

CALCULATING COMMISSIONS BASED UPON "NET SALE PRICE"

We have been receiving an increasing number of questions on whether and how a listing broker can offer a cooperating broker a commission amount based upon the "net sale price." As we understand it, the issue typically arises in connection with an offer in which the buyer is requesting significant concessions in the form of, for example, seller paid closing costs and/or remodeling credits.

In the listing agreement, the seller and the listing broker can agree to calculate the commission amount in any way they see fit. The difficulty arises in connection with the compensation to be paid to the cooperating agent. The MLS Rules and Regulations provide that the compensation offered through an MLS must be either a percentage of the **gross** sale price ("P") or a definitive dollar amount ("D"). This is a NAR policy and cannot be changed by AAABOR (or by MAR). We have confirmed with NAR that this policy does not, for example, allow a member to use the "Remarks" section to alter the method of calculating the commission.

Based on this MLS rule, if a listing broker wants to alter the method of calculating a commission, the listing broker must do so outside of the MLS. Outside of the MLS, listing and cooperating brokers are free to contract on whatever terms they choose. A seller who has received an offer that contains significant concessions may decide that such offer is acceptable ONLY if the commission will be calculated based upon the sale price less the concession amount. If so, and if that commission adjustment is acceptable to the listing broker, then the listing broker should contact the cooperating broker on behalf of the seller to see whether the cooperating broker will also agree. This discussion should take place and be reduced to writing prior to the seller's acceptance of the buyer's offer.

It should be noted that a statement that a commission will be calculated on "net sale proceeds only" is open to interpretation. Will all closing costs to be paid by the seller be deducted from the sale price or only the amount of the renovation credit? If the concessions include personal property of the seller, how will the value of those concessions be calculated? A lawyer or accountant might even argue that the "net sale proceeds" should reflect a deduction for the seller's mortgage payoff. For these reasons, when you are reaching an agreement as to the commission calculation, you should indicate exactly which concession amounts will be deducted from the sale price. Alternatively, if the purchase contract is already prepared, the parties could simply agree, for example, that the

commission amount will be calculated "assuming a sale price of \$200,000." Another method would be to simply state, for example, that "the commission amount will be \$10,000, split equally between the listing broker and the selling broker."

Finally, listing brokers are cautioned against including a provision in their listing agreement agreeing that the commission will be based upon "net sale proceeds." First, as stated above, that phrase is subject to a number of interpretations. Second, the fact that the listing contract provides for a calculation of the total commission amount based upon the "net," will only reduce the amount that the seller is obligated to pay. It will not automatically reduce the amount that the listing broker will be obligated to pay the cooperating broker.

Consider the following hypothetical:

Listing agreement provides that seller will pay a commission equal to 6% of the "net sale price." In the MLS, listing broker offers cooperating agents a 3% commission. Seller receives an offer for \$200,000 that requires the seller to give the purchaser a \$10,000 remodeling credit and to pay purchaser's closing costs up to \$4,000. Understanding that his commission obligation is limited to 6% of the "net sale price," seller accepts this offer. Listing broker then advises the cooperating broker that the commission will be calculated based on the "net sale price." The cooperating broker refuses to agree to this commission amount. Seller will only owe the listing broker a 6% commission based upon the "net sale price;" but the listing broker will owe the cooperating broker a commission equal to 3% of the "gross sale price."

If the listing agreement had not provided that the seller's commission obligation would be based upon the "net sale price," then the seller would have either: (a) paid the commission on the "gross sale price" or (b) rejected this offer until both brokers agreed to accept a commission based upon the "net sale price."

The concern expressed by several AAABOR members regarding this MLS rule has been relayed to NAR and NAR has indicated that it may reconsider this rule in the future. In the meantime, however, members who want to calculate the commission on something other than the gross sale price should use the method discussed in this article.