



# Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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## Inside This Issue

**2**

Checklist for Referral Fee Agreements

**4**

MLS Compensation and Cooperation

**5**

Policy Letters

**7**

Non-MLS Policy Letters

**7**

Policy Letter Checklist

**8**

Policy Letter Provisions and Examples

**10**

Compensation Agreements

**11**

Conclusion

## Getting Paid Outside of the MLS

In this era of larger companies and expanding markets, an increasing number of REALTORS® may find themselves working outside of the Multiple Listing Service (MLS), a staple for residential brokers in many Wisconsin boards. Members may find themselves working with brokers who are participants in other MLS systems, working with non-REALTORS® (who are not MLS participants), working in locations where there is no MLS, or engaging in commercial transactions (which are typically not entered in the MLS).

In each of these situations, the offers of cooperation and compensation, standards of performance for earning a commission, and other accompanying procedures and mechanisms are missing without the MLS safety net with which many members are used to working. Outside of the MLS, there are no automatic offers of cooperation and compensation--brokers must make an offer to the cooperating brokers who, by their words or deeds, may accept that offer and create an agreement for cooperation and compensation. Procuring cause does not determine who gets paid unless the brokers have agreed that procuring cause is the standard of performance that determines the earning of commissions. In short, unless the brokers have a standing policy letter agreement or a compensation agreement for that transaction, the listing broker has no obligation to pay the cooperating broker.

There also is no MLS safety net establishing the terms and conditions of referral fee agreements. Licensees must establish the terms and condi-

tions of the contract entered into with the other licensee for the payment of a fee in exchange for the referral of a client or customer. While some referral fee agreements are verbal, many members have realized it is better to have a written agreement rather than discover there was no mutual understanding about the size or timing of the fee payment.

This *Legal Update* discusses the agreements necessary for establishing a licensee's right to be paid referral fees and commissions in non-MLS transactions. The discussion begins with a discussion of referral fee agreements, including a referral agreement drafting checklist. Next is an overview of the MLS system of cooperation and compensation and the policy letters that brokers may use to modify the compensation offered in the MLS. This is contrasted with a discussion of what cooperation and compensation agreements are needed when a transaction is not governed by the MLS. Checklists for drafting a non-MLS policy letter and a non-MLS compensation agreement also are included.

### Referral Fee Agreements

Normally, a real estate licensee in the United States expects to receive a fee after the licensee refers his or her client or customer to another real estate licensee and the latter completes a transaction involving the referred customer, regardless of whether that latter licensee is in the same state. The prospect of compensation is an important incentive for a licensee in one region to make a referral of a client or customer to

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another licensee in a distant location. Typically, the referring licensee will receive as a referral fee a share of the commission or fee earned by the licensee to whom the referral was made.

In the United States, referrals are considered common practice and happen frequently between licensed brokers or brokerage firms. They are typically based upon an explicit agreement between the referring and receiving brokers. A referral agreement names the client being referred and spells out the referring broker's referral fee entitlement in the event of a sale, lease, exchange or other successful transaction.

Referral arrangements within the United States seem to work on a relatively trouble free, self-executing basis, though interstate referral fee collections can be difficult. Referrals are also widespread in Europe. Needless to say, referral fees are a valuable source of income to the real estate licensee.

Wisconsin law contemplates referral fee arrangements being made with licensees in other states and in other countries. Wis. Stat. § 452.19 provides that "No licensed broker may pay a fee . . . as compensation for a referral . . . to any person who is not licensed or registered under this chapter or who is not regularly and lawfully engaged in the real estate brokerage business in another state, a territory or possession of the United States or a foreign country."

Wisconsin licensees may pay referral fees to other Wisconsin licensees who have a valid and current license. If the person making the referral is an agent associated with a broker/company, Wis. Stat. § 452.14(3)(f) requires that any referral fee be paid to the agent's broker/company. It is a license law violation for that agent to accept the referral fee from anyone other than the agent's broker/company. This is

true regardless of whether the agent has a salesperson's or a broker's license--what is determinative is that the agent is associated with a broker/company. However, a licensee with a salesperson's or a broker's license can make a referral and directly receive a referral fee if the licensee is not associated with a broker/company.

It is prudent practice to ask for a copy of an agent's license or verify the agent's license status before entering into an agreement for a paid referral. The agent's license must be valid and current, meaning he or she must complete the continuing education requirements and pay the renewal fee each biennium. It is not necessary that the agent be a local board or WRA member.

With respect to agents from other states or countries, they must be regularly and lawfully engaged in real estate brokerage. This means that they must hold whatever credential is necessary and meet any other applicable standards that are required in that state or country to lawfully engage in real estate practice. They must also regularly engage in real estate brokerage. This would seem to rule out persons with credentials who actually work in other fields and may rule out part-time agents, depending upon what is judged to be "regular" within that jurisdiction.

