



Unit

# 7

## Real Estate Brokerage Commissions

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### In This Unit

Florida laws regulating real estate brokerage compensation • Contracts that affect the broker's compensation • Commission disputes between brokers and sales associates • Procuring cause disputes between brokers • Disputes between brokers and sellers

### Learning Objectives

**When you have completed this unit, you will be able to accomplish the following.**

- Describe the laws regulating brokerage compensation in Florida.
- Describe the effect that different contract types have on a broker's compensation.
- State the methods used to settle commission disputes between brokers and their sales associates.
- Describe important considerations in handling and preventing commission disputes and procuring cause disputes between brokers.
- Explain what happens in the event of a commission dispute between brokers and sellers.

### **FLORIDA LAWS REGULATING REAL ESTATE BROKERAGE COMPENSATION**

#### **License Requirements**

Eight activities require that an individual have a real estate license, unless there is a specific exemption in the law. If a person provides one of the eight services for another person for any type of compensation (paid or expected), the person must have an active real estate license. These services are appraise, auction, sell, exchange, buy, rent, lease, or advertise to perform a real estate service [475.01(1)(a)].

The law includes many exemptions: for example, owners can sell their own properties without having licenses.

### **Florida Laws Regarding Listing Agreements**

Florida law recognizes written, oral, or implied listings, assuming evidence is available to support a claim for compensation. If a listing is written, it must include a definite expiration date, a description of the property, the price and terms acceptable to the sellers, the amount of commission due upon the broker's performance, and the signature of the parties. A written listing agreement may not have wording that makes it self-renewing, or the listing will be void. The broker, or the broker's authorized representative, must deliver to the sellers a copy of the listing agreement within 24 hours of signature.

### **Sales Associates May Be Paid Directly by the Closing Agent**

Under the law, a sales associate or broker associate may be paid a real estate commission only by the associate's broker, but there is an exception. A 1999 FREC final order allows a sales associate to receive his or her commissions directly from the closing agent immediately after closing if the broker gives specific written instructions to the closing agent for each closing. The written instructions from the broker must identify the transaction, state the name of the salesperson entitled to the commission, specify the amount the salesperson should be paid, and include the broker's signature (FREC Final Order BPR-99-01088).

### **Paying Referral Fees**

A Florida broker may pay a referral fee or share a real estate brokerage commission with a broker licensed under the laws of Florida, or another state or country, so long as the broker does not violate the laws of Florida.

#### **Example of Out-of-State Broker Working on a Florida Real Estate Transaction**

Laurence Harris, a Florida broker, gets a referral from Barron, a New Jersey broker, who has a buyer looking for a parcel of land to build a condominium development. The brokers agree that Harris will pay Barron a referral fee of 20% of the commission collected by Harris if a transaction closes. Barron comes to Florida with the buyer, spends time looking at properties with Harris and the buyer, and writes the offer when the buyer finds the right parcel.

At closing, Harris refuses to pay Barron because Barron came to Florida and violated Florida law by practicing real estate in Florida without a Florida real estate license. If Barron had simply referred the buyer and stayed in New Jersey, it would have been no problem.

If, for example, the out-of-state broker engages in real estate brokerage activity in Florida, the broker has violated Florida law and may not be compensated. If the Florida broker pays compensation, the Florida broker has violated the law.

When involved in a sale with another in-state brokerage firm, it is prudent for the listing broker to verify the license status of the selling broker before sharing the commission. In many cases, brokers negligently allow their licenses to become inactive. Brokers who pay referral fees to other brokers should verify that the other broker holds a valid real estate license. If the broker is in Florida, check the [www.myfloridalicense.com](http://www.myfloridalicense.com) database. If the broker is out of state, get a copy of that broker's license for your files. Remember, it's a violation for a Florida broker to pay any portion of a commission to an unlicensed person.

Sometimes, sales associates handle the business of another sales associate in the same firm when the other sales associate is on vacation or is sick. Compensation for real estate services may not be paid by the absent sales associate to the sales associate who is covering the business. Only the broker may disburse the agreed compensation. Brokers may not pay a portion of a commission to any unlicensed person, including attorneys.

