

CODE COMPREHENSION

ARTICLE 16

Commissions are Negotiable



QUESTION:

There is a home in the MLS that I think my buyer client would love, but the commission being offered by the listing broker is lower than I want to be paid. It's so low that it won't cover the time or effort I put in to representing the buyer throughout the transaction. I want to do the right thing. **What can I do?**

ANSWER:

Since you believe that your buyer client would love the house, you have an ethical duty to show the listing to your client. But you have a few options to address the fact that the compensation being offered is inadequate. First of all, buyers and sellers can negotiate the commission paid to their brokers and agents at any time. When representing a buyer, you should consider using a buyer agency agreement that sets forth the services you will provide and establishes what compensation your client will be responsible for paying. Often, the buyer agency agreement explains that you will first seek to be compensated in the amount set forth in the listing, but that if that amount is inadequate, you will expect the client to make up the difference between _____ and the compensation provided by the listing broker. It is entirely up to you how you will fill in the blank. The buyer agency agreement is between you and your client, so you and your buyer can negotiate the terms of that agreement at any time.

Additionally, with one exception, you could ask the listing broker to negotiate the offer of commission. The one exception is that you may not submit an offer to purchase that is contingent upon an increase in the commission paid to you by the listing broker. An offer of that nature is thought to be inconsistent with your fiduciary duty to the client. This request can be made at any time during the transaction, even after showing the property or submitting an offer to purchase on behalf of the client.

You could also have a conversation with your buyer client about the commission being too low to cover your time and costs incurred in connection with representing that client. If your client so wishes, he or she could make the decision to condition the offer to purchase the property on an agreement by the seller to pay an additional specified amount. The buyer and the seller are the parties to any contract to purchase the listed property. They can negotiate the terms of that contract as they see fit. Just make sure that your client completely understands the pros and cons of submitting an offer with that type of contingency, and make sure not to pressure your client in any manner that is inconsistent with your fiduciary duty to that client.

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QUESTION:

Wait, doesn't Standard of Practice 16-16 prohibit me from negotiating my commission after showing, during the purchase offer phase, or after we have an accepted offer?

ANSWER:

Absolutely not! Except for the fact that you cannot make an offer to purchase contingent upon an increase in compensation paid to you by the listing broker, you can negotiate your commission with the listing broker at any time during the transaction. Standard of Practice 16-16 is designed to protect sellers and listing brokers from having purchase offers "held hostage" by cooperating brokers demanding a higher commission to be paid by the listing broker.

This Standard of Practice *never* prohibits negotiations between the listing broker and a cooperating broker at any time during the transaction. In fact, Standard of Practice 3-3 expressly authorizes the listing broker and cooperating broker to come to an agreement to change cooperative compensation, and that can happen before a property is shown, after showing, or even after an offer is accepted.

STANDARD OF PRACTICE 16-16 PROVIDES AS FOLLOWS:

“ 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. ”