

BUYER AGENCY PRIMER

Hello Michigan Realtors® and welcome back to Letter of the Law, a monthly video series designed to provide a primer on various legal issues impacting your industry. I'm Brian Westrin and today's legal primer will be on the topic of Buyer's Agency.

Many would argue that the potential liability of a buyers' agent greatly exceeds the potential liability of a listing agent. Buyers are looking for help with what, for many of them, is the largest financial transaction of their lives. Their needs are typically very simple and straightforward: They are looking for their dream home in the perfect neighborhood in the perfect condition at the lowest possible price. The home should have no title issues, structural issues or environmental issues. They want to make sure that their loan is on the best available terms, that the closing takes place as scheduled and that the home is in spotless condition when they take possession. Oh, and if they have an existing home, the closing on the purchase of their new home must dovetail perfectly with the sale of their existing home.

The buyers' agent, on the other hand, may work with buyers over many months or even a year for no compensation whatsoever. Regardless of the number of hours he or she puts in, the buyers' agent will get paid if and only if the buyers actually close on the purchase of a home and then only if the buyers' agent is, in fact, the "procuring cause" of the sale. Today's legal primer is intended to help navigate the numerous pitfalls faced by a buyers' agent.

First and foremost, in order to protect themselves, buyers' agents should always use a written buyer's agency contract that does the following:

- (1) establishes your role as a real estate agent and makes clear that you are not providing service as an inspector, appraiser, attorney, environmental expert etc.;
- (2) advises the buyers as to what will happen if another buyer you represent becomes interested in the same home;
- (3) advises the buyers as to what will happen if they become interested in a home that you (or your firm) have listed;
- (4) if you are a designated agency office, keeps the buyers from having an agency relationship with every other real estate agent in your office; and
- (5) if you end up in a procuring cause dispute with another agent, provides support for your case (but does not necessarily "win it").****

By law, buyers' agents must obtain a signed agency disclosure form from their buyer-clients (Form K). Remember, however, that this statutory form is not a substitute for a buyers' agency contract as it does not cover any of the issues that I have just listed. Buyers' agency forms are available online in MR's legal library (Forms J, JJ, U and UU).

Keep in mind that you should establish your agency relationship in writing with the buyers at the earliest possible opportunity. This is particularly critical if you are a designated agency office. The longer you work with a buyer before you get a designated agency contract signed, the more likely it is that your client will be deemed to have an agency relationship with every agent in your firm. This could easily result in an undisclosed dual agency situation which could mean, at a minimum, the forfeiture of your right to a commission.

Customarily, buyer's agents do not get paid by the buyer-client, but instead get paid by the listing office via the offer of compensation through the MLS. In order for a buyer's agent to get paid:

- (1) The buyer's agent must be a member of the particular MLS where the offer is being made. If this is not the case, the buyer's agent needs to enter into a compensation agreement with the listing agent (or the FSBO) before the purchase agreement is signed.
- (2) The transaction must actually close. If your buyer does not purchase the home for any reason, you are not entitled to the commission offered by the listing agent through the MLS.
- (3) If challenged by another agent, you must be able to establish that you, rather than the other agent, were the "procuring cause" of the transaction.

When two Realtors® each claim to be entitled to the cooperating split, the dispute is settled via an arbitration proceeding based on the National Association of Realtors®' "procuring cause" guidelines. It is generally not relevant which Realtor® the buyers think should get the commission split. The arbitration system is based on the premise that no one -- not a lawyer, not a judge nor even the parties to the transaction -- is better able to determine who is deserving of the cooperating split than an impartial panel of your Realtor® peers. There are no hard and fast rules for a "procuring cause" analysis, but a whole list of factors to be considered, and the decision is necessarily based on the subjective opinion of the panel. Briefly summarized, a "procuring cause" determination looks at which Realtor®'s efforts are "the foundation on which the negotiations resulting in a sale are begun." If the buyers changed Realtors® mid-transaction, the panel will try to determine whether this was the result of something the first Realtor® did or did not do, or whether the second record Realtor® interfered with the relationship. A complete list of the factors to be considered in a "procuring cause" dispute is available on NAR's website.

Final Thoughts

One last issue that we should mention is dual agency. In a designated agency office, dual agency happens if the same agent represents both the seller and the buyer. In a traditional agency office, dual agency happens if the same firm represents both the seller and the buyer. In either instance, you will need the written, informed consent of both the buyer and the seller. While some licensees use the agency disclosure form for that purpose, we recommend that Realtors® use an actual dual agency agreement (Forms P or PP) as it provides a better record that the consent given was informed consent. If you do not get the written, informed consent of both parties, you will forfeit your right to a commission, whether or not either party was actually harmed by the dual agency situation.

If you become a dual agent, remember that you must remain neutral at all times. For example, you cannot advise either party as to price, even if the price you establish is what you perceive to be a fair middle ground. Perhaps the primary focus of a dual agent throughout the transaction should be the obligation of confidentiality owed to both sides of the transaction.

As always, thank you for tuning in and watching this legal video primer. Based on the number of views, the topics you all have been submitting seem to be generating an avid viewership for this series. If you have questions or would like to suggest topics for future videos, please send suggestions to the email below. As an aside, all of the forms referenced in this video are linked below the transcript of the video. Again, thanks for watching and see you next time.