

Can brokers share their fees with an attorney?

The Texas Real Estate License Act prohibits brokers from sharing fees received for services as a real estate agent with anyone not licensed as a real estate broker or salesman in Texas or any other state. (See Section 15 (a)(6)(F) and Section 14 (a) of the act for the specific provisions addressing this matter.) With such seemingly clear statutory prohibitions, why is this still an issue with many brokers?

When an attorney performs a brokerage service

Attorneys are exempt from any of the provisions of the Texas Real Estate License Act. They are permitted to represent clients in real estate transactions by virtue of their license to practice law.

That representation could include those actions typically referred to as real estate brokerage services.

Since brokers cannot share their fees with attorneys who perform a brokerage service, attorneys must seek compensation for that service directly from one of the principals in a transaction.

It is permissible for listing brokers to reduce their fee agreement with a seller so that the seller can pay an attorney for his or her services, whether those services are performed for the seller or buyer.

Such a reduction of the listing fee would be a matter of private agreement between the listing broker and the seller. While brokers are not required to forgo their contractual rights to compensation,

some circumstances might require brokers to balance their right to a fee against the best interest of their client.

Attorneys, however, should not insist that listing brokers reduce their fees in such a situation, since that might be construed as interference with the listing agreement. Brokers should not participate in any arrangement designed to circumvent the portion of the act which prohibits splitting compensation.

When an attorney is a principal in a transaction

In Section 15 (a)(6)(F), the Real Estate License Act prohibits sharing a broker's fee with a person not licensed as a broker or salesman "for services as a real estate agent."

An essential element in the definition of a real estate agent is that the person performs an activity described in Section 2 (2) of the act "for another person."

Since a principal in a transaction does not act for another person, a

principal would not fit the definition of a real estate agent.

It follows that brokers may share a fee with a principal, whether the principal is an attorney, plumber, teacher, etc., and the broker would not be violating the prohibitions contained in the act.

Obviously, when an attorney is the seller, the broker could reduce his fee at any time during the course of the transaction. However, when the attorney is the buyer, brokers should consider sharing a fee with that attorney only with full disclosure to all parties, including the seller and any lender involved in the transaction.

Since the buyer's receipt of a portion of the broker's fee could affect the lender's loan-to-value ratio or otherwise violate the lender's loan-underwriting guidelines, lender permission for the sharing of the broker's fee with the buyer is essential. By including such a fee arrangement in the earnest money contract, brokers can ensure they obtain the lender's permission.

Ron Walker - TAR Director of Legal Affairs
Dennis R. Schmidt - TAR Staff Attorney

This article originally appeared in the November 1995 issue of TEXAS REALTOR® magazine, the Official Publication of the Texas Association of Realtors®, and is reprinted with their permission.