

focus on: Legal Affairs

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LEGAL HOTLINE QUESTIONS - Commissions Q&A:



On the Legal Hotline we regularly receive questions concerning many topics of concern to REALTORS®.

The following are based on recent actual questions received through the Hotline. By no means are these the only issues of concern to members, so please let us know if you have any questions. The Legal Hotline is available to assist principal or managing brokers and their designated agents between the hours of 9 a.m. and 5 p.m., Monday through Friday.

Q Recently a transaction closed that one of my former salespersons had pended prior to leaving my firm and is now working through another real estate firm. May I pay the commission directly to the salesperson?

A Generally, under the Indiana Real Estate Commission Rule, a commission must be paid directly to the selling principal broker. See 876 IAC 1-1-20. However, if a salesperson has left an office, the salesperson's former principal broker may pay that former salesperson directly for any pending transactions that have closed rather than pay the salesperson's new principal broker. The former principal broker is not splitting a commission with the salesperson's current firm, but rather simply paying that portion or a part of that portion of the commission that the salesperson would have been entitled to receive had they remained with the former firm.

Q An agent with my company transferred to another brokerage. At the time of the transfer the agent had a listing that stayed with my company and was eventually sold. The listing did not have an accepted offer on it at the time of the transfer, but is scheduled to close soon. After the closing, can my former agent demand part of the commission for bringing the listing to my company? Do I have to pay that agent some commission?

A An agent's entitlement to a commission depends upon the terms of the independent contractor agreement or commission policy of the brokerage with which the agent is/was associated. The agreement or policy should cover commission issues when an agent leaves the company. Generally, most policies provide that a property must have an accepted offer on it when the agent transfers offices for the agent to have earned a commission on the transaction.

Q Is it true that, pursuant to Indiana law, agreements to pay a commission must be in writing for a broker/agent to receive compensation for his/her services?

A Yes. Enforcement of the common law right of a broker/agent to receive compensation for his/her services is limited in part by the Indiana requirement that agreements to pay a commission must be in writing.

Q A commission agreement does not have to be in writing if a listing broker has the cooperative commission posted on the MLS, does it? Isn't it true that another broker can rely on the cooperative amount offered in the MLS?

A Yes, but ONLY if the cooperating broker is a Participant of the MLS that has the cooperative commission listed in its system. In submitting a property to the Multiple Listing Service of a Board/Association of REALTORS®, the Participant of the Service is making blanket unilateral offers of compensation to the other MLS Participants, and shall therefore specify on each listing submitted to the Service, the compensation being offered to other MLS Participants. Specifying the compensation on each listing is necessary because the cooperating broker has the right to know what his or her compensation shall be prior to his or her endeavor to sell.

Q What if the agent who wants to show a property is not a Participant of the same MLS where the cooperative commission was offered?

A There must be an “up-front” agreement in writing to be paid a commission between the brokers since the cooperating broker does not have any participatory rights to a commission. Therefore, prior to showing the property, the listing broker and buyer broker need to sign an agreement as to what commission the buyer broker will receive. IAR has provided a form which may be used in this situation (Broker Compensation Agreement, Form #45).

Q My seller received an offer from a buyer represented by a buyer agent from another real estate firm. The purchase agreement included the statement “seller to pay buyer broker fee of 4% of the selling price.” Isn’t it illegal for a broker to use a purchase agreement to change the listing broker’s offer of compensation?

A It is unethical for a REALTOR® who is representing a buyer to use a purchase agreement to attempt to modify a listing broker’s offer of compensation through an MLS or other written offer. See Standard of Practice 16-16. However, a buyer who has an exclusive buyer agency contract with the buyer broker that requires the buyer to pay the buyer broker a fee, can negotiate with a seller to pay such fee, just as they can negotiate for the seller to pay any other costs of closing. In this situation the buyer is asking that the seller, not the listing broker, pay the buyer broker fee. This distinction is critical. See interpretation case #16-17 of the NATIONAL ASSOCIATION OF REALTORS® Standard of Practice 16-16, page 356 of the 2007 Code of Ethics and Arbitration Manual.

It is important to keep in mind that the goal for the listing agent and the cooperating broker is to sell the property and be fair to all parties in these situations. This may require renegotiation of commissions or splits if one is acting in the best interest of the parties involved.

Q If there is a first right pending after a listing contract expires, does the new listing company receive any portion of the commission on the first right if it is later exercised and a subsequent closing takes place?

A No. The new listing company is taking the listing subject to the pending first right until the time for that first right expires. Some brokers may wish to wait until the first right expires before entering into a subsequent listing contract particularly in the case of a strong offer so that they have no expenses involved in marketing the property if the first right is later exercised and closed. Nonetheless, many brokers are willing to take this risk in order to obtain the listing. It is a personal business decision for the broker.

Q Broker A lists a property at a commission of, say, 10 percent, and publishes the co-op commission in the local MLS, offering cooperating brokers 5 percent for finding a buyer. Broker B then finds a buyer and submits an offer which is accepted. At closing, Broker A informs Broker B that Broker B’s share will only be 4 percent. Is Broker B entitled to 4 or 5 percent?

A The correct answer would be 5 percent. Pursuant to the NATIONAL ASSOCIATION OF REALTORS® Standard of Practice 3-2:

REALTORS® shall, with respect to offers of compensation to another REALTOR®, timely communicate any change of compensation for cooperative services to the other REALTOR® prior to the time such REALTOR® produces an offer to purchase/lease the property.

NAR advises that the best professional practice is for Broker A to notify Broker B of any commission changes before Broker B even shows the property. However, REALTORS® may have to renegotiate their commissions on occasion to facilitate a successful transaction. In those situations, the best professional practice is for the listing broker and co-op broker to contact one another and discuss the situation honestly, in the best interest of selling the property and being fair to all parties. In fact, Standard of Practice 3-3 provides that a listing broker and cooperating broker are not precluded from entering into an agreement to change cooperative commission. □

Please remember that the Legal Hotline is available to assist principal or managing brokers and their designated agents between the hours of 9 a.m. and 5 p.m., Monday through Friday. The Legal Hotline can be reached at (800) 444-5472. Brokers may also send e-mail questions to legalhotline@indianarealtors.com or fax questions to (317) 842-8494.