokers.

Some brokers find that things may go more smoothly if the listing broker pays the buyer's broker's fees as a commission split. That way, there is generally no need to restructure the transaction to accommodate the payment of the fee. If the listing broker can or will not pay the buyer's broker's fee, the buyer may then seek payment from the seller. In other situations such as a FSBO transaction, the buyer may have to directly pay the fee if the seller declines to do so. The buyer's broker may receive part of his or her fee from the buyer and part from the listing broker or seller.

Company policy cannot dictate the buyer's approach when it comes to the payment of the buyer's broker's fee. The buyer is the one who is ultimately responsible to pay the buyer's broker's fee and therefore is entitled to choose

the most effective manner of assuring that the fee is paid. However, the buyer is concerned first and foremost with purchasing the property. The buyer's agent should serve the best interests of his or her client by assisting the buyer in achieving both goals as expeditiously as possible.

Buyer Pays Buyer's Broker's Fees

The buyer may choose to simply pay all or part of the buyer's broker's success fee out of pocket as an additional cost of his or her purchase. This may happen in some FSBO transactions when the buyer drafts the offer to provide for the seller to pay the buyer's broker's fee and the seller declines.

▶ **PROS AND CONS:** The buyer is generally better off if the listing broker or the seller pays the buyer's broker's fee because otherwise the buyer's broker's fee may become an additional purchase expense for the buyer, increasing the buyer's overall cost of acquisition. If the buyer pays the fee and there is a listing broker in the transaction, the listing broker may benefit by receiving a commission that was originally intended to compensate both the listing broker and a cooperating broker.

Listing Broker Pays Commission Split

A commission split from the listing broker may arise from the buyer's broker's acceptance of the listing broker's offer of cooperation and compensation made through the MLS, from a policy letter agreement between the listing and buyer's brokers, or by a specific compensation agreement that the two brokers have entered into for the particular transaction. Payment in these situations is dependent upon the buyer's broker meeting the standard of performance that must be met before the buyer's broker is entitled to compensation. In the MLS, that standard is procuring cause.

► **PROS AND CONS:** Payment by the listing broker benefits the parties because they are not directly involved and do not have to make any additional payments or monetary concessions. This is a familiar process for the brokers and generally works smoothly unless there is a dispute over whether the buyer's broker has met the applicable standards entitling him or her to the offered compensation.

► **PROS AND CONS:** If a dispute arises, it is generally handled through local board arbitration if the parties themselves cannot find a solution. The drawback for the brokers is that they must contend with the strain and expense of going through the local association's mediation and/or arbitration process. Even if the buyer's broker prevails, payment of a success fee may be delayed several months. The drawback for the buyer may be that if the buyer's broker has failed to meet the performance standard entitling him or her to compensation from the listing broker, then the buyer will have to pay the buyer's broker.

Seller's Payment of Buyer's Broker's Fees

The buyer may draft his or her offer to purchase to provide for the seller to pay all or part of the buyer's broker's fee. For example, this may happen if the compensation offered by the listing broker is less than the amount of compensation due to the buyer's broker under the WB-36.

This also may happen if the buyer's broker anticipates a procuring cause dispute. If a buyer who is party to a WB-36 has been working with seller's agents in locating a property yet returns to the buyer's broker to have him or her write the offer, the buyer's broker may fear that the seller's agent the buyer worked with will claim procuring cause. If the seller pays the fee, the issue of procuring

cause will likely be avoided because the seller's contractual obligation to pay the buyer's broker's fee is not subject to procuring cause unless it is specifically stated in the offer.

SOP 16-16 indicates that REALTORS® may not use the terms of an offer to purchase to attempt to modify the listing broker's offer of compensation to subagents or buyer's brokers. It also forbids the submission of an offer contingent upon the listing broker's agreement to modify the offer of compensation. For example, a buyer's broker may not submit an offer which is contingent upon the listing broker reducing the commission received from the seller by the amount offered to subagents on the MLS, and contingent upon the seller paying the buyer's broker's fee. This would violate Article 16 of the Code of Ethics.

