

## **PROCURING CAUSE AND COMMISSION DISPUTES**

1. Cooperating commissions are a matter of contract.
  - A. Under the Michigan law, cooperating commission contracts between licensees may be in writing or may be oral.
  - B. If both REALTORS® are members of the same MLS, then the initial cooperating commission contract is through the MLS.
    - 1) The MLS listing is the “offer,” which is “accepted” by the cooperating broker by producing a ready, willing and able buyer.
    - 2) Listing broker may change the amount of the offer of compensation in the MLS at any time until it is accepted by the cooperating broker.
    - 3) Even after the offer of compensation is accepted, the cooperating commission contract may be changed by agreement between the listing broker and the cooperating broker.
    - 4) If the cooperating broker agrees to reduce his commission in order to facilitate the transaction, this becomes a new (binding) cooperating commission contract.
2. For offers of compensation through a REALTOR® MLS, the listing broker must specify the amount of compensation being offered to other MLS participants. The compensation offer in listings must be:
  - A. A percentage of the gross selling price;
  - B. A definite dollar amount;

C. Or, but only if the MLS specifically allows it, a percentage of the net sales price defined as the gross sales price minus seller concessions (and the MLS must come up with its definition of “seller concessions”).

3. An offer of compensation through a REALTOR<sup>®</sup> MLS must be unconditional except that the cooperating broker must have been the “procuring cause” of the sale.

4. A listing broker is not precluded from offering any particular MLS participant compensation other than the amount that is published in MLS, provided that:

A. The MLS participant must be notified in writing in advance of submitting an offer; and

B. Modification cannot be the result of any agreement with other MLS participants.

5. A MLS may provide for commission adjustments under limited circumstances.

A. MLSs, at their discretion, may adopt rules enabling listing brokers to communicate to cooperating brokers that the commission established in the listing contract is subject to court approval, and that compensation payable to cooperating brokers may be reduced if the commission established in the listing contract is reduced by a court. In such instances, the fact that the commission is subject to court approval and either the potential reduction in compensation payable to the cooperating broker or the method by which the potential reduction in compensation will be calculated must be communicated to the cooperating broker in advance of submitting the offer.

B. In any instance where a listing broker discloses a potential short sale, an MLS, at its discretion, may adopt rules enabling listing brokers to communicate to cooperating brokers how any reduction in the commission established in the listing

contract required by the lender as a condition of approving the sale will be apportioned between the listing and cooperating broker.

6. In order for a cooperating broker to be entitled to a commission as the “procuring cause,” it is not necessary that the listing broker have been paid a commission. It is necessary that there have been a “successful transaction,” meaning the cooperating broker’s buyer actually closed on the purchase.

7. The listing broker’s obligation to compensate the cooperating broker who was the procuring cause may be excused if, through no fault of the listing broker, it was impossible or financially unfeasible for the listing broker to collect some or all of the commission from the seller.

A. Matter for resolution through arbitration.

B. Listing broker must have exercised “good faith and reasonable care.”

C. Listing broker must have promptly communicated to cooperating broker when he became aware of the fact that some or all of the commission might not be paid.

8. Hypotheticals

A. An offer is presented through cooperating REALTOR<sup>®</sup> Smith. REALTOR<sup>®</sup> Jones thinks that he, not REALTOR<sup>®</sup> Smith, was the procuring cause. REALTOR<sup>®</sup> Jones may remain silent until after the sale closes and then attempt to establish that he was in fact the procuring cause of the sale. REALTOR<sup>®</sup> Jones is entitled to the cooperating commission offered through the MLS if he can establish that he, not REALTOR<sup>®</sup> Smith, was the procuring cause.

B. An offer is presented through cooperating REALTOR<sup>®</sup> Smith. REALTOR<sup>®</sup> Jones calls REALTOR<sup>®</sup> Smith and claims that he, not REALTOR Smith, is

the procuring cause for the sale. REALTOR<sup>®</sup> Smith and REALTOR<sup>®</sup> Jones agree that REALTOR<sup>®</sup> Jones will receive a 1% referral fee. This is a binding amendment to the original cooperating commission contract.

C. In a short sale, REALTOR<sup>®</sup> Jones submits an offer to the listing REALTOR<sup>®</sup>, which is accepted, but the seller's lender will only consent if both REALTOR<sup>®</sup> Jones and listing REALTOR<sup>®</sup> agree to reduce their commission. If REALTOR<sup>®</sup> Jones agrees to a reduced commission, this is a binding amendment to the original cooperating commission contract.

D. Listing REALTOR<sup>®</sup> lists his mother's home in the MLS and offers a cooperating commission of 3%. REALTOR<sup>®</sup> Jones presents an offer which is accepted. The seller changes her mind and refuses to proceed with the sale. REALTOR<sup>®</sup> Jones cannot proceed to arbitration against listing REALTOR<sup>®</sup> because there was not a "successful transaction." If, on the other hand, the listing REALTOR<sup>®</sup>'s mother closes on the sale, but the listing REALTOR<sup>®</sup> waives the entire commission, REALTOR<sup>®</sup> Jones can proceed with arbitration against the listing REALTOR<sup>®</sup> even though no commission was collected at closing.

E. Listing REALTOR<sup>®</sup> lists a short sale property, offers a 3% cooperating commission but adds a notification stating that any reduction in the commission required by the lender will be shared equally between listing REALTOR<sup>®</sup> and the cooperating REALTOR<sup>®</sup>. The original cooperating commission contract through the MLS is not for a 3% commission, but is for a 3% commission or such lesser amount as may be approved by the lender.

F. Listing REALTOR<sup>®</sup> places a listing in the MLS and offers a cooperating commission of 2%. REALTOR<sup>®</sup> Brown, not a participant in the MLS, calls to arrange an appointment to show the property to a prospective purchaser. There is no discussion of compensation. REALTOR<sup>®</sup> Brown presents listing REALTOR<sup>®</sup> with a signed purchase agreement, which is accepted by the seller. Subsequently, REALTOR<sup>®</sup> Brown requests arbitration with listing REALTOR<sup>®</sup>, claiming to be the procuring cause of the sale. Because REALTOR<sup>®</sup> Brown is not a participant in the MLS, there is no cooperating commission contract between them, and therefore no issue to arbitrate.