### Checklist for Referral Fee Agreements

A recent Legal Hotline caller received a referral from an Illinois broker and agreed to pay a fee if the buyer purchased a property. What the Wisconsin broker did not realize was that the Illinois broker had referred the buyer to a total of three local agents. When the deal closed, two of the agents were disputing the selling side and the Illinois broker was demanding fees from both Wisconsin agents. This scenario

illustrates what may occur when brokers do not use specific written referral agreements.

All referral agreements should be in writing. Members may wish to enlist the assistance of their company attorney to develop a referral fee agreement format that is appropriate to the company's marketplace and transactions. The following points should be addressed in any referral fee agreement:

1. The full names and contact information for the referred parties.
2. The full names of the referring and receiving agents and companies.
3. Company addresses and contact information.
4. The state of licensure and license number of the referring agents. The receiving agent should require written confirmation that the referring agent holds an active real estate license and/or seek written confirmation of an active license from the appropriate state real estate commission if there is any question about the licensee's status.
5. Whether the referral originated with the other agent or the company. To put it another way, if the referring agent goes to another company before the referral fee is paid, does the fee follow the agent or stay with the company? This may depend upon the referring agent's company policy - are referrals personal to the agents in that company or are they considered part of the company's business?
6. Whether the referral is exclusive to the receiving company or referrals are being made to other companies as well. If the latter is the case, specify which receiving agents/companies are responsible for paying the referral fee.
7. A clear and precise statement of

the basis for computing the fee. If the fee will be based on a percentage of commissions actually collected, specify if this is the gross commission received by the receiving company or the net commission received by the receiving agent. Business practices vary from market to market, so it is necessary to spell out exactly how the fee will be determined.

8. State exactly who is responsible to pay the fee, exactly to whom the fee should be paid, and when the fee will be paid.
9. Performance standard that must be met before the fee is earned. For example, the fee may be due if there is an accepted offer that closes. It should also be stated if there are any restrictions or limitations with respect to types of properties or transactions, geographic areas, etc.
10. Agreement term - how long the referral agreement is good for. If the referred party buys or leases a property with the receiving agent ten years after the referral was made, is the fee still due?

Members who are the principal broker should consider establishing a company policy that licensure confirmation be obtained as early as possible—definitely before closing. Company policy should also address whether referrals and the fees they produce are personal to the agents, business income for the company, or both. Referrals of friends and family members might be personal referrals and referrals involving contacts made from real estate practice on behalf of the broker/company might be company referrals. Office policy may also provide for a different portion to be retained by the company for referral fees as opposed to commissions.

### **Referral Fee Agreements-- Legal Hotline Q&A**

The following questions were recently asked of the Legal Hotline regard-

ing referral fee agreements.

***An attorney from Illinois has a client who is interested in property in Wisconsin. The attorney requested a referral fee from the broker. Is this legal?***

Wis. Stat. § 452.19 limits the payment of referral fees, finders fees and commission splits to persons licensed or registered in Wisconsin to practice real estate, or persons regularly and lawfully engaged in real estate brokerage in another state. This would exclude the attorney unless he has the credentials necessary under Illinois law to practice real estate and he regularly engages in real estate brokerage. This would not likely be the case if his primary occupation is his law practice.

***May a salesperson personally pay referral fees to active or inactive licensees?***

As long as company policy permits a salesperson to do so, a salesperson may pay a referral fee directly to an individual who holds an active real estate license, but is not employed by a broker. If the individual's license is under a broker, the referral fee must be paid to that broker.

***May a broker pay a referral fee to a salesperson who isn't currently licensed under a broker?***

Wis. Stat. § 452.19 permits a broker to pay referral fees and finders fees to other Wisconsin licensees as long as that person's license is active, regardless of the fact that the person holds a salesperson's license and not a broker's license. The fact that the person is not currently employed by a broker is not relevant.

It may be prudent practice to ask for a copy of an agent's license before entering into an agreement for a paid referral. A license may also be verified on the DRL Web site at [http://drlchq.state.wi.us/plsql/chq/cred\\_holder\\_query](http://drlchq.state.wi.us/plsql/chq/cred_holder_query) or use the link on the WRA Web site. The agent

must have a valid, current license. It is not necessary that the agent be a local board or WRA member.

***A real estate licensee gave names to a builder/broker, and the builder/broker was planning on paying a referral fee to the licensee. Now the builder/ broker is concerned about whether it is legal for him to pay the referral fees for names of building prospects***

Under Wis. Stat. § 452.19, licensees may pay referral fees only to other licensees. Since both the builder and the licensee hold real estate licenses, the builder may pay the licensee.

If the builder did not hold a real estate license, he could still pay the referral fee to the licensee. Wis. Stat. § 452.19 does not apply to non-licensees who pay referral fees.

***Re: Payment of a referral fee to a person in another state who does not have a Wisconsin license. The offer is for the person's daughter, who lives in Wisconsin, and the property is located in Wisconsin.***

Wis. Stat. § 452.19 limits the payment of referral fees, finders fees and commission splits to persons licensed or registered in Wisconsin to practice real estate, or persons regularly and lawfully engaged in real estate brokerage in another state.