A buyer may, however, ask the seller to pay the buyer's broker's fee as part of the terms and conditions in the offer to purchase. This payment would become a seller's expense paid at closing from the seller's proceeds. This payment by the seller is an economic adjustment only and does not create an agency relationship between the seller and the buyer's broker. It is similar to the case when the buyer's offer provides for the seller to pay the buyer's mortgage points or closing costs, except in this case, the expense being paid is the buyer's broker's fee. Because this request for payment is made between the parties to the offer – by the buyer to the seller – there generally will be no Article 16 violations. The brokers are not parties to this agreement because they are not the parties to the offer to purchase. This is not an agreement between the buyer and the listing broker or an agreement between the seller and the buyer's broker.

► **PROS AND CONS:** Payment by the seller benefits the buyer because the buyer will not have to pay the buyer's broker's fee as an additional

expense. Payment by the seller is an advantage to the buyer's broker because the buyer's broker does not have to meet a performance standard as a pre-condition to receiving the fee, and payment will typically be received immediately at closing. For the seller, on the other hand, this is an additional cost which decreases the seller's net proceeds. Accordingly, sellers who receive an offer with such a provision may react in various ways.

Seller Responses to Fee Payment Provisions

The seller must be permitted to make an informed decision regarding how to respond to a provision in the offer asking the seller to pay the buyer's broker's fees. The listing broker's job is to educate the seller about agency relationships and broker compensation alternatives, and to discuss the advantages and disadvantages of various options for the seller.

SOP 1-12 provides that, "When entering into listing contracts, REALTORS® must advise sellers/landlords of: 1) the REALTOR®'s general company policies regarding cooperation with and compensation to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities; 2) the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by the sellers/landlords may represent the interests of buyers/tenants; and 3) any potential for listing brokers to act as a disclosed dual agents, e.g. buyer/tenant agents."

The seller does not set the buyer's broker's fees, but may certainly choose what provisions are acceptable in the offer to purchase or other real estate acquisition contract. The seller is entitled to negotiate whatever is in his or her best interests, and is not bound by the listing broker's or buyer's broker's compensation preferences or policies.

The seller may agree to a provision in the offer to purchase asking the seller to

pay the buyer's broker's fee if the seller is anxious to sell the property. The seller may counter out the fee provision if the seller is confident that other good offers will be received. The seller may agree to pay the fee and ask the listing broker to reduce his or her commission by a like amount. The seller also may counter the offer to increase the purchase price, counter the offer to delete the fee provision and try to convince the buyer's agent to accept the compensation offered by the listing broker, or the seller may make some other response.

◆ *Seller Just Pays Buyer's Broker's Fees*

The seller may just agree to pay the buyer's broker's fee if the seller is worried about losing the offer or must sell immediately due to an emergency situation.

▶ **PROS AND CONS:** Payment by the seller benefits the buyer because the buyer will not have to pay the buyer's broker's fee as an additional expense, but it causes the seller to pay an additional cost, decreasing the seller's overall net proceeds. Payment by the seller is an advantage to the buyer's broker who does not have to meet a performance standard as a precondition to receiving the fee, and payment will typically be received immediately at closing.

◆ *Seller Pays Fees and Listing Broker Reduces Commission*

The seller may agree to pay the buyer's broker fee and ask the listing broker to amend the listing contract to reduce the listing broker's commission by a like amount so that the seller will come out even. The seller does not want to pay, for example, a 6 percent commission to the listing broker plus 3 percent to the buyer's broker. If the listing broker agrees to reduce the commission to offset the seller's payment of the buyer's broker's fee, and a selling broker then arrives on the scene and claims to be procuring cause, it may seem that the

listing broker might end up with nothing. However, the Code of Ethics in SOP 17-4 may operate to protect the listing broker's remaining commission.

If a cooperating broker claims to be procuring cause in this type of situation, the matter may be addressed in local association arbitration. SOP 17-4(2) applies if the buyer's Broker B was paid by the seller, and listing Broker A has reduced the commission owed by the seller before the cooperating Broker C appears and claims to be procuring cause. Under SOP 17-4(2), Broker C may initiate arbitration directly against buyer's Broker B without having to involve listing Broker A. If cooperating Broker C does bring arbitration against listing Broker A, Broker A can name Broker B as an additional party without having to go through the consolidation process. If cooperating Broker C does prove that he or she is procuring cause, the compensation paid to buyer's Broker B may be awarded to cooperating Broker C, with listing Broker A keeping the reduced commission they received from the seller.

