Joel Grayson, an attorney licensed since 1971, is a recognized authority in real estate law, litigation, a published author, and has been a frequent lecturer and continuing education instructor and mediator to the real estate industry, as well as a contributor to newspapers, television and radio. Mr. Grayson practices in Oregon and Washington.

Janet L. Grayson is a member of the firm's real estate and litigation group, participates in continuing education instruction to brokers, and is a published author.

Maylie & Grayson is a full service law firm providing representation to real estate brokerages, licensees, Realtor® associations, developers, builders, lenders and investors, providing services in all aspects of real estate including transaction review, land use planning, licensing, mediation, arbitration and court matters throughout Oregon and Washington.

Protecting Your Commission in a Short Sale

Short sales continue to make up a larger percentage of many brokers' transactions due to the conditions of the real estate market. Although we have written several articles on this topic within the last year alone, we thought it would be helpful to address one aspect of short sales which plays a large role in a broker's life – the commission. In many short sales, listing brokers are asked by lenders to reduce their commissions in exchange for the lender agreeing to accept less than it is owed. Although many brokers are aware of this possibility, some may not be protecting their commission when cooperating with a selling broker.

The following is a fact scenario that will illustrate our point. Listing Broker lists Seller's property, with no designation in RMLS™ that 3rd party approval is required. The listing offers 2.7% cooperative commission to a selling broker. Buyer, through Selling Broker, makes an offer to purchase the property. Seller accepts the offer, and the parties continue in the transaction.

Upon receipt of a preliminary title report, it is clear to the parties that this transaction will constitute a short sale – Seller owes more to Lender than the sale proceeds will cover. Listing Broker negotiates with Lender in an attempt to convince it to reduce the amount it is owed by Seller. Lender agrees to a reduction, provided that Listing Broker will reduce its commission from 6% to 2%. Listing Broker agrees, and the transaction is on target to close.

After completing his negotiations with Lender, Listing Broker contacts Selling Broker to inform him that the commission will be reduced. Selling Broker demands that Listing Broker pay the full 2.7% cooperative commission that was offered in the listing, even though Listing Broker only received a 2% commission. Listing Broker ultimately pays Selling Broker's commission out of his pocket because he failed to properly disclose that Selling Broker's commission would be reduced in the event Lender required Listing Broker to reduce his commission.

This dispute could easily have been avoided by Listing Broker. First, Listing Broker should have indicated in the private remarks on the listing that the cooperative commission would be reduced in the event Lender required a reduction in commission by Listing Broker. Such language in the private remarks should indicate the method by which the cooperative commission will be reduced, such as a reduction that is proportionate to the reduction that is required of Listing Broker by Lender. For example, the private remarks could state that the commission received by the listing broker would be split equally between the listing and selling brokers.

In addition, Listing Broker may have prevented such a situation if he had entered into a separate agreement with Selling Broker that indicated how the cooperative commission would be calculated in the event Lender required Listing Broker to reduce his commission.

As with many details involved in any transaction, a listing broker should identify all potential issues up front so as to prevent any misunderstandings later. Had Listing Broker in the example above properly disclosed that the cooperative commission could be reduced, Listing Broker would not necessarily have been liable to Selling Broker for the full cooperative commission.

Conclusion

In the example outlined in this article, the listing broker could have done a better job at documenting the transaction. He would have benefited from properly disclosing that the cooperative commission would be reduced if the lender required the listing broker to reduce the full commission. In the end, full disclosure and appropriate documentation in every transaction will lead to brokers retaining a greater portion of their commissions and limiting their liability towards other brokers or buyers and sellers.

This column contains general information only and must not be construed as legal advice. Questions may be submitted directly to Maylie & Grayson by fax at (503) 775-1765, by email at joelgrayson@mayliegrayson.com or by mail at 7959 SE Foster Road, Portland, Oregon 97206.