



The New World of REALTOR® Compensation

Like all professionals, REALTORS® need and want certainty with respect to how they will be paid. The ambiguities regarding compensation in a post-NAR Settlement world have become a source of frustration for REALTORS®. As a result, REALTORS® are asking more questions than ever regarding compensation. Here are the answers to some of their hardest questions.

1 | How should buyer's brokers protect their compensation when it is being paid by the seller?

ANSWER: When the seller is paying the buyer's broker's compensation, the buyer's brokers always need to get the seller to enter into a written agreement with the buyer's broker obligating the seller to pay the buyer's brokers compensation at closing. Most REALTORS® believe that incorporating the compensation agreement into the Purchase and Sale Agreement is the best way to ensure that the closing attorney is aware of the obligation and pays it at closing. However, GAR has created multiple compensation forms that buyer's brokers can use for this purpose. The benefit of using the GAR forms is that they make the payment of compensation a precon-





dition of closing. Why is that important? Well, brokers should never put their right to collect compensation at closing before the best interests of their clients. But when the parties agree that fulfillment of compensation obligations is a precondition of closing, brokers have more protection without compromising REALTOR® ethics. The GAR forms also establish

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that the right to pursue compensation survives closing in the event that full compensation is not paid at closing. The GAR forms also do not allow the buyer and seller to amend the compensation of the buyer's broker without the consent of the buyer's broker.

2 | Does procuring cause still matter?

ANSWER: The answer to this question is yes, but only in certain circumstances. Because compensation is no longer offered through REALTOR®-owned MLS's, many of the traditional procuring cause disputes that arose from competing claims to an MLS-based offer of compensation simply no longer occur. Instead, brokers and parties negotiate and document buyer-broker compensation through written agreements.

That does not mean procuring cause has disappeared. Compensation may still be advertised publicly, such as through broker websites or social media. In those situations, disputes can still arise as to who was the procuring cause of the sale of the property. Likewise, procuring cause may remain relevant in markets or transactions involving non-REALTOR®-

owned MLS's where some offers of compensation continue to exist.

3 | Can REALTORS® still collect bonuses?

ANSWER: This may be the hardest question of all to answer, period. The NAR settlement requires REALTORS® to agree in advance with buyers on a definite and precise amount of compensation that is not dependent on the amount of compensation being offered by a seller or seller's broker. It is not permissible for a REALTOR® to charge a buyer "up to X" or "X plus any bonus that seller may be offering." Brokers can, as discussed below, amend their brokerage engagements to receive a bonus in certain circumstances.

4 | So, what are the buyer's brokers options if the buyer broker is only asking for X, but the seller is offering more than X or X plus a bonus?

ANSWER: The best answer is that the REALTOR® should always negotiate the true value of their brokerage services up front in their brokerage engagement agreement and be satisfied with that compensation.

5 | Can the REALTOR® and the buyer amend their buyer brokerage engagements to increase the buyer's broker's compensation to cover a bonus the seller is offering?

ANSWER: The answer is yes, with some caveats. First, the buyer must agree to pay the compensation, including the bonus, should it not be paid by the seller or should the buyer ultimately buy a different property where a bonus is not offered. If the buyer is unwilling to do this, that should be the end of the discussion. Second, the NAR settlement was partly oriented towards preventing REALTORS® from steering buyers to properties based on the compensation being offered to the buyer's broker. The optics of a buyer's broker taking a buyer to a property where the buyer's broker is being offered a bonus



are not good, regardless of whether it happens to be the “right” house for the buyer or not. Therefore, the question that should be carefully considered is, if the buyer’s broker’s compensation has already been agreed upon, what did the buyer’s broker objectively do to deserve a bonus? If there is a good answer to this question based on the performance of the broker, a bonus may be appropriate. For example, let’s say a buyer’s broker initially negotiates a 90-day brokerage agreement with the expectation that the buyer will purchase a resale property. If the buyer finds a new construction property where construction will take a year, then the extra nine months of brokerage services might be deemed an appropriate reason to amend the brokerage agreement to increase compensation. However, if there is no good answer to this question, and the bonus is being offered solely to induce agents to bring their buyers to see the property, that bonus should either be avoided or given to the buyer. Though some REALTORS® may not like this answer, it is a much better answer than being a defendant in a future lawsuit.

6 | What can I do if my broker will not pursue compensation that is not paid?

ANSWER: Unfortunately, the answer to this question is that there is nothing the agent can do if the agent’s broker will not pursue unpaid compensation. Compensation belongs to the broker. Therefore it is for the broker to decide whether or not to pursue unpaid compensation. Agents have no legal standing to pursue unpaid compensation. If the broker decides not to pursue unpaid compensation, the agent has no discretion other than to accept the broker’s decision.

Some agents have tried to negotiate to add language to their Independent Contractor Agreement to require the broker to pursue claims for unpaid compensation. Few brokers will agree to this. In the rare circumstances when they do, most brokers will then insist that in such an event, the agent pays a share of the broker’s attorney’s fees equal to the share of the compensation that the agent receives.

