

Buyer Representation - Misconception Corrections

The Standard Forms Advisory Committee will likely approve and release as early as June 2024 two new forms, "Disclosure and Modification to the Listing Agreement" (Form DM-LA) and "Disclosure and Modification to Buyer Representation Agreement" (DM-BR) which are intended as attachments to the Residential Listing Agreement (RLA) and the Buyer Representation and Compensation Agreement (BRBC), respectively, for the purpose of compliance with the NAR Settlement.

There are lots of misconceptions out there about the new buyer representation forms and a new provision being added to the RPA in December 2022. This Quick Guide corrects some of those common misconceptions.

1. Buyer representation agreements are required, starting with the 12/22 release of new C.A.R. forms.

Wrong. Buyer representation agreements are good risk management but not legally required.

2. New paragraph 3G(3) in the 12/22 RPA which asks the seller to pay the buyer's broker is mandatory.

Wrong. The paragraph is optional, and only part of the contract if checked. Further, the paragraph is only applicable if the buyer already has a signed written agreement with a broker, and if the buyer commission obligation exceeds the amount the listing broker agrees to pay the buyer's broker through the MLS.

3. If paragraph 3G(3) is checked, seller must pay the buyer's broker.

Wrong. Seller can counter out that term, just like a seller can counter any other term is a buyer's offer.

4. If seller agrees to paragraph 3G(3), seller must pay the entire buyer's broker's commission.

Wrong. Seller only agrees to pay the difference between what the buyer agrees to pay and what the listing broker has agreed to pay the buyer's broker through the MLS, or otherwise.

5. If seller agrees to paragraph 3G(3), seller no longer has to pay the listing broker.

Wrong. Seller's obligation to pay their own broker pursuant to a listing agreement is unaffected by 3G(3).

6. If seller agrees to paragraph 3G(3), the listing broker has no obligation to pay the buyer's broker.

Wrong. The listing broker's obligation to pay a cooperating broker pursuant to the MLS is unaffected by 3G(3).

7. Paragraph 3G(3) violates the NAR Code of Ethics and MLS Rules.

Wrong. Standard of Practice 16-16 of the NAR Code of Ethics only prohibits a buyer's broker from using the buyer's offer to modify the listing broker's offer of compensation through the MLS. 3G(3) does not alter the listing broker's offer of compensation but instead asks the seller to pay. 3G(3) is also consistent with NAR Case Interpretation 16-17.

8. Listing brokers no longer have an obligation to offer compensation to buyer's brokers through the MLS.

Wrong. Model MLS Rule 7.12 requires a listing broker to make a unilateral offer of compensation to other MLS Broker Participants. However, there is no minimum amount or percentage that is required. That rule has not changed.

9. This is a new and dramatic change to how commissions work in the real estate industry.

Wrong. Buyers agents have been able to enter into buyer representation agreements with buyers and many already do. Some agents have already incorporated this buyer commission cost into the agreement already in the form of seller credits. 3G(3) provides more transparency and a straightforward spot in the agreement to ask for that expense to be paid, similar to other costs in the transaction.