Prior to making a referral payment, a broker may ask a person to show proof that he or she is licensed and lawfully engaged in real estate brokerage in another state. It would be prudent for the broker to enter into a written referral fee agreement with the other person prior to submitting any offers on behalf of the daughter.

## MLS Compensation and Cooperation

A critical part of every real estate transaction is establishing a REALTOR®'s right to be paid a commission if the REALTOR® successfully assists the party in obtaining the

desired buyer, tenant or property. While REALTORS® recognize a responsibility to serve their clients, customers and the public under high standards of ethics and integrity, they also have concerns about being fairly compensated for their professional endeavors. Compensation in real estate transactions may be established by the MLS, standing policy letters between broker/companies, compensation agreements pertaining to single transactions, or a combination of these.

In listing a property with the MLS of a board of REALTORS®, the listing broker makes a unilateral offer of cooperation and compensation to other MLS participants. The listing broker specifies on each listing whether cooperation and compensation are being offered to subagents, buyer's brokers or both. The offer to compensate is accepted by a broker who becomes the procuring cause of the sale or lease. In other words, the listing broker extends a blanket invitation to other brokers to become the procuring cause of the sale or lease.

All MLS participants are potential cooperating brokers. When a listing broker lists a property on the MLS, the listing broker is offering to cooperate with all MLS participants, provided they are willing to cooperate as subagents or buyer's brokers--whatever form of cooperation is being offered in that particular listing. If a cooperating broker/MLS participant responds to the MLS listing by making inquiry about the property on behalf of a buyer or by asking to schedule a showing, the responding broker must disclose if he or she is acting as a buyer's broker.

Standard of Practice 16-10 provides that "REALTORS®, acting as agents of, or in another relationship with, buyers or tenants, shall disclose that relationship to the seller/landlord's agent or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord's agent or broker not later than

execution of a purchase agreement or lease. (Amended 1/98)"

If no such disclosure is made, it is assumed that the cooperating broker is a subagent. The MLS required a mandatory offer of subagency before buyer brokerage became widespread. This offer of subagency is presumed in a Wisconsin MLS unless notice is given that the broker is acting as a buyer's broker.

## Using Policy Letters to Modify MLS Offers of Compensation

With respect to policy letters, the following rules are derived from the Article 3 Standards in the Code of Ethics and MLS policy:

- An offer to cooperate does not mean that there must also be an offer to compensate. When filing a listing with the MLS, the listing broker may offer compensation to selling agents, buyer's agents or both. The listing broker is not required to offer the same amount of compensation to all agents.
- The commission shown in the MLS listing must be shown as a percentage of the gross sales price or as a definite dollar amount.
- Listing brokers may unilaterally modify the compensation offered on the MLS so long as the modification is received by the cooperating agent, in writing, prior to the time an offer to purchase is produced. If a listing broker chose to offer one or more brokers a greater or lesser percentage of the sales price, or a greater or lesser dollar amount, the broker may simply send a unilateral policy letter containing the desired compensation. As long as the modification was communicated before an offer to purchase or lease was produced, the changed compensation will supersede the compensation stated in the MLS. The listing broker cannot, however, unilaterally modify the offered compensation after an offer to purchase or lease has been pro-

duced.

- MLS rules allow listing brokers to modify offers of compensation in ways other than stating a new percentage of the gross sales price or a new stated dollar amount, but this can be done only by mutual agreement with the cooperating agent via a bilateral policy letter. The cooperating agent receiving the policy letter must accept the modification by signing the policy letter and returning it to the listing agent, or in some other specified manner. If the cooperating agent does not accept the policy letter, the compensation offer shown in the MLS will stand.

- Any policy letter with the goal of discouraging cooperation may violate Article 3 of the Code of Ethics.

Under these standards, it would be permissible for two brokers to mutually agree to a change in compensation after an offer had been accepted. A listing broker also may unilaterally modify the offer of compensation prior to an offer being submitted. The listing broker cannot, however, unilaterally modify the offered compensation after an offer has been produced. The mechanism used by brokers for making these changes is typically a policy letter.

## Policy Letters

A policy letter is a communication from one broker to one or more other brokers, establishing the terms and conditions upon which cooperation and compensation is being offered. Policy letters can be used to establish the terms and conditions of cooperative relationships in any transaction.

The terms and conditions established in a policy letter may be divided into two categories:

- (1) Letters making an offer of compensation or modifying an MLS offer of compensation. These letters are accepted when the cooperating broker produces an offer to purchase.

This type of policy letter is referred to as a “unilateral policy letter.”

- (2) Letters addressing all other types of terms and conditions of cooperation. These letters are accepted by the cooperating broker’s signature on the policy letter and delivery of the accepted policy letter back to the listing broker, or by any other actions required for acceptance under the terms of the policy letter. This type of policy letter is referred to as a “bilateral policy letter.”

## Policy Letters Mechanics

Several important points must be remembered when writing and distributing policy letters:

- Policy letters must be clearly stated. Any ambiguities in a policy letter will be interpreted against the drafting office. If the conditions for cooperation or compensation are too vague, the courts may hold that no policy letter contract was created.