▶ **PROS AND CONS:** This approach is disruptive for the seller and the listing broker who have to modify the listing contract, but the seller is pleased to have no net impact on his total proceeds. The listing broker would usually prefer to directly compensate the buyer's broker and have the compensation subject to procuring cause. The buyer's broker will typically enjoy this outcome, however, the fee he or she receives from the seller may be challenged if another broker can prove he or she is procuring cause.

◆ *Counter the Offer to Increase the Purchase Price*

When a seller is asked to pay the buyer's broker's fees as a condition in the offer to purchase, some sellers may choose to counter the offer and increase the purchase price to cover the buyer's broker's

fees and preserve the seller's net proceeds. For example, a seller receives an offer for \$200,000 conditioned upon the seller paying the buyer's broker's fees in the amount of \$5,000. The seller may choose to counter at \$205,000 if the seller's desired sales price is \$200,000.

▶ **PROS AND CONS:** Payment by the seller benefits the buyer's broker, who receives his or her payment, and the listing broker, who receives what some may consider to be a windfall: a commission that may have contemplated compensation for both the listing broker and a cooperating broker. The seller's proceeds are substantially protected although the slight distortion of the purchase price will result in slightly higher costs for financing, transfer fees, percentage commissions and fees, insurance, and title insurance. The buyer essentially ends up paying the buyer's broker's fees via the increase in the purchase price.

◆ *Counter Out Buyer's Broker's Fee Provision*

The seller may counter the offer to delete the buyer's broker's fee provision and try to convince the buyer's agent to accept the compensation offered by the listing broker. This action is often intended to avoid adjustments to the listing contract and the offer and to try to place the buyer's broker in the procuring cause arena where only the broker who procured the buyer will be paid. The seller may be willing to counter out the fee provision if the seller is confident that other good offers will be received.

▶ **PROS AND CONS:** The seller might risk losing the buyer by countering the fee provision in the offer, but that assumes that the buyer does not really want the property or is unwilling to find a different way to pay the fees. The buyer and the buyer's broker may have to consider whether other payment arrangements

may be acceptable. Countering the fees payment provision preserves the monetary parameters planned for by the seller and the listing broker as to price range, seller's net proceeds, and compensation to the cooperating broker.

◆ ***Reduce Purchase Price***

If the seller resists paying the buyer's broker's fees, the buyer may make an offer based upon a net purchase price, that is, a price computed by deducting the amount of the buyer's broker's fee from the price the buyer would otherwise offer. This may cause the seller and listing broker to adjust the listing commission.

▶ **PROS AND CONS:** The buyer basically comes out even when the buyer pays the buyer's broker's fees but reduces the price by the same amount. The seller is receiving less money and the seller's net proceeds will be diminished unless the listing broker reduces the commission due by the same amount. This is viewed by some as undesirable because it distorts the actual purchase price for purposes of financing, transfer fees, percentage commissions and fees, insurance, and title insurance.

Legal Hotline Questions & Answers – Buyer Agency Compensation

The following questions concerning buyer agency compensation were asked of the WRA Legal Hotline.

▣ **Seller Pays Buyer's Broker Fee**

The seller received an offer drafted by a buyer's agent. The offer included an addendum asking the seller to pay the buyer's brokerage fee and rejecting the MLS offer of compensation. Can a buyer's broker's compensation be addressed in this manner in an offer to purchase?

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 National Association of REALTORS® (NAR's) Case Interpretation #16-12. 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. However, the buyer's broker must have been authorized by the buyer in the WB-36 to accept compensation from the owner or the owner's agent to comply with § RL 24.05(1).

▣ **Fee Negotiation**

An offer was received from a buyer's broker. The property is currently listed at a 6 percent commission with a 50 percent split to cooperating agents. In Addendum A it states that the buyer's broker rejects any offer of compensation offered by the listing broker and that the seller agrees to pay at closing, on behalf of the buyer, the buyer's broker fee equaling 3.5 percent of the final sales price. After a couple of counter-offers, negotiations are at a standstill. The listing broker maintains that the seller can dictate the buyer brokerage fee or get the buyer's broker to change the fee. The buyer's broker does not agree – he suggests that the seller just increase the price. How to proceed?

