

HEY - THAT'S MY BUYER!



The heat outside can cause tempers to flare.

Combine that with the recent market conditions and the amount of hard work that you REALTORS® put in, and you often get disputes among agents with regard to whom a buyer “belongs”. Over the past month there have been an unusually high number of questions concerning buyer side transactions and the commissions from them. The following scenarios are based on 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.

Over the past month I have gone out on at least 10 different showings with a couple. In fact, I showed them 2 houses the other day. When I called them today to see when they would like to look at more houses, I discovered they have already put an offer in on a property with another agent! According to the buyers, they saw a property they really liked (not one I had shown them) and they called the listing agent whose name was on the sign. The listing agent met them at the property within the hour and, at the request of the buyers, wrote up an offer for them that evening and it was accepted. I have spent so much time with these buyers that I am sure they are my buyers – aren't they? Didn't the listing agent violate the Code of Ethics by writing the offer?

Assuming you had no written agreement (i.e. Buyer's Exclusive Agency Contract), then no –they aren't YOUR buyers. Absent a written agreement or a procuring cause situation, you cannot claim a buyer to be yours. In fact, even an exclusive agreement with a buyer, does not always guarantee you will be entitled to commission if the buyer uses a different broker. As in the facts described above, the buyer is the one who initiated the dealing with the other broker so there would be no Code of Ethics violation. The Code of Ethics Standard of Practice 16-13 states, “[a]ll dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's representative or broker, and not with the client, except with the consent of the client's representative or broker or except where such dealings are initiated by the client. (see NAR Code of Ethics and Arbitration Manual, Interpretations of the Code of Ethics, Case #16-13: Dealings Initiated by Another Broker's Client).

What can I do to make sure I don't waste my time showing properties to buyers who then use another agent to purchase a property?

- The most important things you can do when you start working with a buyer are:
- 1) Always ask a prospective buyer whether he or she is working with another broker.
 - 2) Explain the concept of agency to a prospective buyer immediately upon working with them.
 - 3) Have the buyer sign an IAR Buyer's Exclusive Agency Contract (Zipform #15). Just as the Exclusive Listing Contract does with a Seller, the Buyer's Exclusive Agency Contract will ensure that you will get paid when the Buyer closes on a transaction.
 - 4) Never send your buyer client to other brokers with instructions for them to come back when they are ready to write an offer.
 - 5) Always try to accompany your clients to open houses. If this isn't possible, then give some of your business cards to the client and instruct them to present your card to the open house broker and let the broker know that they are working with you.
 - 6) Stay in close contact with your client.

My situation is very much like the first question except that the properties I had shown the buyers were in the same neighborhood as the one they ended up buying. Doesn't that mean I am due a commission?

No. These facts do not change the situation into one in which you would be due a commission.

My situation is very much like the first question except that, not only had I been working with these buyers, but I also have sold everyone in their families homes over the years. Therefore, I've known them since they were born and even attended their wedding. Doesn't my long running relationship with these buyer and their families mean that I get to represent them and collect my commission?

No. These facts do not change the situation into one in which you would be due a commission.


My situation is very much like the one in the first question except that the property the buyer's ended up buying was one of the properties I recently showed them. They went out on their own just to drive around and noticed the listing agent in the yard fixing the sign. When the buyers stopped at the property, the listing agent asked them if they wanted to go in. Although they explained that they had already seen the property once and would call me to see it again, the listing agent insisted that since he was there they should look at it because he is expecting an offer to come in any minute. Because the listing agent convinced them that it was urgent, my buyers said that felt that they needed to hurry and submit an offer and the listing agent was more than willing to do that for them. Is there anything I can do?

This question appears to have two separate elements:

- 1) Procuring cause issue. While there is no predetermined rule or standard that determines entitlement to an award of the commission, there is a set of guidelines for a hearing panel to follow when considering a procuring cause dispute. These guidelines are set out in Appendix II to Part Ten of NAR's Arbitration Guidelines. Of notable interest with regard to the above set of facts is Factor #4 which reads:

Panels will consider whether, under the circumstances and in accord with local custom and practice, the broker made reasonable efforts to develop and maintain an ongoing relationship with the purchaser. Panels will want to determine, in cases where two cooperating brokers have competing claims against a listing broker, whether the first cooperating broker actively maintained ongoing contact with the purchaser or, alternatively, whether the broker's inactivity, or perceived inactivity, may have caused the purchaser to reasonably conclude that the broker had lost interest or disengaged from the transaction (abandonment). In other instances, a purchaser, despite reasonable efforts by the broker to maintain ongoing contact, may seek assistance from another broker. The panel will want to consider why the purchaser was estranged from the first broker. In still other instances, there may be no question that there was an ongoing relationship between the broker and purchaser; the issue then becomes whether the broker's conduct or, alternatively, the broker's failure to act when necessary, caused the purchaser to terminate the relationship (estrangement). This can be caused, among other things, by words or actions or lack of words or actions when called for. Panels will want to consider whether such conduct, or lack thereof, caused a break in the series of events leading to the transaction and whether the successful transaction was actually brought about through the initiation of a separate, subsequent series of events by the second cooperating broker.

- 2) Possible violation of the Code of Ethics, specifically Article 16, Standard of Practice 16-14, on the part of the listing agent. This situation is closely aligned with the Case Interpretation #16-14 in NAR's Code of Ethics and Arbitration Manual. In the Interpretation, given very similar facts, it was noted that the listing agent's inducement of the buyer by emphasizing that the property might sell quickly (which may or may not have been true), coupled with the listing agent's offer to prepare the Purchase Agreement on the buyer's behalf, constituted an initiation of the dealing by the listing agent and not the buyer and, in that situation, a violation of Article 16 would most likely be found.



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