- To be effective, the policy letter must be delivered. Any office sending a unilateral policy letter should use some means to establish that delivery has been accomplished (i.e. registered mail, return of receipted copy, affidavit of delivery). With bilateral policy letters, a cooperating broker’s signature and delivery back confirms delivery.

- According to MLS policy, policy letters must be accepted in some way to create a binding contract. Following are the terms of acceptance for possible types of policy letters:

- (1) Unilateral policy letter stating compensation as a percentage of the gross sales price or a dollar amount. When a cooperating broker who has received a unilateral policy letter modifying an MLS offer of compensation procures a buyer for the property, the terms of the policy letter have been accepted by the cooperating broker’s actions. This is how an MLS offer

of cooperation and compensation is accepted. This is also how a unilateral policy letter—modifying the amount of the MLS offer of compensation by stating a different percentage of the purchase price or a definite dollar amount—is accepted. Brokers receiving this type of policy letter have three options: accept the terms and proceed with showings, etc.; reject the terms and refuse to show the property; or contact the listing broker with suggestions for an amended policy letter.

- (2) Bilateral policy letter modifying the MLS offer of cooperation and compensation. If a bilateral policy letter modifies the MLS offer of compensation in terms other than a percentage of the gross sales price or a definite dollar amount, the modification is accepted only if the cooperating broker signs and returns the letter to the listing broker, or accepts the policy in some other way specified in the policy letter. There must be some clear indication that there is a meeting of the minds. If the cooperating broker is not happy with the terms and conditions of the policy letter and refuses to accept the policy letter, the listing broker may consider honoring the compensation originally stated in the MLS listing or using a unilateral policy letter to change the compensation amount, at least until a bilateral letter can be negotiated.

- (3) Policy letter changing terms and conditions of cooperation other than, or in addition to, price. This type of policy letter will also require written acceptance and delivery or some other unconditional acceptance action before it becomes a binding contract.

- Policy letters are expressions of the independent competitive decisions of broker/firm. Each office’s policy letter must be based on its own decisions, not a group’s attempt to influence the terms of

competition. It may be a violation of antitrust law for competing offices to agree on standard compensation terms or competitive policies. A number of offices in a local market may discuss a new problem with fellow brokers and together formulate the best response to the situation, or franchise offices may all be subject to the same policies. Unfortunately, joint office responses may be considered a conspiracy under antitrust law. Parallel activities (several offices independently reaching the same result) do not necessarily constitute a conspiracy, however, they can create a strong presumption of an antitrust violation.

Accordingly, it may be prudent to document the internal development of an office's cooperation and compensation policy. Include in office meeting minutes the details of whatever discussion led to the new policy. A classic mistake that has led to antitrust lawsuits is to simply take a competitor's policy letter that looks good, and copy the body of the letter onto office letterhead. Office counsel should review and approve content and procedures prior to issuance of a policy letter.

## MLS Cooperation and Compensation - Legal Hotline Q&A

The following questions were recently asked of the Legal Hotline regarding MLS cooperation and compensation.

***Re MLS offers of compensation. MLS members are entering "call" in the MLS as the offer of compensation for buyer agents. Is this permissible?***

Per the National Association of REALTORS® MLS Policy, "The compensation specified on listings published by the MLS shall be shown in one of the following forms: 1. by showing a percentage of the gross selling price 2. by showing a definite

dollar amount." Additionally, MLS policy states that the MLS shall not publish listings that include general invitations by listing brokers to other participants to discuss terms and conditions of possible cooperative relationships. Therefore, the MLS should not accept listings with "call" as the compensation offered by a participant.

If an MLS participant chooses to offer a minimal amount of compensation, the entry should reflect that offer. Under Wis. Stat. § 452.133(2), the listing broker has duties to the client to disclose to the client all information known by the broker that is material to the transaction. In this case, the seller should be made aware of the minimal offer of compensation if it will have a material effect on the marketability of the property.

***A listing broker had a closing with a cooperating broker. In the MLS, the commission was stated as a flat dollar amount versus a percentage of the selling price. The cooperating broker is trying to tell the listing broker what the standard co-broke rate is. Please advise.***

Because the MLS is a tool by which the listing broker may make a unilateral offer of compensation, it is the listing brokers choice to set compensation amounts. Once the offer of compensation is made, the cooperating broker then knows the amount of commission that will be paid if it is determined the cooperating agent is the procuring cause of the sale.

Commissions offered to cooperating agents are always negotiable. There is no industry or MLS standard rate. Pursuant to MLS policy, the MLS is prohibited from fixing, controlling, recommending, suggesting, or maintaining commission rates or fees for services rendered by members. When offering compensation, MLS rules allow listing brokers to enter either a percentage or flat rate in the MLS.