Many brokers are also legitimately reluctant to file a lawsuit for compensation because the person owing the compensation will often file a counterclaim against the broker alleging some breach of duty on the part of the agent. If this occurs, and the claim is covered by the broker’s errors and omissions insurance, the broker will ask the agent to pay their respective share



of the deductible. If there is no insurance, most brokers will ask their agent to pay their proportionate share of all defense costs.

7 | Why are there so many GAR forms about compensation?

ANSWER: In addition to the various GAR brokerage engagement agreements, there are three key GAR forms related to the payment of compensation, each of which serves a different function in the post-NAR settlement world.

F258 Pre-Showing Compensation Agreement

With offers of compensation no longer offered in REALTOR®-owned MLS’s or guaranteed through MLS participation, the F258 provides a way for sellers and listing brokers to communicate offers of compensation to buyers and buyer’s brokers. It also secures that agreement before a property is shown, allowing buyers to make informed decisions before moving forward. Importantly, the F258 does not change the



amount of compensation a buyer has agreed to pay their broker under a separate brokerage agreement. Any compensation offered by the seller or seller's broker in the F258 simply offsets or reduces the buyer's compensation obligation.

F259 Buyer Broker Compensation Exhibit

Because many buyers do not formalize compensation agreements with sellers before making an offer, particularly in the metro Atlanta area, the parties can attach the F259 as an exhibit to the Purchase and Sale Agreement to secure the seller's and/or seller's broker's contractual obligation to pay some or all of the buyer's broker's compensation. It does not address the seller's broker's compensation or how much the buyer is paying buyer's broker. Once initialed and incorporated into the contract, the F259 cannot be modified without the written consent of the affected broker(s), who are third-party beneficiaries to the agreement with rights that survive closing.

agreement and is not intended to create or modify the underlying compensation agreements between the parties or their brokers.

8 | If the parties have a properly completed F258 Pre-Showing Compensation Agreement, do they still need F259 Buyer Broker Compensation Exhibit?

ANSWER: In most cases, the answer is no. If the parties already have an F258 establishing the amount of compensation the seller and/or the seller's broker will pay to the buyer's broker, there is generally no need to also attach an F259 as an exhibit to the contract. The F259 makes clear that the exhibit is not intended to be used where broker compensation terms have already been established in a separate written agreement, such as an F258, unless those terms are being modified.

So, for example, if a seller initially agrees in an F258 to pay the buyer's broker compensation of X

While the F255 documents the compensation payments that should be made at closing, it is not incorporated into the purchase and sale agreement and is not intended to create or modify the underlying compensation agreements between the parties or their brokers.

F255 Instructions to Closing Attorney

The F255 is primarily used to instruct the closing attorney how to collect and disburse broker compensation, referral fees, and rebates on the settlement statement. It specifies amounts or percentages that are to be paid to the Seller's Broker, the Buyer's Broker (either directly by the seller or shared by the seller's broker), and may also specify payments by the buyer to their broker. While the F255 documents the compensation payments that should be made at closing, it is not incorporated into the purchase and sale

but later becomes unwilling to do so because the buyer offers below list price, the parties could use the F259 to establish the revised compensation arrangement as a part of the Purchase and Sale Agreement. On the other hand, if the seller remains willing to pay X as previously agreed, attaching an F259 as an exhibit to the contract would serve no real purpose and could introduce unnecessary risk of inconsistent terms. In that circumstance, the existing F258 is typically sufficient to document the agreed-upon compensation obligations.



9 | If the parties have a properly completed F259, do they still need F255?

ANSWER: Yes, the F259 only reflects the amount of compensation the seller and/or seller’s broker have agreed to pay buyer’s broker. It does not address the seller’s broker’s compensation, any compensation being paid by the buyer, or the existence of rebates or referral fees. Because closing attorneys typically do not receive copies of brokerage agreements, the F255 is a convenient way to facilitate communication between the brokers and closing attorneys.

10 | Can the parties use the F255 Instructions to Closing Attorney to amend the amount of compensation on the F259 Buyer Broker Compensation Exhibit?

ANSWER: No. The F255 was never intended to function as a tool to amend broker compensation. Its purpose is much more practical and limited to

F255 may end up being used as evidence in a later dispute over compensation, the best practice is to amend the purchase and sale agreement, pre-showing agreement, or brokerage agreement that established the compensation obligation in the first place.

11 | If a non-REALTOR® owned MLS permits information about compensation, is it okay to publish compensation in the MLS?

ANSWER: This practice is strongly discouraged and may expose the REALTOR® to potential future litigation. Given the number of copycat lawsuits in Georgia, offering compensation in any MLS, even if permitted, could open the brokerage up to potential claims.

REALTOR® compensation is an evolving area. Most experts predict that in ten years, compensation will be completely decoupled where each party either



instructing closing attorneys how to collect and disburse fees for professional brokerage services at closing. Importantly, the form states that a broker’s signature on the F255 does not waive or limit the broker’s right, after closing, to challenge their entitlement to compensation that was paid or not paid pursuant to the instructions in the form. While the

pays their own broker the compensation they have negotiated or where the seller separately pays the buyer’s broker and the seller’s broker. In fact, many states have already adopted this practice in their state forms.

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