## Sharing Commissions With Unlicensed Persons

The law prohibits licensees from sharing real estate commissions with an unlicensed person [475.25(1)(h), F.S.].

There are two exceptions:

- A real estate licensee may rebate all or a portion of the commission to the buyer or the seller in a transaction. The licensee must disclose the rebate to all interested parties (especially the lender). If the lender is not informed of a commission rebate to the borrower, both the borrower and the licensee may be guilty of mortgage fraud. For the licensee's protection, any disclosures should be written. The rebate must also be shown on the Closing Disclosure if one is used in the transaction (Rule 61J2-10.028(2), F.A.C.).
- The law exempts an owner of an apartment complex or a property management firm that pays a finder's fee of not more than \$50 to a tenant of the apartment complex. The tenant who receives the fee is also exempt from licensing.

### IN PRACTICE

#### Be careful with rebates and referral fees

You can pay a portion of your commission to a buyer or a seller in a transaction; the rebate must be disclosed. If the rebate is to be advertised, the licensee must comply with FREC Rule 61J2-10.025, which provides, in part, that real estate advertisements must not be false, fraudulent, deceptive, or misleading. The ad should clarify any conditions or limitations that apply. However, you can't pay fees for referred business (not even a candy bar) to unlicensed persons who are not buyers or sellers. That's illegal!

## Only a Broker Can Sue a Seller or Buyer for a Commission

A sales associate or broker associate is not allowed to claim a commission or sue the seller or the buyer. The associate's broker must file the lawsuit (Section 475.42(1)(d), F.S.).

## Practice Questions

1. It is a first-degree misdemeanor for an unlicensed person to perform real estate services for another person for compensation.
  - a. True
  - b. False
2. A written listing agreement may not have wording that makes it self-renewing, or the listing will be void.
  - a. True
  - b. False

## CONTRACTS THAT AFFECT THE BROKER'S COMPENSATION

Contracts that influence a broker's compensation include the listing contract, the buyer-broker agreement, and MLS blanket offers of compensation to cooperating brokers.

- The listing contract between the seller and the listing broker creates the relationship and establishes the duties of each and the terms under which the listing broker will be deemed to have earned a commission.
- A buyer-broker agreement sets forth the duties of the buyer and the broker, as well as the terms and conditions of the broker's compensation.
- The contract between the listing broker and cooperating brokers is usually created by a blanket offer of compensation to MLS participants. If a cooperating broker is not a participant of the MLS, the cooperating broker must enter into an agreement with the listing broker or may not be able to collect a commission split at all. The listing broker's offer of compensation sets the terms of the compensation to cooperating brokers. This may vary among different brokers. The contract is formed only when the cooperating broker performs as the procuring cause of a successful transaction.

The purchase contract between the seller and the buyer establishes their respective promises and obligations to each other. The commission between the seller and the brokerage firm may be referenced in the contract but usually does not set a commission agreement. The broker's and seller's duties are described in the listing agreement.

### **Entitlement to a Commission**

A broker who has been employed by the seller is entitled to a commission if he produces a buyer who is ready, willing, and able to buy upon the stated terms or upon terms that are acceptable to the seller. He must be the procuring cause of the transaction.

Residential brokers are typically paid by the seller based on a listing agreement. Brokers are advised to prepare written agreements to protect the broker's commission and prevent disputes. Of the three major types of listings, the exclusive right-of-sale listing contract is the strongest way to avoid procuring cause disputes between the seller and the broker.

Open listings and exclusive agency listings result in many procuring cause disputes.

### **Exclusive Right-of-Sale Listing**

The exclusive right-of-sale listing is the most advantageous listing from the broker's viewpoint and the most common type of listing. The listing is given to one broker who is due a commission regardless of who sells the property. It is an agreement to find a purchaser.

This automatically makes the broker the procuring cause of any sale. If the owner sells the property during the contract period, the broker has earned a commission. Also, if the owner sells the property within a designated period after the listing contract has expired to a buyer originally introduced to the property by the broker, the owner usually is liable for a sales commission to the broker.