This is a matter of negotiation. The seller can (a) choose to accept the provision for the buyer's broker's fee and cover it out of the sale proceeds, (b) accept the provision for the buyer's broker's fee and ask the listing broker to amend the listing contract to reduce the listing broker's commission, (c) counter out the provision for the buyer's broker's fee, (d) offer to pay a different amount to the buyer's broker, (e) raise the purchase price to cover the requested fees, and/or (f) make some other response. The seller cannot dictate the buyer's broker fee because that is set in the buyer agency agreement, but the seller can choose what he or she wants to agree to during offer negotiations.

▣ **Waiving Off the MLS Compensation**

A broker has a listing and buyer agency

compensation in MLS is 2.4 percent. The buyer's agent has written in the offer that the seller agrees to pay the buyer's agent 2.4 percent of the purchase price. Is this in addition to the 2.4 percent that the listing broker is offering in the MLS?

Yes. The buyer's agent may receive 2.4 percent from the seller and 2.4 percent from the listing broker for a total of 4.8 percent. Even if that is not what the buyer's broker intended, it is always best to clarify this in writing. The proper procedure would be for the buyer's broker to contact the listing broker and express, in writing, that the buyer's broker is waiving off the compensation offered in the MLS.

▣ **Additional Compensation**

May a buyer's broker draft an offer to purchase that requests the seller to pay an additional percentage of the sales price to the broker's company at the time of closing and still receive the compensation paid by the listing broker via the MLS?

An agent may receive commission from multiple sources. The WB-36 buyer agency agreement may be negotiated so the buyer will pay the buyer agent a success fee. This amount may be reduced by amounts the broker receives from the seller or the listing broker. If the success fee is in excess of the amount paid by the seller and the listing broker, the buyer will be obligated to pay the remainder of the success fee.

Buyer's brokers should be clear when drafting offer to purchase provisions to specify whether the amounts being paid pursuant to the offer are in addition to – or in place of – the compensation offered by the listing broker. The buyer's broker should advise the listing broker directly if the buyer's broker is waiving off the compensation offered by the listing broker.

▣ **One-Party Listing Not Necessary**

An agent is working as a buyer's agent on a FSBO transaction. Can the agent

require the seller to pay a fee directly? Should the agent enter into a one-party listing?

§ RL 24.05(1) provides that a real estate licensee may accept a fee or compensation related to a transaction from a non-client with prior written consent of all the parties. A buyer's agent may provide real estate brokerage services for the seller in a FSBO transaction. Because agency authority is created by the WB-36, it is not necessary to enter into a one-party listing with the seller in order to negotiate with a FSBO seller. Arguably it is not in the seller's best interest to create a multiple representation. Depending on the facts, to enter into a one-party listing just to negotiate commission from the seller arguably may place the agent's interest ahead of that of the parties to the transaction.

▣ **Limited Service/MLS Compensation**

A buyer's agent writes an offer on a property that has a For-Sale-By-Owner (FSBO) sign in the front yard but is listed in the MLS with a limited-service broker. Can the agent write in the offer that he would like a higher commission to be paid by the seller on behalf of the buyer?

A buyer's agent may negotiate the buyer-agency fee in the WB-36 buyer agency agreement. The buyer may then negotiate the offer to purchase to have the seller pay the buyer-agency fees on behalf of the buyer. Whether a buyer's agent might be able to negotiate directly with the seller depends on the terms and conditions of the listing. With the listing broker's consent, a buyer's agent may negotiate with the seller directly and enter into an agreement to provide non-brokerage services to the seller for a fee.

Buyer Agency and Procuring Cause

Buyer's brokerage does not trump procuring cause. The NAR Code of Ethics and Arbitration Manual, in

Appendix II to Part Ten – Arbitration Guidelines – Sample Fact Situation Analysis, provides the following example of a typical procuring cause arbitration scenario involving a subagent and a buyer's agent:

“Fact Situation

Listing Broker L placed a listing in the MLS and made an offer of compensation to subagents and buyer's agents. Broker S (a subagent) showed Buyer #1 the property several times, most recently two days before the successful offer to purchase was written by Broker B (a buyer's broker). At the arbitration hearing, Buyer #1 testified she was not dissatisfied in any way with Broker S but simply decided that "I needed a buyer's agent to be sure that I got the best deal."

