



You Work Hard For Your Money: Compensation Issues Explored

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10 Key Concepts in Short Sale Cooperative Compensation

1. The listing broker's contract for compensation is with the _____.
2. Assuming a listing is published in an MLS, the cooperating broker's contract for compensation is with _____.
- T F 3. While a short sale lender may have substantial leverage in negotiating the terms of approval of the short sale, the lender does not have the right to unilaterally change or dictate the terms of compensation between the listing broker and the seller and/or the listing broker and the cooperating broker.
- T F 4. The listing broker cannot unilaterally change the compensation to the cooperating broker after an offer to purchase has been submitted by the cooperating broker.
- T F 5. A short sale is defined for MLS rule purposes as "a transaction where title transfers, where the sales price is insufficient to pay the total of all liens and costs of sale, and where the seller does not bring sufficient liquid assets to the closing to cure all deficiencies."
- T F 6. An MLS must allow a participant to publish within their listing content whether a property is a potential short sale.
- T F 7. An MLS may require a participant to publish whether a property is a potential short sale.
- T F 8. An MLS may, as a matter of local discretion, allow participants to publish in their listing content how any potential reduction in cooperative compensation required by a lender will be allocated between listing broker and cooperating broker.
- T F 9. An MLS may, as a matter of local discretion, allow participants to publish in their listing content that cooperative commission will be paid on the net sales price rather than the gross sales price.
- T F 10. If an MLS allows participants to publish that cooperative compensation will be paid on the net sales price, "net sales price" is defined as the gross sales price minus seller concessions as that term is defined by the MLS or by state law.

Short Sale Arbitration Case Study

***NOTE:** This case study contains the use of several examples of amounts and percentages paid as commission in the transaction. These amounts and percentages are used strictly as examples and do not and are not intended to suggest, recommend or imply that there are any standard or "normal" commission rates or amounts. Commission rates and amounts charged to the public as well as amounts and rates shared with co-brokers via the MLS systems or otherwise are matters of independent determination by each listing broker and firm.*

- Broker Brenda, a REALTOR®-principal with Granite Group, REALTORS®, took a listing on a property at 3456 Rockstrewn Road.
- The seller's mortgage balance was \$260,000. Brenda's CMA indicated the best sale price they could hope for was about \$235,000 with a listing price of \$239,900
- The owner also told Brenda that they had no assets to cover the difference in the potential sales price and the mortgage balance, but they had talked with their lender and the lender indicated a willingness to consider reducing the balance due on the mortgage.
- From this information, Brenda knew she had a potential short sale. When Brenda entered the listing into the MLS, in the confidential agent remarks, she put this phrase: "Potential short sale subject to lender approval." The amount offered to co-brokers for cooperative compensation was stated at 3%.
- An offer was received from a buyer represented by Daniel, a REALTOR® principal of White Tree, REALTORS®, for a purchase price of \$232,000 and the seller's lender approved the sale.
- Five days before closing the buyer had a home inspection and submitted repair requests to the seller with a total cost of \$15,000.
- The buyer's lender allowed the \$15,000 to be escrowed at closing. The seller's lender was asked to accept a further reduction in the mortgage balance since the seller did not have \$15,000.
- The day before the scheduled closing, the lender accepted the additional reduction in the mortgage amount and stated that the brokerage commission would be reduced by \$5,000 to cover part of this shortfall and that the brokerage commission would be based on the net price of \$217,000 and not the gross price of \$232,000.

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- The next day, at the closing, Daniel arrived at the closing with his buyer and first received a copy of the HUD1 closing statement which showed the disbursement and distribution of the brokerage commission.
 - Total brokerage commission was shown as \$10,190.
 - The amount shown being paid to Daniel's firm was \$4,010
 - Brenda's firm was being paid \$6,180.
- Needless to say, Daniel was shocked to see this. He was fully expecting that he would be paid the amount shown in the MLS – that is 3% of the full sale price of \$232,000, or \$6,960 and he fully expected that he was being treated equally by Brenda in the division of the commission.
- He also felt like he had been put in a terrible position with his buyer ready to close. He called Brenda and asked her just what she was trying to do to him by not paying him what she promised in MLS and further by trying to take more of the commission that he got.
- Brenda bluntly told him that the lender determined the commission in this transaction since it was a short sale and that fact was fully disclosed to him in the MLS.
- Feeling like he couldn't be an obstacle to the closing for his buyer, he allowed the transaction to close without objecting to the commission payout.
- Thirty days after closing, Daniel filed an arbitration petition against Brenda and Granite Group, REALTORS® for \$8,120.
- He had calculated that Brenda must have had a commission of 7% in her listing contract and that he should receive half of that on the full sale price of \$232,000, or \$8,120.
- In his arbitration petition, Daniel stated that Brenda violated Standard of Practice 3-2 of the Code of Ethics because she had not timely communicated the change of commission prior to the time he produced the offer to purchase.