The Florida Realtors® listing agreement specifies, "Upon full execution of a contract for sale and purchase of the Property, all rights and obligations of this Agreement will automatically extend through the date of the actual closing of the sales contract." This means that even if the closing happens after the agreement terminates, the broker is entitled to the agreed compensation. If your office uses its own listing agreements, check them carefully to make sure they contain this beneficial line.

To be enforceable, the exclusive right-of-sale listing contract should be in writing and include valuable consideration (a promise for a promise; the broker promises to make best efforts to market and list the property in the MLS, and the owner promises to pay the broker's commission when the broker has performed).

## Open Listing

An **open listing** is a contract in which an owner reserves the right to employ any number of brokers. Brokers may work simultaneously, but the first broker who produces a ready, willing, and able buyer at the terms accepted by the seller is the only one who earns a commission. If the owner himself sells the property without the aid of any of the brokers, he is not obligated to pay any commission; but if a broker can prove she was the procuring cause of the transaction, she may be entitled to a commission.

While open listings may be written, oral, or implied, a contract does not exist until terms are negotiated.

## Exclusive Agency Listing

In an **exclusive agency listing**, sometimes called an exclusive listing, the owner appoints the broker but reserves the right to sell the property without paying a commission to the broker if the broker has not introduced or identified the buyer. If the broker performs by selling the property before the owner can do so, the broker is entitled to a commission. Exclusive agency residential listings are less common than exclusive right-of-sale listings.

A common problem with exclusive agency and open listings is the exposure to lawsuits for procuring cause between the broker and the seller.

### Example of Procuring Cause Dispute Between a Broker and a Seller

A broker has an open listing on a tract of land and shows the property to a prospective buyer. The buyer sees the seller's For Sale sign and calls the seller immediately after the broker leaves him. The seller, not aware that the broker showed the property, signs a contract with the buyer that afternoon.

That evening the broker sends an email to the seller, registering the prospect's name. When the seller gets the broker's email, he refuses to pay a commission. When the sale closes, the broker sues the seller.

While there's little doubt that the broker is the procuring cause of the sale, the seller didn't know of the broker's actions when he signed the contract. The seller, whom we assume to be an honest person, was sued because of the buyer's actions, not his own. How can a broker prevent this type of misunderstanding? Registration is not enough because the notification may come after the parties have entered a contract.

## IN PRACTICE

Protect your sellers by suggesting that when they sell directly, they should put these words in the contract:

*This property is listed with a broker under an agreement that the broker will be paid a commission for procuring a buyer for the property. Buyer warrants to Seller that he or she was not shown or made aware of this property by any real estate broker or sales associate. Buyer agrees that if a broker claiming a commission provides information to the contrary, buyer will hold Seller harmless from damages and will reimburse Seller for commissions due to said real estate broker as well as costs and legal fees.*

A buyer who has seen the property with a broker will refuse to sign such a statement, putting the seller on notice that the buyer is trying to save the commission by excluding the broker.

## Implied Listings

In some cases, a broker does not have a written contract of employment and relies on an unwritten, unspoken intent to sell a property.

### Example of an Implied Listing

Assume that a broker met W at a restaurant. W asked how the broker's business was going and offhandedly suggested that the broker could bring W a buyer. Five weeks later, the broker met a buyer, H, who says she'd like to buy a house. The broker brings H to W's house. W agrees to let the broker show the house. The next day H calls W and signs a contract to buy the house. The broker demands a commission, but W says they do not have any type of employment agreement and refuses to pay.

The broker in the example above would likely sue W for compensation under a theory of *quantum meruit*, which means "as much as one deserves." To recover under a *quantum meruit* theory, a plaintiff must prove that (1) the plaintiff performed a service to the benefit of the defendant; (2) the plaintiff did not perform the service gratuitously; (3) the defendant accepted this service; and (4) no written contract existed to prescribe payment for this service. If a court finds that the defendant was introduced to the seller by the broker and would not have known about the property but for the broker's efforts, the court will likely award the broker's commission based on reasonable compensation for the area.