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had remained in contact with the buyer on an ongoing basis; and whether Broker S's efforts were primarily responsible for bringing about the successful transaction. Unless abandonment or estrangement can be demonstrated, resulting, for example, because of something Broker S said or did (or neglected to say or do but reasonably should have), Broker S will likely prevail. Agency relationships are neither synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues. (Amended 11/99).”

For an in-depth discussion of procuring cause, see [Legal Update 02.04 \(www.wra.org/LU0204\)](#), particularly the Transaction Timeline on page 13.

Arbitrable Commission Disputes

Some buyer's brokers may encourage the buyer to ask the seller to pay the buyer's broker's fee if there is concern that another broker may be procuring cause or in order to avoid the delay and

inconvenience of a procuring cause dispute. This may be successful in the short run, but there is no guarantee that a cooperating broker or the listing broker won't pursue the cooperating commission in local association mediation or arbitration. If the other broker can prove procuring cause, the buyer's broker may lose the fee that was originally paid at closing.

SOP 17-4 defines certain non-contractual disputes as subject to the duty and privilege of arbitration. In the case where the seller paid commission to a buyer's broker pursuant to the offer to purchase, the listing broker reduced the amount of the commission due from the seller, and a second cooperating broker appears on the scene and claims to be procuring cause, the two cooperating brokers may arbitrate for the cooperative commission. (One was paid indirectly through the seller, and the other wants direct payment from the listing broker.)

• **SOP 17-4(2)**

SOP 17-4(2) provides that non-contractual disputes that are subject to Article 17 arbitration include situations “Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent.”

• **SOP 17-4(5)**

Previously, the interpretation of SOP 17-4 did not allow the listing broker to play the role of the second cooperating

broker and arbitrate against the first cooperating broker for the selling side of the commission. A new addition to SOP 17-4 permits arbitration in such situations to determine if the cooperating broker paid by the seller or the listing broker is procuring cause.

SOP 17-4(5) relates to situations where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, claims to be the procuring cause of sale or lease. In such cases, arbitration shall be between the listing broker and the buyer or tenant representative, and the amount in dispute is limited to the amount of the reduction of commission to which the listing broker agreed.

Legal Hotline Questions & Answers – Buyer Agency and Procuring Cause

The following questions concerning the interplay between buyer agency compensation and procuring cause were asked of the WRA Legal Hotline.

▣ **SOP 17-4(5)**

An agent met her customers at a new home site and showed them the listed home. The next day an agent from another company showed the buyers the same property and wrote the offer as a buyer's agent. When the buyer's offer indicates that the agent rejects the MLS offer of compensation and asks for the seller to pay a 3 percent buyer agency fee at closing, how does this get handled? How to proceed with procuring cause?

The offer to purchase should be timely presented to the seller in an objective and unbiased manner. The listing broker shall inform the seller of the advantages and disadvantages of the offer including the provisions relating to payment of the buyer agency fee.

Article 17 of the Code of Ethics allows for certain non-contractual disputes to

be arbitrated. According to the 2005 Code of Ethics and Arbitration Manual, if the seller agreed to pay the 3 percent in the offer and the listing broker reduced the listing commission by the same amount, the listing broker would be able to later arbitrate for the 3 percent under the newly adopted SOP 17-4(5).

▣ **Procuring Cause and Agency Disclosure**

Re: Buyer agency. If buyer agency is not disclosed when the agent makes the showing appointment and an offer is then written, is any compensation due the agent?

§ RL 24.07(8)(a) requires that a buyer's agent disclose his or her status upon first contact with the listing agent. A failure to make a timely disclosure of buyer agency, however, generally does not preclude compensation under a procuring cause analysis.

▣ **Procuring Cause as Contractual Standard**

A buyer's broker wants the offer to purchase to provide that the seller agrees to pay the buyer's broker fee on behalf of the buyer. The listing broker believes this is a problem because of procuring cause. If the offer contains this provision, can the offer be countered to say that this payment would be subject to procuring cause? Would this be an impermissible discussion of commission in the offer?

