

# What to Do if the Listing Broker Offers a Minimal Commission

by Barry S. Goodman, Esq., NJAR Counsel

**W**hat can you do? The listing broker only offers a "minimal" commission to you, as a buyer's agent. Can you negotiate the offer with the listing broker? How about negotiating with the seller? Should your buyer negotiate the offer? Can you offer a reciprocal minimal commission to that broker on your listings?

There are many legal, ethical and practical issues you, as a buyer's agent, must consider in such situations. Understanding your options and obligations for dealing with this situation will maximize the likelihood of your being paid the commission you expected and minimize the possibility of a lawsuit, an ethics complaint, or of the Real Estate Commission (REC) sanctioning you for improper conduct.

## What Legal Standards Apply?

It is important for buyer's agents and listing agents to know what duties they have regarding commission splits under REC regulations. The starting point for any discussion is to keep in mind that you, as a buyer's agent, have a fiduciary duty to the buyer. Of course, the listing agent also has the same fiduciary duty to the seller. In fact, REC regulations require that each licensee "protect and promote, as he would his own, the interests of the client or principal he has undertaken to represent."<sup>1</sup>

In addition, the REC requires that, "[u]nless directed not to do so in writing by an owner... every licensee shall fully cooperate with all other New Jersey licensees, utilizing cooperation arrangements which shall protect and

promote the interests of the licensee's client or principal."<sup>2</sup> An exception is, if the seller, "with full knowledge of all relevant facts, expressly relieves the listing broker from one or more of those requirements in writing."<sup>3</sup> Thus, absent such a written waiver by the seller, the listing broker has a duty to fully cooperate with you as a buyer's agent under REC regulations.

Listing agents also are required to include in the written listing agreement the precise commission splits that will be offered to other brokers so that the seller will know what commission is being offered to buyer's agents.<sup>4</sup> However, a listing broker is not prohibited "from varying his commission split policy with respect to any one or more selling brokers in order to achieve equality of commission splits with such other selling broker or brokers in connection with their commission split policy with such listing broker."<sup>5</sup>

## Is NAR'S Code of Ethics Applicable?

The Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® (NAR) also significantly affects what can and cannot be done by you as a buyer's agent and by the listing broker. For example, REALTORS® must advise sellers when they enter into a listing agreement about the REALTOR®'s policy regarding cooperation and the amount of any compensation that will be offered to buyer's agents or transaction brokers.<sup>6</sup>

The Code's Standard of Practice 16-16 is of particular importance with regard to this issue. It specifically prohibits a REALTOR® from using the terms of an offer to try to modify the listing broker's offer of compensation. It also prohibits a REALTOR® from making the submission of an executed offer contingent on the listing broker modifying his/her offer of compensation.<sup>7</sup>

However, keep in mind that the Code of Ethics only applies to the activities of

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REALTORS® and not to the conduct of buyers (or sellers).

### What Are Your Options?

Based upon New Jersey law and the Code of Ethics, there are at least six options for dealing with a listing broker who only is offering a minimal commission. The key to choosing which of these options is in the best interest of your buyer is to have an agreement, preferably in writing, with the buyer at the beginning of your relationship after you have fully explained the ramifications of each option. In this way, the issue of a minimal commission split to you will not come as a surprise to the buyer or be a problem if it arises.

Your options when faced with a minimal commission offer include at least the following:

1. The buyer can include in a written offer to the seller that the seller will pay

your full commission. Note that only the buyer, not you, can decide to include this in the offer. It only should be included in the offer where the buyer has provided informed consent, which would include your explaining to the buyer how such a term will affect the offer.

A quick example will show how the offer will be affected. Let's say that your buyer is submitting a \$400,000 offer and that you and the buyer have agreed that you will be paid a 3% commission. However, the listing broker only is offering a 1% commission to buyer's agents. As a result, if the \$400,000 offer includes the seller paying your 3% commission, the offer in effect will be \$8,000 less ( $\$400,000 \times 2\% = \$8,000$ ) than another offer for \$400,000 that does not include that the seller will pay an "extra" 2% to the buyer's agent.