### Practice Questions

3. It is illegal for a licensee to rebate all or a portion of a commission to a buyer or a seller in a real estate transaction.
  - a. True
  - b. False
4. A broker who has an exclusive right of sale will automatically be the procuring cause of the sale.
  - a. True
  - b. False

## COMMISSION DISPUTES BETWEEN BROKERS AND SALES ASSOCIATES

Commission disputes between brokers and their sales associates is one of the top 10 reasons for calls to the Florida Realtors® legal hotline.

Brokers and sales associates occasionally have disputes over commissions that are due to the sales associates. Because the Florida Real Estate Commission will not become involved in commission disputes between brokers and sales associates, the sales associate's only remedy is to sue the broker and get a civil judgment. If the broker fails to pay the judgment to the sales associate, the sales associate can file a complaint with the FREC for violating Section 475.25(1)(d), for failing to account or deliver.

### **Example of a Commission Dispute Between a Broker and a Sales Associate**

Sales associate Sally resigned recently from Sells-a-Lot Realty in order to take a job with a state agency. She had a pending sale of a house that did not close until 45 days after she left. When the sale closed, she requested her commission from the broker. The broker refused to pay the commission because she didn't have an active license. Sally filed a complaint with the FREC. The FREC responded that the complaint was not legally sufficient because it was not a violation of a statute or rule. (The FREC does not get involved in procuring cause disputes.) Provided that all the services of real estate for which she earned a commission were performed before her license went inactive, Sally is likely to win the suit.

Before a court will render a judgment in favor of the sales associate, the court will consider the parties' independent contractor agreement along with other evidence, such as the broker's office policy manual, verbal agreements between the parties, and what is customary in the industry.

## **PROCURING CAUSE DISPUTES BETWEEN BROKERS**

### **Non-MLS Selling Broker Expects a Commission**

Sometimes, a cooperating broker will anticipate receiving a commission without an agreement with the listing broker.

### **Example of a Commission Dispute Between Brokers**

Broker Sims saw a sign on a property listed by Broker Rand. An MLS sign was on the property. Sims, who was not a member of MLS, knew that brokers made a blanket offer of cooperation and compensation to other MLS brokers for half the commission. Sims wrote a contract and delivered it to Broker Rand, who secured an acceptance from the sellers. At closing, Sims contacted Rand to get his share of the commission. Rand informed him that there was no agreement of compensation because the blanket offer was to MLS members only. Sims sued. A court would likely find that Sims did not have an agreement from Rand to split the commission.

A broker who is not a member of the MLS should not expect to receive the same commission split that the listing broker has offered to MLS participants. The MLS split is a result of a blanket offer to MLS participants. A non-member of the MLS has no agreement from the listing broker for payment. Courts have held that a listing broker has no obligation to pay a nonmember unless there was a specific agreement between the brokers outside of the MLS. The cooperating broker should ensure that there is an agreement on the amount of commission the listing broker will pay.

Often, a listing broker will also be the selling broker. However, many sales are generated by a cooperating broker who sells the property (the selling broker). The listing broker collects the commission from the seller and pays the selling broker a portion (split). Commission splits between cooperating brokers are negotiated.

Many residential real estate transactions are cooperating sales between brokers who are members of the MLS. The listing broker makes a blanket offer of compensation to other MLS members in the listing information. There need be no further negotiations between the brokers. If a cooperating MLS member brings a contract that closes, the listing broker should pay the cooperating broker the amount shown in the blanket offer.

The amount shown in the blanket offer is unconditional. It doesn't matter that the selling broker "does less work" than the listing broker or that the listing broker helped more in the negotiations. The listing broker must pay the agreed amount.

In some cases, the listing broker may change the commission rate. The listing broker must ensure that cooperating MLS members are aware of the change, especially if they have already shown the property. If a cooperating broker who has previously shown the property brings a successful offer before being notified of the change, it is likely that the listing broker will have to pay the originally published rate.

### **Variable Rate Commissions**

Variable rate commissions are often written with wording like, "If property is sold by any broker other than the listing broker, the commission paid by the seller will be 6%. The listing broker will split the commission evenly with the selling broker. If the property is sold by the listing broker or a member of the broker's firm, the commission paid by the seller will be 5%."

This type of commission can cause disputes among brokers, as shown in the following example.