Short Sale Arbitration Decision

Based on the information, decide in your groups what amount of compensation you would award to the cooperating broker, Daniel.

Notes:

1. In all cases the Brokers and Agents involved are REALTORS®.
2. Individual state license laws may cause the scenarios to play out differently.
3. These are for educational purposes only and you are advised to check your state requirements for issues such as necessity for a buyer agency agreement, ability to rebate a client, etc.

Procuring Cause Case #1

Broker Connie had an Exclusive Agency listing with the Sellers. Broker Rob had shown the property previously to Mr. and Mrs. Byer and had researched taxes, schools and proposed zoning for the vacant lot behind the property. Rob is practicing in a state that does not require a written buyer representation agreement.

While Broker Rob was showing the property for the second time, Mr. Sellers came home and told Mr. Byer that there was something he wanted to show him in the garage. While there, Mr. Sellers told Mr. Byer to 'dump their agent' and 'come back tomorrow on your own' and they would sell the house to them at a considerably lower price – \$50,000 to be exact.

The Byers did - and after the closing Rob filed an arbitration request against Connie for his commission asserting that he was the procuring cause of the sale.

Connie was adamant that she didn't owe Rob anything because she had an Exclusive Agency listing and the seller sold it himself and that was allowed.

What do you think?



Procuring Cause Case #2

Broker Donna's buyer found a property on REALTOR®.com they wanted to see. It was listed by Broker Jack. Although it was out of Donna's marketplace, it was in her MLS so she made arrangements to show it.

Her buyer didn't like it but saw another one down the street that was also listed by Broker Jack although this one was not in Donna's MLS.

She called Jack and made arrangements to show it. The buyer bought it and when they went to the closing, Donna was waiting for her check and all she got was a hearty handshake and an "atta-boy".

Donna filed for arbitration asking for her commission as procuring cause. Donna was informed that it was not a mandatory arbitration and it was dismissed by the Grievance Committee - there would be no hearing.

Why?

What should Donna have done differently?



Procuring Cause Case #3

Buyer Bob had been looking at houses for months – with many agents. He saw Broker Barb's ad in the paper to buy with her and save a few dollars.

The arrangement with Barb was that she did not show property – she found listings in the MLS for Bob to see – he made arrangements to go see them – and she would write the contract for him when he found something.

He continued to look at property with the agents he had been using and found something with Broker Sam. Barb wrote and after the closing Broker Sam filed for arbitration against Barb claiming he was procuring cause.

The hearing panel found that Broker Sam was the procuring cause and has awarded him the compensation that was published in the MLS.

Barb is disputing the finding – saying she should not have to give the money back because she wrote the contract – and if she does have to - it shouldn't be **all** the commission since she gave some of it back to the buyer.

In your state – can you rebate the buyer?

How much does Barb owe? All or only what she had left after she rebated her buyer?

Now – fast forward to: Barb got nowhere with her appeals and subsequently went after the buyer for the commission he owed her since she had an Exclusive Buyer Agency Agreement with him.

Will Barb be successful in collecting commission from her buyer?



The Code of Ethics and Model MLS Rules - Short Sale Issues

Standard of Practice 3-2

To be effective, any change in compensation offered for cooperative services must be communicated to the other REALTOR® prior to the time that REALTOR® submits an offer to purchase/lease the property.

