



TRAINING TIP OF THE WEEK

Ethical Considerations with Commissions and the REPC

Standard of Practice 16-16 reads: “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.”

How could a potential violation occur?

- Withholding an offer to purchase, first trying to obtain a signed commission agreement modifying the BAC.
- Having a Buyer prepared to write an offer, but first wanting to obtain a signed commission agreement modifying the BAC.***

Does this Standard of Practice allow the Buyer and Seller to address real estate agent commissions as part of the REPC? The answer is yes. The only thing that Standard of Practice 16-16 prohibits is using the terms of the offer to modify the listing broker’s offer of compensation, i.e., the BAC in the REPC.

EXAMPLE. Say the Listing Agent puts the Seller’s property on the MLS and is offering a 1.5% BAC. The Buyer’s Agent has a Buyer Broker Agreement with a Buyer that states that the Buyer will pay a total of 3% commission. Most Buyers do not want to pay out of pocket or do not have the funds to make up the difference between the BAC and the Buyer Broker Agreement.

An alternate way to address this (other than a commission agreement, which could violate Standard of Practice 16-16) is for the Buyer to submit an offer to the Seller that contains language that asks the Seller to pay the *Buyer’s Brokerage* a 1.5% brokerage fee.

Why is this permissible? The key is because the Buyer is asking the Seller to pay. This DOES NOT modify the BAC or the listing agreement between the Seller and listing broker. So if the Seller accepts this offer, then the Seller would be responsible to pay the Buyer’s Brokerage a 1.5% brokerage fee AND the listing brokerage would still be responsible to pay the BAC of 1.5%.

***It has been discussed that if your Buyer fully understands they could be liable for the additional BAC, and they instruct you to first obtain a commission agreement in writing, prior to writing an offer to purchase, then you MAY be protected by Article 3 of the Code of Ethics. It reads: “Realtors® shall cooperate with other brokers except when cooperation is not in the client’s best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker.” However, there are no NAR case studies at this time to support this.

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