#### **Example of a Variable Listing**

Broker James had a variable listing on a large home in Miami: 6% if a cooperating broker sold the house, 5% if Broker James's firm sold the house. Multiple offers were received for the property the day after it was listed. One offer was through Broker James for \$745,000, all cash. The other offer was through Broker Marge for \$747,000, all cash. Broker Marge went to present the offer with Broker James and was elated to see that hers was the highest offer. She left after she presented her offer and was later told by Broker James that her contract was not accepted. She was astonished and asked why. Broker James told her that the 6% commission on her offer gave the seller \$702,180 (\$747,000 - \$44,820). But because he had a variable rate commission, the seller would net \$707,750 (\$745,000 - \$37,250). She didn't know about the variable rate commission, but there was no legal remedy. While this is not illegal under Florida law, if the brokers had been REALTORS®, Marge could have filed a grievance against James.

MLS Rules usually require disclosure of variable rate commissions in the listing information. Standard of Practice 3-4 of the REALTORS® Code of Ethics requires REALTORS® to disclose the existence of dual or variable rate commission arrangements.

### **Using the Terms of an Offer to Modify a Commission Split**

The parties to a purchase and sale agreement are the buyer and the seller. Real estate commissions are determined by the listing agreement and the listing broker's offer of compensation to the selling broker. In some cases, a cooperating broker who is dissatisfied with the amount of the commission split may attempt to modify the split in the terms of an offer to purchase.

#### **Example of Attempting to Modify a Commission Split in an Offer to Purchase**

A listing broker has offered blanket compensation to selling brokers for 2% of the sale price. A selling broker is aware that the listing broker charges a 6% commission rate and is not splitting 50-50.

The selling broker prepares an offer on the property with wording in a special clause that says: "Listing broker agrees to compensate selling broker in the amount of 3% of the sale price of the property."



What should the listing agent do? In this case, the listing broker need not pay the selling broker 3%. The purchase and sale contract is between the buyer and the seller, not between the brokers, and has no effect on the contract between the brokers. By selling the property listing in the MLS, the selling broker has accepted the listing broker's blanket offer of 2% compensation.

### **The listing agent sets the amount of the commission split.**

Standard of Practice 3-1 states that the listing REALTOR® establishes in writing how much, if any, compensation she will pay to a selling broker. The selling agent should not assume that any compensation will be paid and is responsible for checking the amount of compensation offered before submitting an offer on property.

If both brokers were REALTORS®, the listing broker could file a grievance against the selling broker. The selling broker has violated Standard of Practice 16-16, which says REALTORS® shall not use the terms of an offer to attempt to modify the listing broker's offer of compensation or make the submission of an executed offer contingent on the listing broker's agreement to modify the offer of compensation.

### **REALTORS® Arbitration Hearings**

Most of the arbitration hearings conducted by boards and associations involve disputes between REALTORS®, most frequently between listing and cooperating brokers, or between two or more cooperating brokers. These generally involve questions of procuring cause, where the panel is called on to determine which of the contesting parties is entitled to the funds in dispute.

There are no clear-cut rules for arbitration panels that decide procuring cause cases; the facts and circumstances of each case must be considered in the decision. Some of the contracts to be examined include the listing contract, the terms of compensation offered by the listing broker to cooperating brokers (through the MLS or otherwise), and the wording of the purchase contract.

Hearing panels don't take prior decisions into account when reviewing a case. In fact, the National Association's Professional Standards Committee states that arbitration awards should not include findings of fact or reasons for the award because:

- arbitration awards are not appealable on the merits but generally only on the limited procedural bases established in the governing state arbitration statute;
- the issues considered by hearing panels are usually complex, and the reasoning for an award may be equally complex and difficult to reduce to writing; and
- the inclusion of written findings of fact and rationale would conceivably result in attempts to use such detail as precedent in subsequent hearings, which might or might not involve similar facts.

### **Preventing Procuring Cause Disputes Between Brokers**

Real estate brokers and sales associates can reduce the chances of a procuring cause dispute in several ways. The broker, in consulting with the customer when their relationship begins, can ask the client if they are currently working with another broker or if they have seen any houses with another broker.