MLS Policy Statement 7.23:

Multiple Listing Policy Statement 7.23, Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of an Association of REALTORS®:

In filing property with the multiple listing service, participants make blanket unilateral offers of compensation to the other MLS participants and shall therefore specify on each listing filed with the service the compensation being offered by the listing broker to the other MLS participants. This is necessary because cooperating participants have the right to know what their compensation will be prior to commencing their efforts to sell. (Revised 11/04)*

The listing broker retains the right to determine the amount of compensation offered to subagents, buyer agents, or to brokers acting in other agency or nonagency capacities, which may be the same or different. (Revised 11/96)

This shall not preclude the listing broker from offering any MLS participant compensation other than the compensation indicated on his listings as published by the MLS, provided the listing broker informs the other broker in writing in advance of their producing an offer to purchase and provided that the modification in the specified compensation is not the result of any agreement among all or any other participants in the service. Any superseding offer of compensation must be expressed as either a percentage of the gross sales price or as a flat dollar amount. (Amended 11/95)

While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional (except where MLS rules create specific exceptions as specified elsewhere in this policy statement), a listing broker's obligation to compensate a cooperating broker who was the procuring cause of sale (or lease) may be excused if it is determined through arbitration that, through no fault of the listing broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the listing broker to collect a commission pursuant to the listing agreement. In such instances, entitlement to cooperative compensation offered through MLS would be a question to be determined by an arbitration hearing panel based on all relevant facts and circumstances including, but not limited to, why it was impossible or financially unfeasible for the listing broker to collect some or all of the commission established in the listing agreement; at what point in the transaction did the listing broker know (or should have known) that some or all of the commission established in the listing agreement might not be paid; and how promptly had the listing broker communicated to cooperating brokers that the commission established in the listing agreement might not be paid. (Amended 11/98)

The multiple listing service shall not have a rule requiring the listing broker to disclose the amount of total negotiated commission in his listing contract, and the multiple listing service shall not publish the total negotiated commission on a listing which has been submitted to the MLS by a participant. The multiple listing service shall not disclose in any way the total commission negotiated between the seller and the listing broker.

Note 1: *The compensation specified on listings filed with the multiple listing service by the participants of the service shall be expressed as a percentage of the gross sales price or as a definite dollar amount. Multiple listing services may, as a matter of local discretion, allow participants to offer cooperative compensation as a percentage of the net sales price, with net sales price defined as the gross sales price minus buyer upgrades (new construction) and seller concessions (as defined by the MLS unless otherwise defined by state law or regulation). The essential and appropriate requirement by a multiple listing service is that the information to be published shall clearly inform the participants as to the compensation they will receive in cooperative transactions unless advised otherwise by the listing broker in writing in advance of their producing an offer to purchase.*

Multiple listing services shall not publish listings that do not include an offer of compensation expressed as a percentage of the gross selling price or as a definite dollar amount, nor shall they include general invitations by listing brokers to other participants to discuss terms and conditions of possible cooperative relationships. (Amended 11/96)

Note 2: *Multiple listing services, at their discretion, may adopt rules and procedures enabling listing brokers to communicate to potential cooperating brokers that gross commissions established in listing contracts are subject to court approval ; and that compensation payable to cooperating brokers may be reduced if the gross commission established in the listing contract is reduced by a court. In such instances, the fact that the gross commission is subject to court approval and either the potential reduction in compensation payable to cooperating brokers or the method by which the potential reduction in compensation will be calculated must be clearly communicated to potential cooperating brokers prior to the time they produce an offer that ultimately results in a successful transaction. (Adopted 11/98)*

Note 3: *Multiple listing services must give participants the ability to disclose to other participants any potential for a short sale. As used in MLS rules, short sales are defined as a transaction where title transfers, where the sales price is insufficient to pay the total of all liens and costs of sale, and where the seller does not bring sufficient liquid assets to the closing to cure all deficiencies. Multiple listing services may, as a matter of local discretion, require participants to disclose short sales when participants know a transaction is a potential short sale. In any instance where a participant discloses a potential short sale, they may, as a matter of local discretion, be permitted to communicate to other participants how any reduction in the gross commission established in the listing contract by the lender as a condition of approving the sale will be apportioned between the listing and cooperating participants. All confidential disclosures and confidential information related to short sales, if allowed by local rules, must be communicated through dedicated fields or confidential "remarks" available only to participants and subscribers. (Amended 5/08)*