

I wanted to take a few minutes of your time to chat about the Buyer's Brokerage Compensation.

As a quick reminder, traditionally there are two ways a Buyer's agent is paid; via the fee offered by the Listing Brokerage (posted on MLS®) or via an Exclusive Buyer's Brokerage Representation Agreement where the Buyer takes care of the fee. More recently business models have developed in which the Seller will undertake to pay a fee directly to the Buyer's Brokerage on closing rather than do this through their Listing Brokerage.

Recently, an article was published through AREA's "Practically Speaking" blog that discussed this [\(you can find it here\)](#) and offered some advice on how to possibly address the topic through adding terms to the offer to purchase by which the Seller can then assume the Buyer's obligations contained in their Buyer's Brokerage Representation Agreement for compensation to their Agent. There were some good points raised in the article that explains the process of compensation to the public and offers a possible solution for Buyers when faced with the need to pay their agent. I would like to provide a bit more fulsome discussion to Members that puts some context with regards to the contracts in question and then highlights a few potential pitfalls and things to consider when looking for a solution.

Apologies ahead of time I probably exaggerated when I said "...take a few minutes ..".

Firstly, the BEST piece of advice I can give a member when asked about this topic is: Call your Broker!

So let's start with a refresher; all contracts regardless of brokerage type – Common Law or Designated Agency – are held by the Brokerage, so your Brokerage may have specific policies in place on how any commission agreement needs to be entered into or modified. Finding out about your office policies and/or speaking to your Broker before adding something into a legal binding contract can save a lot of headaches later. A great point is raised by Allison Kimmins, Manager of Member Practice at the Calgary Real Estate Board in a conversation we had on adding fee agreements to offers to purchase:

".. if there is a problem with the seller holding up their end of the term, the remedy to attempt to collect this falls squarely on the Buyer to take legal action against the Seller for failure to perform the contract (seems less than ideal to be putting that pressure on the buyers) because brokerages have no interest in that PC. It's also not ideal to make compensation part of a Purchase Contract because if the Seller finds out at closing they don't have the proceed of sales to pay out the new commission, the seller can't close, the buyer doesn't have a home and no one is getting paid, the whole transaction is in jeopardy, not just the brokerage compensation."

Allison points out a very real danger where, practically speaking, a solution to make one problem go away can create more critical, unintended issues downstream.

So, let's cut to the chase and talk about the "real world". First off as a Buyer's agent you need to have a written service agreement with every Client (even "Customers" need something in writing as an acknowledgement so there is no getting around paperwork). You have two choices, an Exclusive agreement where the client agrees to pay you, or a "non-exclusive" one where you are agreeing to get paid from some other means (MLS® or elsewhere) that will be disclosed to the Buyer as part of the offering process. I would suggest that the majority of transactions still see the compensation come from the Listing brokerage via their agreement with the seller; everything closes, moneys shuffle about and everyone goes about their business happy.

In those instances where this doesn't happen, there are two most likely scenarios; there is no fee offered by the Listing Brokerage, OR the fee offered is insufficient to offset the Buyer's obligations in their agreement with their Brokerage.

Regardless of the scenario, the first step is to be aware what your brokerage policy is on entering into any fee agreement. Your Broker will most likely have a policy and an approved form for use in these situations to protect your fee and your relationship with your Buyer. Keep in mind that RECA would most likely argue that your #1 priority in any transaction is your fiduciary duties to your client so, an action which is aimed at protecting your fee over protecting your client's interests may be looked at unfavorably in any investigation that arose from the transaction. Secondly, remember that the Buyer needs to be aware of how you are getting paid and this needs to be in writing. If your Brokerage doesn't have one, Web Forms provides a "Fee Disclosure" form to disclose in writing the manner of your compensation and the details.

Let's consider the second scenario above – the fee offered on MLS® by the Listing Brokerage is insufficient to cover the fee agreed to by the Buyer in your contract. There really are only three options:

- take what is offered on MLS® and waive the Buyer's obligation to make up the difference.
- have the Buyer honor the contract and pay you the balance on closing per the contract.
- find a means of getting the full fee from the Seller either by assuming the full obligations of the Buyer's Brokerage Contract (as suggested in the AREA article) or seeking a fee amendment from the Listing Brokerage.

As noted earlier, there are some potential issues with the last option as it could hold up the contract between the Seller and the Buyer if any issues arose and, in the end, the Buyer would need to go to litigation if the Seller refuses to pay as the Buyer Brokerage has no standing in the Offer.

Also, consider the Harmonized Rules:

14.01 Fee Alteration and Payment Timeframe

The Seller's Brokerage shall pay the Buyer's Brokerage the fee as posted on the MLS® System at the time the offer was written and signed by the party who initiated the Purchase Contract. The posted fee shall not be altered during the course of negotiations without disclosure and agreement from the Buyer's Brokerage. Any changes to fees payable to either Brokerage will be in the form of a signed written agreement between the two Brokerages.

So, while on the surface, this rule protects the posted Buyer's Brokerage fee, by making it inviolable, the opposite must also be true; the Buyer's Brokerage cannot alter the offering to their benefit without mutual agreement either. Since the offering is part of the Listing Contract and is a subset of the full fee from the Seller to the Listing Brokerage, the alteration can only be done by the two parties to that contract – the Seller and their Brokerage – the Buyer's have no standing in that contract. If, for some reason the Seller agreed to a fee adjustment as part of the negotiations with the Buyer; it should be done as function of the Buyer's obligations to their contract with the Buyer Brokerage rather than as an imperative for the Buyer's agent to be paid in full. In other words, when writing up the reason for the change the phrasing needs to be less about you and more about your client, very similar to the wording used in the AREA article; the only alteration I would suggest is to separate the agreement from the offer.

I know what you are thinking by now “boy this is a lot of words to deal with someone agreeing to pay me a fee, why are you making this so complicated?”

Well, 10 years ago as a practitioner, I would have agreed with you and written the Offer to Purchase up with a condition in it to deal with the fee. With a willing Seller and willing Buyer and everything else going swimmingly I would have gotten paid. Today is no different, 95% of the time everything works out, the parties understand the context and the end result desired, and everyone walks away happy.

Articles such as this are meant to raise awareness of what can go wrong so that IF the deal you are working on falls within the 5% of trouble cases, you are prepared and can navigate safely through it. Simply removing the fee agreement out of the Offer to Purchase into a standalone document can help alleviate some of the potential pitfalls that could arise when things go sideways after the fact.

Remember these quick suggestions:

- Know your Brokerage policies and talk to your Broker if you have questions before entering into any “unique” agreements.
- Keep agreements solely between the parties to which they pertain to.
- Written disclosure is your best friend in any transaction
- Respect the relationship others have with their clients as much as you value your own.
- An apple a day may keep the doctor away, but great paperwork keeps RECA in Calgary!