For example, if a buyer was shown a house by another broker and they signed a buyer-broker agreement with that broker, this is information you'd want to know. If the buyer signed an exclusive contract with the other broker and you knew about the contract and continued to work with the buyer, this could result in a dispute.

## Practice Questions

5. A listing broker has no obligation to pay a non-MLS member unless there was a separate agreement between the brokers.
  - a. True
  - b. False
  
6. A REALTOR® who uses the terms of an offer to modify a commission split violates the REALTORS® Code of Ethics.
  - a. True
  - b. False

## DISPUTES BETWEEN BROKERS AND SELLERS

Some sellers question the value of a real estate broker's services and are reluctant to pay the full commission. For example, a broker who takes nine months to sell a house may be considered inept by the owner and not worthy of the full commission. On the other hand, a broker who lists a property one day and sells it the next "didn't have to do very much work," and "does not deserve the full commission." A broker should clearly discuss these situations at the time of listing, which may help alleviate some of these issues.

What happens if a seller refuses to pay the agreed commission? The matter would be resolved according to the terms of the listing agreements. Most listing agreements have wording like the Florida Realtors® listing agreement.

### Example of Contract Wording to Resolve Disputes

*This Agreement will be construed under Florida law. All controversies, claims, and other matters in question between the parties arising out of or relating to this Agreement or the breach thereof will be settled by first attempting mediation under the rules of the American Mediation Association or other mediator agreed upon by the parties. If litigation arises out of this Agreement, the prevailing party will be entitled to recover reasonable attorney's fees and costs, unless the parties agree that disputes will be settled by arbitration.*

**Note:** The listing agreement gives the parties the option to choose arbitration at the time they sign the agreement.

A broker cannot place a lien on a residential property to collect a commission unless the broker is expressly permitted by contractual agreement with the seller to do so or is recording a civil judgment rendered by a Florida court. In most cases, the broker must file a lawsuit against the seller and obtain a judgment, which the broker can then record.

The Commercial Real Estate Sales Commission Lien Act allows a broker to file a lien against the seller's proceeds from a sale and does not attach to any interest in real property. The act only applies to sales that meet the definition of "commercial real estate" as set forth in the act.

## Case Study

### PROCURING CAUSE DOCTRINE

*Rotemi Realty, Inc. v. Act Realty Co., Inc.*, 911 So.2d 1181 (Fla. 2005)

● **Facts:** In 1998, two real estate brokers learned that the Miami-Dade School Board might be interested in buying land for a new high school. The brokers contacted the owners of two parcels of land totaling 60 acres. One of the parcels was owned by Act Realty Company, Inc.

Together, these brokers entered into a written brokerage agreement with the owner of Act Realty. It stated that the brokers would receive a commission equal to all sales proceeds in excess of \$1 million if they were “able to procure a sale of Act Realty’s property with the school board of Dade County Florida as the buyer.”

The brokers prepared the school district’s first offer, which was rejected for being too low. The school district eventually purchased Act Realty’s property for \$1,144,650.50. The brokers claimed a commission of \$144,650.50, the agreed amount over \$1 million. Act Realty contested their claim.

- **What do you think?** Did the brokers earn their commission in this case?
- **What Really Happened?** The non-jury trial court found that the brokers “clearly” procured the sale. According to the trial court, the brokers “proved that they initiated the negotiations, took affirmative action to bring the buyer and seller together, and that the transaction was closed and they were entitled to the agreed commission.”

Act Realty appealed this ruling to the Third District Court of appeals, which reversed the trial court ruling.

The case ended in the Florida Supreme Court. The court quashed the appeals court, ruling that competent, substantial evidence supports the trial court’s finding that the brokers procured the sale of Act Realty’s property to the School District. In its opinion, the Florida Supreme Court decreed that a broker must perform two essential tasks in order to be entitled a commission:

- The broker must take affirmative action to initiate negotiations and bring the buyer and seller together.
- Unless intentionally excluded by the seller and the buyer, a broker must continue to be involved in negotiations.

Thus, substantial, competent evidence supports the trial court’s finding that the brokers were a procuring cause of the sale and entitled to the commission.

The Supreme Court opinion would later come to be called the “procuring cause doctrine.”