2. The buyer can agree to pay your commission or any part of it that the seller does not pay. This preferably would have been agreed upon in writing at the inception of your relationship with the buyer.

3. You can negotiate directly with the listing broker to be paid the commission you expected. However, you cannot place your interest in receiving the commission you expected above the interest of your client, the buyer. As a result, if your buyer wants to place an offer on the house, you must do so regardless of whether or not you are going to be paid your full commission at that point. This is why it is so important for you and the buyer to have agreed early in your relationship how

this compensation issue will be handled.

4. You can negotiate directly with the seller if the listing agent agrees or the buyer can negotiate directly with the seller. However, you should be careful about encouraging the buyer to directly negotiate with the seller since you are subject to ethical standards. It should be the buyer's decision to enter into such negotiations.

5. You can agree with the buyer that you will not show the buyer any listings where the listing broker is not offering the full commission that you and the buyer have agreed you will be paid. However, such an agreement should be in writing after the buyer has given his or her informed consent with full knowledge that this will limit the number of properties the buyer will be shown.

6. You simply can remove yourself from the transaction and let the buyer negotiate the offer directly with the listing broker or seller. If the commission split that is being offered to you is extremely low and you have not worked out with the buyer ahead of time how you will be paid in such a situation, this may be the most realistic choice. However, if you have come to an agreement with the buyer about your compensation in a timely manner, this option should never have to come into play.

### Can You Offer the Same Minimal Commission to the Listing Broker on Your Listings?

Do you have to offer the same commission to all buyer's agents? If you want to vary the commission for a specific broker on your listings, what steps must you take?

A broker has the right to unilaterally decide the terms on which he/she will deal with other brokers, consistent with the REC regulations and NAR Code of Ethics cited above and with the full knowledge of his/her client (preferably in writing). The key is that it must be a unilateral decision and not be a part of any agreement, conspiracy or other joint decision that could be considered to be a boycott or restraint of trade under the antitrust laws. You, therefore, should not make this decision in conjunction with any other broker.

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If you decide to vary the commission you will be offering in the MLS for a specific broker, you should advise that broker by sending him/her a letter. The letter should be sent by certified mail, overnight express or some other means that will provide you with evidence it was received. Do not copy the MLS or any other broker, person or association on the letter. The letter solely should be between you and the other broker so as to avoid any implication that you are encouraging others to make the same decision (remember, no group boycotts).

The letter should state the specific dollar amount or percentage you will be paying as a commission to the other broker, rather than simply saying that the commission will be "reciprocal" or the same as the other broker has in his/her listings. It also specifically should state that this amount is in lieu of the amount set forth in the MLS for all of your listings.

Finally, you must inform the seller for each listing you take that your policy is to

provide a lower commission to that broker and that this policy may limit the number of potential buyers who will submit an offer for the property. This preferably should be in writing, which can include having the seller sign the letter that you have sent to that broker.

### Conclusion

The key to avoiding any problems is to remember that you have a fiduciary duty to your buyer (as the listing agent must remember that he/she has a fiduciary duty to the seller) to place the buyer's interest over your financial interest. Problems with minimal commission splits will not arise if you have fully discussed this issue with your buyer before the issue arises. Whether you have an exclusive agency or not, it always is preferable to have your agreement with the buyer in writing in order to avoid any last minute problems when you finally locate your buyer's dream house. If you've earned your commission, and if you have taken the time to reach an agreement with the buyer at the beginning of your relationship, there is no reason why you should not be paid the full commission you were expecting. ■



Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for NJAR. He is a trial

attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders and partnership disputes.

1 N.J.A.C. 11:5-6.4(a).

2 N.J.A.C. 11:5-6.4(f).

3 N.J.A.C. 11:5-6.4(f)2.

4 N.J.A.C. 11:5-6.4(f)3.

5 N.J.A.C. 11:5-7.6. However, such a varying commission split policy cannot be directly or indirectly undertaken based upon "any punitive or retaliatory action against any other licensee(s) or such actions based upon the failure or refusal to adhere or to adopt any commission." *id.*

6 NAR Standard of Practice 1-12.

7 NAR Standard of Practice 16-16 provides as follows: "REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation."