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## Protecting Your Commission In An Off-MLS Transaction

By David Hamerslough

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Off-MLS transactions raise a number of issues and provoke strong opinions, including views as to their propriety and impact on the real estate industry. Irrespective of your position on these issues, the percentage of such transactions remains, over the last three years, between 19 and 26%.

Where the off-MLS transaction involves a single agent or a single brokerage, protecting your commission as a selling agent is generally not a concern, because control of the commission rests with the broker of record. However, protecting your commission as a selling agent in an off-MLS transaction in which more than one brokerage is involved is an issue in our current marketplace. This article identifies some of the issues you should evaluate if you find yourself in that situation.

The first issue to consider is that commissions are paid to and controlled by brokers, not agents. Identifying the broker who will be paying you a commission is the first step.

The second issue is the need for a broker-to-broker compensation agreement. While such agreements do not have to be in writing to be enforceable, the safer practice is to get it in writing. A written agreement can prevent disputes about the terms of compensation as well as how any disputes regarding that compensation will be resolved.

From a timing standpoint, my recommendation is that a written broker-to-broker compensation agreement be finalized before any offer is submitted rather than submitting the compensation agreement along with an offer. Prior to submitting any written compensation agreement, my suggestion is that you phone the listing broker and determine what policy, if any, that broker has regarding compensation for off-MLS

transactions and what compensation they are offering in a particular transaction.

The broker-to-broker compensation agreement should include (1) who will pay the commission (listing broker, seller, or both), (2) the amount of the commission that will be paid to the selling broker, (3) whether payment will require a successful close of escrow or, if not, under what other terms and conditions the commission will be paid, (4) whether the offer of compensation can be unilaterally altered or modified by the listing broker and, if so, under what circumstances (an issue that becomes significant when one recalls that the customary MLS rule on this point may not automatically be in place), and (5) how disputes regarding compensation be resolved (mediation initially and, if unsuccessful, Board arbitration, MLS rules and regulations, etc.).

These questions need to be asked because in an off-MLS transaction, the normal rules regarding commission disputes will not apply. The current PRDS and C.A.R. listing and purchase agreements, as well as the C.A.R. Cooperating Broker Compensation Agreement, provide for offers of compensation through the MLS. If the offer is through the MLS, then MLS rules and regulations apply. These rules arguably do not apply, however, if the property is not submitted to the MLS. Whether brokers or members of the MLS would otherwise be subject to the MLS rules regarding offers of compensation is an argument that a selling broker and agent could make in this situation, but the safer practice, again, is to identify these issues up front and execute a written broker-to-broker compensation agreement and do so before moving forward with any transaction.

A written broker-to-broker compensation agreement will also anticipate and address potential fiduciary duty issues between you and your buyer. Such fiduciary duty issues will arise if compensation, or the amount thereof, is in doubt or jeopardized by a decision by either the listing agent and/or seller to attempt to alter the compensation during the transaction as part of a counteroffer or due to any subsequent transaction events that result in a change in the net proceeds to the seller.

Please remember that even with a written broker-to-broker compensation agreement, should a commission issue arise, fiduciary obligations to your client require that their interests be placed above yours, an objective that usually can be achieved by closing the escrow but preserving, prior to the close, any disputes and/or issues related to compensation with the other broker.

The foregoing is a general overview of some of the issues that often arise when it comes to protecting your commission in an off-MLS transaction. A review of these issues on a case-by-case basis, including the specific transactional documents, is recommended.

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Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

*Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology*

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