

REALTOR®'s Obligation to Disclose Dual Commission Arrangements

REALTORS® A and B were members of the same Board and Participants in the Multiple Listing Service. REALTOR® A, cooperating with REALTOR® B on REALTOR® B's listing, presented an offer to purchase signed by buyers offering the listed price, and a check for earnest money. The only contingency was a mortgage contingency, and REALTOR® A shared with REALTOR® B qualifying information about the buyers indicating there should be no problem securing a mortgage. The following day, REALTOR® B returned the offer to REALTOR® A with "REJECTED" written on it and initialed by the seller, and explained that the seller had accepted another offer secured by one of REALTOR® B's sales associates. REALTOR® A inquired about the seller's reason for rejecting the full price offer with only a mortgage contingency, and what had caused the seller to accept the other offer. REALTOR® B responded that he did not know, but with equal offers, he supposed the seller would favor the offer secured by the listing broker.

Later, REALTOR® A met the seller at a social event. The seller thanked him for his efforts in connection with the recent sale of the seller's home. The seller hoped REALTOR® A understood there was nothing personal in his decision, adding that the money he saved through his "special agreement" with REALTOR® B had been the deciding factor. When REALTOR® A asked about the "special agreement," the seller explained he had signed a listing agreement for the sale of his property which authorized the submission of the listing to the Multiple Listing Service and specified a certain amount of compensation. However, the seller stated that he had also signed an addendum to the listing agreement specifying that if REALTOR® B sold the listing through his own office, a percentage of the agreed compensation would be discounted to the seller's credit, resulting in a lower commission payable by the seller.

REALTOR® A led a written complaint with the Board of REALTORS® against REALTOR® B, alleging a violation of Article 3. After its review of the complaint, the Grievance Committee requested that an ethics hearing be arranged.

REALTOR® A, in restating his complaint to the Hearing Panel, said that REALTOR® B's failure to disclose the actual terms and conditions of the compensation offered through the Board MLS resulted in concealment and misrepresentation of pertinent facts to REALTOR® A and to the prospective buyers served by REALTOR® A who had, in good faith, offered to purchase the property at the listed price with only a mortgage contingency. REALTOR® A told the Hearing Panel that if he had known the facts which were not disclosed by REALTOR® B, he could have fully and accurately informed the buyers who could have taken those facts into consideration when making their offer. As it was, said REALTOR® A, the buyers acting in good faith were deceived by facts unknown to them because they were unknown to REALTOR® A. Further, REALTOR® A said that REALTOR® B's failure to fully disclose the true terms and conditions relating to compensation made it impossible to have a responsible relationship with REALTOR® B and make proper value judgments as to accepting the offer of compensation.

REALTOR® B stated that it was his business what he charged and the Board or MLS could not regulate his charges for his services. If he wished to establish a dual commission charge by agreement with his client, that was his right, and there was no need or right of the Board or MLS to interfere.

The Hearing Panel agreed that it was REALTOR® B's right to establish his fees and charges as he saw fit, and that the Board or MLS could not and would not interfere. However, the Hearing Panel noted

that his complete freedom to establish charges for his services did not relieve him of his obligation to fully disclose the real terms and conditions of the compensation offered to the other Participants of the Multiple Listing Service, and did not justify his failure to disclose the dual commission arrangement. In the case of a dual commission arrangement, the listing broker must disclose not only the existence of the "special arrangement" but also must disclose, in response to an inquiry from a potential cooperating broker, the differential that would result in the total commission in a cooperative transaction. The Hearing Panel concluded that by submitting a listing to the MLS indicating that he was offering a certain amount of compensation to cooperating brokers while other relevant terms and conditions were not disclosed to the other MLS Participants, he had concealed and misrepresented real facts and was in violation of Article 3 of the Code of Ethics.