The seller may counter the offer to provide that the seller's obligation to pay the buyer's broker's fee is subject to procuring cause, as determined pursuant to local association arbitration standards. This may cause payment to the buyer's broker to be delayed if there is another agent claiming procuring cause.

A listing broker also may ask other brokers who are not in the MLS to sign policy letters agreeing to have all compensation determined and paid according to procuring cause standards.

▣ **Buyer Agency Does Not Equate with Procuring Cause**

A buyer looked at a property listed on the MLS with a co-broke agent, but now wants to hire another agent from a third firm as a buyer's agent. Can this agent work as a buyer's agent and earn the compensation offered on the MLS even though the co-broke agent introduced the property to the buyer?

The issues of buyer agency and procuring cause are independent. The agent may enter into a buyer agency agreement and work with the buyer as a client, but whether the agent will receive the compensation offered on the MLS will depend upon procuring cause. Buyer agency does not trump procuring cause – the buyer's agent will not be procuring cause just because he has a buyer agency relationship. The buyer's agent can draft the offer, but the buyer may end up paying the buyer's broker's fee directly to the buyer if the buyer's agent is not procuring cause.

Before the buyer enters into the buyer agency agreement, the agent should explain to the buyer that choosing buyer agency may increase the cost of the transaction for the buyer – the buyer may have to pay the buyer's broker's fee in addition to the customary transaction costs. Failure to explain this to a buyer client is arguably a failure to disclose material information in violation of Wis. Stat. § 452.133 and may cause a violation of SOP 1-4 if the buyer is misled regarding the savings and other benefits of buyer agency.

Conclusion

REALTORS® should carefully educate their clients about the agency and compensation issues they may encounter in real estate transactions so that those clients can make informed decisions. Brokers should make sure that they are properly authorized to perform the job the buyer wants done. Buyer agency is an extremely effective business model when it is used responsibly as a tool for buyer representation in a transaction.

WRA Calendar of Events

Pre-License

October 10-13, 2005, Broker, Madison
November 7-10; 14-17, 2005, Sales, Madison
January 16-19, 2006, Broker, Milwaukee

Real Estate Continuing Education

October 4, 2005, 2005-2006, CE3, Janesville
October 4, 2005, 2005-2006, CE1 & 2, Appleton
October 6, 2005, 2005-2006 CE 1 & 2, Madison
October 6, 2005, 2005-2006 CE 1 & 2, Brookfield - WICPA
October 10, 2005, 2005-2006 CE2 (commercial), Madison
October 11, 2005, 2005-2006 CE3 & 4A, Appleton
October 18, 2005, 2005-2006 CE1 & 2, Green Bay
October 19, 2005, 2005-2006 CE1 & 2, Richfield
October 20-21, 2005, 2005-2006 CE1, 2, 3 & 4A, Mosinee
October 25, 2005, 2005-2006 CE3 & 4A, Green Bay
October 26, 2005, 2005-2006 CE3 & 4A, Richfield
November 2, 2005, 2005-2006 CE3 & 4A, Madison
November 3, 2005, 2005-2006 CE4A, Janesville
November 9, 2005, 2005-2006 CE 3 & 4A, Brookfield - WICPA
December 1, 2005, 2005-2006 CE 2 & 1, Madison
December 7, 2005, 2005-2006 CE 2&1, Brookfield - WICPA

Sales and Marketing & Management

October 19-20, 2005, QuickStart Module 1 & 2, Madison
October 26-27, 2005, ABR Course, Eau Claire
November 3-4, 2005, QuickStart Module 3 & 4, Madison
January 23-26, 2006, GRI Course 2, Lac du Flambeau
January 25-26, 2006, Lac du Flambeau
February 21-24, 2006, GRI Course 2, Madison
February 21-24, 2006, GRI Course 3, Madison
February 23-24, 2006, RS201, Madison
February 23-24, 2006, RS202, Madison
February 22-23, 2006, ABR, Madison
February 21, 2006, ABR Elective, Madison
February 23-24, 2006, RLI Tax Deferred 1031 Exchanges, Madison
February 21, 2006, CRS Elective - Earn More. Work Less by Russer
February 22, 2006, CRS Elective - Bridging the Marketing Generation Gap
February 23, 2006, Property Management - REM101
February 24, 2006, Property Management - REM102

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