***A broker is working with a commercial buyer. The buyer identifies Property X and the broker obtains an exclusive listing contract. Another broker writes the offer. The property is not in MLS nor is there a co-broke agreement. The offer states that the listing broker is to split his commission with the broker who wrote the offer to purchase. The offer is acceptable to the seller. The broker with the listing refuses to co-broke because he feels the he was clearly procuring cause and a significant amount of money is involved. Does the listing broker have any obligation to co-broke with the other broker?***

A cooperating agent's right to commission will be determined by an offer of compensation from the listing broker or an amount negotiated from the seller in an offer to purchase. There generally three ways a cooperating broker has a rightful expectation of commission from the listing broker: an MLS offer of compensation, a policy letter, or a separate compensation agreement relating to the specific transaction. Non-MLS compensation agreements should be reduced to writing and signed by the brokers to avoid commission disputes.

If the broker is a REALTOR®, the REALTOR® is prohibited from using the offer to purchase to modify the listing broker's offer of compensation. Standard of Practice 16-16 of the REALTOR® Code of Ethics provides that "REALTORS®, acting as subagents or buyer/tenant agents 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's agents 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. (Amended 1/98)"

The offer to purchase is an agreement between the parties, not the brokers, so the brokers cannot negotiate a

binding compensation agreement there. However, the buyer may request that the seller pay the cooperating agent a fee in the offer to purchase. Any terms to this effect would be negotiable between the buyer and the seller. The parties should review the contract language to determine what is intended and if it is ambiguous, counter to clarify their understanding. Otherwise, they risk later litigation.

## Non-MLS Policy Letters

In transactions where there is no MLS or where neither broker involved is an MLS participant, policy letters and compensation agreements are often used to establish the terms of cooperative relationships and offer compensation in a transaction. In these situations, the MLS safety net is not there. There is no automatic offer of cooperation and compensation, and no pre-designated standard of performance for earning a commission. Brokers must make an offer to the cooperating brokers who, by their words or deeds, may accept that offer and create an agreement for agency relationships, cooperation and compensation. Procuring cause does not determine who gets paid unless the brokers have agreed that procuring cause is the standard of performance. Unless the brokers have a standing policy letter agreement or a compensation agreement for that transaction, the listing broker has no obligation to pay the cooperating broker.

For example, if commercial brokers are using a Commercial Information Exchange (CIE) rather than an MLS, no offers of cooperation or compensation are extended through the CIE. However, any information submitted on properties for sale, lease or exchange must include the seller's or lessor's written authorization for the participant to submit information on the property to the CIE. If the participant is acting on behalf of a buyer, then the participant may submit information describing the type of

property sought to the CIE even though the participant may not be the buyer's exclusive agent.

If a broker gets information from the CIE and approaches the broker who submitted the property information to the CIE, there may be absolutely no underlying agreements or understandings about how the two brokers will proceed. The approaching broker may disclose if he or she is working as a buyer's broker, but that will not necessarily be so if the broker is not a REALTOR® and the property is not one-to-four family residential. REALTORS® must disclose buyer/tenant agency per the REALTOR® Code of Ethics Standard of Practice 16-11, and Wis. Admin. Code § RL 24.07(8) requires licensees to disclose buyer agency if the property is used or intended to be used principally for one-to-four family residential purposes. If the broker is not a REALTOR® and the property is commercial, the broker may have no duty to disclose anything.

At this point, the brokers should try to reach an agreement about whether the brokers will cooperate with each other, what their agency relationship will be, and what compensation will be paid under what circumstances. Assuming that the other broker will cooperate is not wise--nonmembers have only limited duties to cooperate. Under § RL 24.13(2)(a), a listing broker must permit access for showing purposes unless the owner has given specific written instructions to exclude the other broker. Under § RL 24.13(1), a listing broker must submit offers to the owner unless the owner has given specific instructions to the contrary. Other than that, a nonmember has no obligation to cooperate with a buyer's or tenant's broker, and no obligation to offer subagency. And without an agreement to compensate the other broker, a listing broker certainly has no duty to pay the other broker.

Standard of Practice 3-1 states that "REALTORS®, acting as exclusive

agents or brokers of sellers/landlords, establish the terms and conditions of offers to cooperate. Unless expressly indicated in offers to cooperate, cooperating brokers may not assume that the offer of cooperation includes an offer of compensation. Terms of compensation, if any, shall be ascertained by cooperating brokers before beginning efforts to accept the offer of cooperation. (Amended 1/99)" Brokers who are aware of the need to establish a basis for compensation--or risk not being paid at all--will likely pursue the issue with the other broker. A smart broker knows that an agreement on compensation should be reached, in writing, before any offer is submitted.

What is often overlooked, however, is that the broker should not be satisfied with only an agreement for compensation. If there is to be an agreement, it should include an agreement regarding cooperation and agency. A listing broker may allow a broker to show a property (because § RL 24.13(2)(a) says he or she has to), but that does not necessarily mean that the listing broker has agreed to otherwise co-broke. In addition to establishing cooperation and subagency or buyer agency, the agreement should also establish the often overlooked point of standard of performance--what the other broker has to do to earn the agreed upon compensation. These and other points may be addressed in a policy letter.

