



## Commitment Exists in Exclusive Relationship

**Dear Forms Guy:** I have some questions about one of the changes made to the Exclusive Right to Represent Buyer form (NC REALTORS® form #201) this past July. In the last version of the form, the buyer had a choice whether or not they would pay any difference if the fee offered to cooperating firms by the listing firm or seller was less than the fee set forth in the buyer agency agreement. In the new version, the choice has been eliminated and the form now simply states that the buyer will pay the difference. My first question is, why was the change made?

**Sincerely, John Jacob Jingleheimer Schmidt**

**Dear J.J.J.:** Wow, are you the real John Jacob Jingleheimer Schmidt from the children's song? **Sincerely, Forms Guy**

**J.J.J.:** His name is my name, too. I'm the one who's supposed to be asking the questions here, correct?

**Forms Guy:** You're correct, sorry. Your question is a good one. The main reason for the change is that under the old version of the exclusive buyer agency agreement, if the buyer was interested in a property where little or no compensation was being offered to cooperating agents (FSBO seller unwilling to pay anything to cooperating agents, listing agent offering nominal fee to other MLS participants, etc.), and the buyer agency agreement provided that the buyer wasn't responsible for paying the buyer agent any difference, the buyer agent still wasn't excused from representing the buyer in the purchase of that property.

**J.J.J.:** What if the buyer doesn't want to agree to pay any difference?

**Forms Guy:** If a firm is willing to relieve the buyer from any obligation to pay the difference between the agreed-upon fee and the fee being offered by the listing agent or seller, the firm should consider using the Non-Exclusive Buyer Agency Agreement (form 203) instead. The "Compensation of Firm" section of form 203 specifically provides that the buyer is not obligated to pay a brokerage fee or assure the payment of a brokerage fee to the firm.

**J.J.J.:** Wouldn't a firm be in the same situation under the Non-Exclusive Buyer Agency Agreement if the seller or listing firm of a property the buyer is interested in isn't offering adequate compensation?

**Forms Guy:** Actually, in the compensation section of the Non-Exclusive Buyer Agency Agreement, new wording has been added that allows the firm to terminate the agree-

ment if they are unable to negotiate a reasonable modification of the compensation terms of the agreement in situations where the compensation offered by the listing agent or seller is less than the amount inserted in the blank.

**J.J.J.:** So why didn't we add that kind of wording to the Exclusive Buyer Agency Agreement, too?

**Forms Guy:** This was discussed at length by the Forms Committee. The feeling of the Forms Committee was that if a buyer and a firm are willing to commit to an exclusive relationship with each other, the firm ought to be committed to representing the buyer in purchasing any property described in the buyer agency agreement, and the buyer ought to be committed to paying the firm if they want to buy a property where the seller or listing firm isn't willing to pay the firm its fee. On the other hand, in a non-exclusive relationship, the level of commitment isn't quite the same. The buyer isn't obligated to use the firm's services or to pay it a fee for its services, and although the firm would be obligated to provide the same type of service it would provide under an exclusive agreement, it shouldn't be obligated to provide those services for free if the buyer wants to purchase a property where the firm's fee won't be paid by the seller or the listing firm.

**J.J.J.:** OK, say a buyer client and I use the Non-Exclusive Buyer Agency Agreement. I show the buyer an MLS property listed by another firm and then the buyer decides to use a different agent to make an offer on that same property. My right to be paid isn't protected if I use the non-exclusive agreement, right?

**Forms Guy:** Wrong. Your right to be paid the compensation offered by the listing firm in MLS depends on whether you were the procuring cause of a transaction that closes. The determination of procuring cause depends on an analysis of all the facts of the particular situation, but the fact that your agreement with the buyer was non-exclusive rather than exclusive would be irrelevant in my opinion.

**J.J.J.:** I prefer to use the exclusive agreement, but how do I persuade the buyer to sign it?

**Forms Guy:** For one thing, you need to be able to convince the buyer (and perhaps yourself) that you are worth your fee! And you also need to make it clear to them that they are in control of the fee situation. Note

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that in paragraph 4(b)ii of the Exclusive Right to Represent Buyer form, the firm is obligated to timely inform the Buyer if the compensation offered is less than expected. So if you "timely" notify the buyer before they make an offer on the property that the compensation offered to your firm is less than the fee the buyer agreed to pay your firm, the buyer may always choose not to purchase the property if they don't want to pay all or some portion of your firm's fee. And of course, the firm may also make a decision at that time to waive the right to any difference.

**J.J.J.:** Thanks, Forms Guy.


**Forms Guy:** Before you go, may I ask you a question?

**J.J.J.:** Sure.

**Forms Guy:** Whenever you go out, do the people always shout ...

**J.J.J.:** John Jacob Jingleheimer Schmidt?

**Forms Guy:** Dah dah dah dah dah dah!! ■



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