

URBAN LEGENDS

My favorite current urban legend is the one where it is said that Bill Gates has a chain e-mail tracing program, and if you forward the chain email Bill will pay you \$1,000. Sorry folks, not true.

There is one rule of your profession that has, in my opinion, reached near urban legend status, and it is the one that says an agent cannot seek to modify the offer of compensation in the buyer's offer. Typically the problem with urban legends in general is that there is a hint of truth that makes them sound completely true. Our compensation urban legend arises chiefly from Standard of Practice 16-16 of the Code of Ethics, which says:

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.

Seems pretty clear does it not? No, not at all. While it is true that you cannot require, seek or make compensation a condition or requirement of the offer, it is absolutely untrue that your client cannot do so.

And we really do not need a special rule or Standard of Practice in order to say that this needs to be a client decision because that rule applies to *everything*. The client may well accept your advice and judgment about price, concessions, inspections, etc. but we would never say that you made the final decision about any of these things. You simply cannot, in this context or in any other, put your interest ahead of the client's interest – indeed that is the *sine qua non* of professionalism and agency.

Legal Corner

Let us assume then you have a written buyer brokerage agreement that calls for your buyer to pay you more commission than is offered by the listing broker. In such a case you have a duty to point this out to your client and explain options and consequences. So, with client permission and direction (which I would like to see you get in writing), how do you seek to modify the offer of compensation so your buyer does not have to pay?

First, you should call the other agent before showing the property, discuss the situation, and try to reach an agreement. If you are unable to reach an agreement beforehand, you may (again with client consent and direction) include a modification of the offer of compensation in your client's purchase offer as a requirement or condition of the offer. The listing agent is then obligated to disclose the offer to the seller, and they will evaluate the offer accordingly. It may well be, particularly in the current market, that the seller will agree to pay the commission you seek despite what the listing agent previously thought.

It is a closer case though, and probably an insurmountable one, if you do not have a written buyer brokerage agreement that calls for the buyer to pay you commission because what would be your justification for recommending your client seek compensation for you? How would we say you did not violate the Code of Ethics, and in many cases MLS rules, if that request is contained in the buyer's offer? This is just another reason why you should always have written buyer brokerage agreements.

By the way, I got my \$1,000 check from Bill Gates, and if you'll send me your email address and a law office referral I am told on very good authority Bill has a special email program that knows you did so and you will be qualified to inherit his fortune. Just sayin.

Please feel free to email or refer business to the author at bdlytle@lytlelaw.com (where I am a legend in my own urban mind). Of course, if you have any questions about this article or have a topic to suggest for a future article you may email me as well.

© Brian D. Lytle, Esq., Lytle Law, P.C. www.lytlelaw.com Reprinted with permission of the author. This article was originally published in the *Realtor Update*, a publication of the Virginia Peninsula Association of Realtors® The law may have changed since this article was written and published so caution is advised.