## Policy Letter Checklist

Brokers using a policy letter agreement to establish cooperation, agency, compensation, and other rules and standards often will use a bilateral agreement. The listing broker may prepare an agreement and submit it to the other broker. If the other broker is unhappy about any of the provisions, the two brokers may be able to negotiate a modified agreement that is mutually agreeable. Sometimes the listing broker may be unwilling to change the provisions and may refuse to cooperate or pay

the other broker unless the other broker goes along with the listing broker's terms and conditions.

Cooperation and compensation may be offered to subagents and/or buyer's brokers. Listing brokers and sellers have some potential legal liability for the acts of their subagents. Therefore, some offices may wish to limit subagency to offices and licensees who are actively engaged in real estate practice. Appropriate policies may include limiting subagency to agents who are actively engaged in the real estate market in which the listing is located and who carry errors and omissions insurance. Whether these policies are appropriate for a given office must be determined by the individual office, preferably with assistance from counsel.

Policy letters are also an excellent vehicle for establishing the rules and standards with which a cooperating agent must comply in order to earn the offered commission. Failure to meet the listing broker's standards could result in reduction of compensation or termination of subagency if the policy letter is written to include penalty provisions for noncompliance. Failing to establish minimum standards of practice is an invitation for other brokers to do things their own way.

There is a vast assortment of potential policy letter provisions. The following checklist attempts to list the different types of provisions that might be used and give a few examples of each. Ultimately, a broker must determine what terms and conditions are best suited for the broker's company, the transaction, the parties and the cooperating brokers.

### Policy Letter Provisions

The following provisions may be appropriate for different types of policy letters. Members may wish to enlist the assistance of their company attorney to develop a policy letter format that is appropriate to the company's marketplace and transactions.

**1. Identify Brokers:** State or provide spaces for the name, address, telephone number, fax number, e-mail address and any other contact information for each broker/company.

**2. Term of the Agreement:** State the term or duration of the agreement.

**Example:** This policy letter agreement is entered into by the two brokers/companies identified and signing at the conclusion of this letter. This agreement shall remain in force until such time it is terminated by written notice delivered to the other broker.

**3. Territory/Property:** State whether the policy letter is specific to particular properties or a specific geographic area. Make sure any descriptions are clear and precise.

**4. License Requirements:** If working with brokers from out of state or where otherwise prudent, have the broker confirm that the company and all agents practicing in Wisconsin are licensed in Wisconsin, and that out-of-state agents are regularly and lawfully engaged in the real estate brokerage business in another state, territory or possession of the United States or another country.

**5. Compensation Amount:** The formula for expressing the compensation to be paid may vary widely, and may be very complex in transactions like commercial leases. Different amounts may be offered, conditioned upon the performance of specified tasks or dependent upon whether the cooperating broker meets certain standards. It is critical that the amount of compensation being offered be expressed precisely using clear terminology that can be readily understood by brokers from different marketplaces. Many transactions are so complex that compensation is separately negotiated between the brokers later on, when transactional details are taking shape. Thus, compensation language may or may not appear in a policy letter agreement.

**Example 1:** The commission or buyer's broker's fee paid to cooperating brokers upon a successful closing shall be the greater of the compensation offered in the MLS, if any, or the following:

- a) \_\_\_ percent of the final gross sales price for vacant lots and parcels
- b) \_\_\_ percent of the final gross sales price for retail and commercial properties
- c) \_\_\_ percent of the final gross sales price for new construction not previously occupied
- d) \_\_\_ percent of the final gross sales price for residential properties

**Example 2:** The listing broker will pay a selling broker who is a REALTOR® \_\_\_ percent of the total commission actually received by the listing broker from the owner. The listing broker will pay \_\_\_ percent of the total commission actually received to a nonmember selling broker, provided the following conditions are met:

- 1. The broker has an active Wisconsin real estate broker's license.
- 2. The broker is actively engaged in real estate brokerage.
- 3. The broker is not a principal (buyer) in the transaction.

**Example 3:** Tenant's broker will be paid \_\_\_ percent of the annual gross rent for the first \_\_\_ years, and \_\_\_ percent of the annual gross rent for each year in the balance of the lease term and \_\_\_ percent of the annual gross rent in the event of any renewal or extension.

**6. Performance Standard:** State what must be done to earn the compensation. The commission or fee might be earned if the cooperating broker is procuring cause per MLS and local board standards, "procures the buyer" as defined in the listing contract, writes an offer that successfully closes, etc. Again, this standard must be clearly stated so the parties

know when the compensation is earned. It should also be stated when compensation will be paid.

**Example 1** Compensation will be paid to the broker who wrote the offer, but only after a successful closing has occurred. Payment to be within 48 hours of closing.

**Example 2:** The broker who is the procuring cause of a transaction that closes will earn the cooperative compensation to be paid at closing.

**Example 3:** Compensation will be earned if a tenant procured by the buyer/tenant's broker enters into a lease with a minimum term of two years.

**7. E & O Insurance:** If the listing broker is going to cooperate with a subagent from out of the broker's area or state, the listing broker may want to require that the cooperating broker have errors and omissions (E&O) insurance to help protect the listing broker if the listing broker becomes liable for some action or omission by the cooperating broker.

**Example** Any cooperating broker shall have a current errors and omissions insurance policy with at least \$ \_\_\_\_\_ minimum liability coverage per claim and at least \$ \_\_\_\_\_ minimum aggregate liability coverage. Each agent must be covered under the office E&O policy or have his or her own E&O policy meeting these minimum requirements.

**8. Agency Disclosure:** Because a listing broker has potential legal liability for undisclosed dual agency, listing brokers may insist that all cooperating subagents provide a copy of a signed agency disclosure form no later than the time that an offer is submitted. Listing brokers may also want to be notified as soon as possible if a broker is acting as a buyer's/tenant's broker.

**Example 1:** Any subagent must furnish the listing broker with a copy of the agency disclosure that was pro-

vided to the buyer per Wis. Stat. § 452.135. The agency disclosure form must conform to § 453.135 and any other applicable legal requirements. The copy of the agency disclosure form must be given to the listing office no later than the time that an offer to purchase is submitted. Any confidential information stated on the agency disclosure form may be removed from the copy provided.

**Example 2:** Buyer's brokers must disclose their status as a buyer's broker upon first contact with the listing office, prior to setting up an appointment to show any listing.

#### **9. Property Condition Reports, LBP, and Other Disclosures:**

Receipt of a copy of any real estate condition report furnished by the listing broker or owner to the cooperating agent or buyer must be acknowledged by the buyer in the offer to purchase. A copy of any lead-based paint addendum furnished by the listing broker or owner to the cooperating agent or buyer must be signed by the buyer and incorporated into the offer to purchase, if applicable. Any offers for non-exempt target housing built before 1978 must include a lead-based paint disclosure addendum that conforms to federal law.

**10. Buyer/Tenant/Licensee:** A listing broker may wish to state a policy with respect to licensees who act as parties in a transaction.

**Example 1** The listing broker will not, as a matter of policy, share commissions with brokers who are acting as a principal in the purchase or leasing of a listed property. If a licensee purchases or leases a listing as the buyer/tenant/licensee, the listing broker will pay an incentive equal to \_\_\_\_\_. The buyer/tenant/licensee must be actively engaged in the practice of real estate.

**Example 2:** With respect to offers to purchase submitted by licensees, a

buyer's incentive may be negotiated with the listing broker prior to the submission of the offer to purchase.

**11. Procedures for Presentations of Offers and Counteroffers:** REALTORS® working in non-MLS areas may consider addressing the issues covered in the model MLS rules, such as a cooperating broker's right to attend the presentation of offers.

**12. Showings:** The listing broker may want to establish a process for identifying parties attending showings. A cooperating broker may be required to disclose the name and capacity of the party to the listing broker upon initial contact. The listing broker may also want to regulate how showing appointments are scheduled and who will attend showings.

**Example 1** All showings must be arranged through the listing broker's office. The listing broker will record the name of the agent showing the property and the name of the party.

**Example 2:** All showings must be arranged with the listing broker's office, not the seller. The cooperating agent scheduling a showing shall give his or her name, the firm name, and the name of the buyer (unless the buyer's name is confidential information). Buyer's agents are also required to give the name of the buyer when scheduling showings.

**13. Policy Letter Enforcement:** Many policies that a listing broker wants to establish will mean little if there is also not an enforcement mechanism or a penalty that may be imposed if the cooperating broker breaks the policy letter agreement.

**Example:** In the event that a cooperating broker fails to comply with any of the terms and conditions of this policy letter agreement, the listing broker may reduce the compensation otherwise due to that broker by \_\_\_\_\_. In the event that the same cooperating broker fails to comply with any of

the terms and conditions of this policy letter agreement a second time, the listing broker may reduce the compensation otherwise due to the broker by \_\_. Notwithstanding any other provision of this policy letter agreement, any further breach of this policy letter agreement by the same cooperating broker will entitle the listing broker to give written notice terminating this agreement. This notice shall be effective immediately upon receipt by the cooperating broker.

**14. Resolution of Commission Disputes:** The parties may wish to establish a method of resolving disputes other than going to court.

**Example 1:** All disputes regarding compensation or other provisions under this agreement will be settled by arbitration.

**Example 2:** Any dispute will be settled by mediation per NAR policy and procedures.

**15. Acceptance:** The most traditional way for the cooperating broker to indicate his acceptance of a bilateral policy letter is to have the broker sign the agreement and deliver it back to the listing broker. Other methods may be designated in the policy letter, provided that there is a clear indication that the brokers have a meeting of the minds.

**Example** Duplicate originals of this policy letter have been enclosed for your convenience. Please sign and date one copy of this letter in the space provided and return it to [address] or fax it to [fax number]. If we do not receive your reply by noon on [month/day/year] compensation to all agents from your firm will be limited to \_\_ percent of the gross sales price on all transactions.

**16. Binding Effect:** Some brokers may want to specify that the policy letter is binding only upon the current broker/companies and that any sale of one of the companies, a sale of

the assets of one of the companies, etc. shall cause the policy letter to become immediately null and void.

## Compensation Agreements

Whereas policy letters, particularly bilateral policy letters, are often used to create long-term cooperation and compensation agreements, compensation agreements generally are used for a single transaction.

A broker's compensation agreement may be used in many different situations, including commercial transactions, when there is no applicable MLS at that location, when the MLS offer of compensation has been rejected, when one of the brokers is not an MLS participant so the MLS does not apply, or when the brokers desire to negotiate a different compensation rate than what is on the MLS. In the last situation, it may be advisable to state that the agreed commission or fee is in place of, not in addition to, any compensation offered in the MLS or elsewhere.

With respect to a compensation agreement, the only necessary parties are the listing broker and the cooperating broker. The seller and the buyer might, however, acknowledge this agreement for the purpose of consenting to a buyer's broker receipt of compensation from someone other than the client, if that consent has not already been given elsewhere. This is necessary for compliance with Wisc. Admin. Code § RL 24.05(1).

A broker's compensation agreement should indicate that the listing broker is offering cooperation and compensation, and that the cooperating broker is accepting this offer. The agreement should also indicate whether the brokers will cooperate via a subagency relationship or buyer brokerage. Subagency is presumed within the MLS due to the historical fact that brokers once offered cooperation and compensation as subagency

only. Outside of the MLS, brokers are well advised to not assume or presume anything and specifically and plainly state if a subagency relationship is being agreed upon as well as confirming the agreement for cooperation and compensation.

Compensation agreements may contain many or all of the same elements of a policy letter, so members may also review the various provisions sometimes used in policy letter agreements to see if any of those are appropriate for the immediate transaction. Members may wish to enlist the assistance of their company attorney to develop a compensation agreement format that is appropriate to the company's marketplace and transactions. A compensation agreement should:

1. Describe or identify the property;
2. Name the parties;
3. Give the names, addresses and contact information for the agents and brokers;
4. Identify the agency relationship--offer and accept subagency, or acknowledge buyer brokerage or another relationship;
5. Offer and accept cooperation as a subagent or buyer's broker;
6. State the amount of the commission or fee to be paid by the listing broker to the cooperating broker in clear, specific terms;
7. Indicate when compensation shall be paid; and
8. State the standard of performance or what must be done to earn compensation.

A cooperating broker should always attempt to enter into a compensation agreement before submitting any offers to purchase or lease to the listing broker. The listing broker may lose incentive to agree to the cooperating broker's compensation proposal once the listing broker has an offer in hand.

## Compensation - Legal Hotline Q&A

The following questions were recently asked of the Legal Hotline regarding a broker's entitlement to compensation:

***Re Whether or not a co-broke commission was earned. One broker had a listing and another broker submitted an offer. The seller countered with respect to the financing contingency deadline and the disposition of the earnest money if the closing did not occur on time. The buyer rejected that counter and countered back, assuring the funds were there and that everything was in place.***

***The selling broker is claiming that his co-broke commission has been earned because he produced a ready, willing and able buyer. This is not an MLS-listed property, there are no policy letters between these brokers, and no other compensation agreement other than a gentlemen's agreement that commission is split 50-50 if a property is sold.***

Listing brokers are obligated to pay commission if there is an agreement to pay, typically based upon either an MLS offer of compensation, a compensation agreement or a policy letter. If the property were listed on the MLS, the listing broker would be obligated to pay the MLS offer of compensation to the broker who procured the buyer in a successful transaction, i.e., a closed sale. However, MLS standards and procuring cause analysis apply only in MLS listings or when those standards have been specifically adopted in a policy letter or compensation agreement.

A broker's compensation agreement should identify the property, name the parties and the brokers, state the amount of the commission or fee to be paid by the listing broker to the cooperating broker, indicate when the commission or fee will be paid, and state what must be done to earn it. There is no automatic "flow-through" application of the listing contract standards to the relationship between the listing broker and the selling broker.

Whatever the standard for earning a commission might be, it must be clearly identified. The commission or fee might be earned, for example, if the cooperating broker (a) is procuring cause per MLS standards, (b) "procures the buyer" as defined in the listing contract, or (c) brings in an offer that successfully closes. Compensation agreements should be in writing and signed by the brokers to avoid commission disputes.

The selling broker in the described scenario arguably has no basis for an action against the listing broker because there simply is no compensation agreement or standards. The selling broker also has no cause of action against the seller because there is no contract between the seller and the selling broker, so there is no contractual privity.

## Conclusion

Policy letters, compensation agreements and referral fee agreements allow REALTORS® the flexibility to structure cooperative relationships with other brokers, both within and outside of the MLS, and inside and outside of Wisconsin. These agreements will further the interests of clients and customers as well as the business interests of the brokers involved.

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