Commission Mythology 101

Kerri Lewis
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While it is generally understood that real estate agents work for a commission, many consumers (and even some real estate agents) don't fully understand the intricacies of how payment of a commission works.

By exploring several common misconceptions about real estate commissions, this article will clarify what is myth and what is the law in Texas.

Takeaway

On the surface, real estate commissions seem like a simple, straightforward way for agents to be compensated for their services. However, Texas' laws governing such commissions are intricate. Agents and consumers alike need to understand how they work.

Myth No. 1: Standard Commission Rate for Residential Real Estate is 6 Percent

In Texas, there are no specific laws regulating the commission rates real estate agents can charge. Rates are negotiable between the agent and the client and are often based on the services the agent will provide and the complexity of the transaction. Generally, the rate is set out in the listing agreement or buyer's representation agreement that a client signs for an agent to represent them.

Over the years, many agents have valued their services somewhere around 3 percent for each side of the transaction, resulting in the common belief that there is a standard 6 percent commission for the sale of residential property. But there is no standard or uniform commission rates in real estate. In fact, an agreement between brokerages in an area to all charge 6 percent commissions would violate federal antitrust law.

One statute indirectly addresses the rate of real estate commission. The Texas Real Estate License Act states that license holders may use contract forms prepared by the Texas Real Estate Broker-Lawyer Committee and adopted by the Texas Real Estate Commission (TREC), but it qualifies that any listing contract form adopted must include a provision informing the parties to the listing contract that real estate commissions are negotiable (Sec. 1101.155).

Although TREC has not chosen to promulgate a listing agreement to date, it is clear from the law that the legislature understands and intends for real estate commissions to be negotiable between the parties. This applies to commercial as well as residential commissions.

Consumers need to carefully consider the terms of their agreement with real estate agents, including the commission rate and any other fees that may be charged, before entering into a listing agreement or buyer's representation agreement. Consumers are encouraged to shop around and compare rates and services offered by different agents to make an informed decision.

Myth No. 2: No Written Commission Agreement is Needed if a Sale Closes

This is true only if the client wants to pay the commission at closing. Texas law does not allow recovery of a commission unless there is a signed written agreement in compliance with the Texas Real Estate License Act Sec. 1101.806(c). That statute reads "(c) A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document."

Texas courts have consistently required strict compliance with the terms of the Texas License Act if a real estate broker or agent wants to use the courts to recover a commission. This is true even if the broker or agent can prove they "earned" the commission. Further, Texas courts have interpreted "promise or agreement on which the action is based" to mean the property that is the subject of the written agreement must be sufficiently identified in the document to be enforceable.

Myth No. 3: Broker Must be Procuring Cause of Sale to Earn Commission

The procuring cause doctrine dates back to a 1916 Texas Supreme Court case, Goodwin v. Gunter, which stated that for a real estate broker to earn a commission, "a purchaser must have been produced through his efforts, ready, able, and willing to buy the property upon the contract terms."

However, as pointed out in a recent 2022 Texas Supreme Court case, Perthuis v. Baylor Miraca Genetics Laboratories LLC, the "procuring cause doctrine" is a default doctrine. The court noted, "When a seller agrees to pay sales commissions to a broker (or other agent), the parties are free to condition the obligation to pay commissions however they like. But if their contract says nothing more than that commissions will be paid for sales, Texas contract law applies a default rule called the 'procuring-cause doctrine.'" The court went on to say, "Under this doctrine, the broker's entitlement to a commission vests on his having procured the sale, not on his actual involvement in a sale's execution or continued employment through the final consummation of the sale." In other words, to be a procuring cause, the agent must have taken some action, like marketing or showing the property, and then help to negotiate contract terms.

While most agents understand they need to be a procuring cause to earn a commission, what they miss is that the listing agreement or buyer's representation agreement may condition the payment of commission on something other than procuring cause, if the parties specifically agree to that in the agreement. Texas courts may have to interpret ambiguous text sometimes, but they do not interfere with terms parties willingly agree to in a written document. As the court summarized in Perthuis, "The procuring cause doctrine is not a judicially created 'term' for commission contracts. It does not add anything to a contract or take anything away. It does not restrict parties' ability to modify their contractual relationships, and it does not change the law governing whether parties have entered into such a relationship in the first place. Parties certainly may condition the obligation to pay a commission on something other than procuring the sale—they need only say so."

Myth No. 4: Commission Agreement Cannot Be Changed After Sales Contract is Executed

A listing agreement or buyer's representation agreement is a contract between the client and the broker. Just like any other contract, it can be amended at any time if both parties agree.

There are times when agents feel put in a box by clients who, for one reason or another, ask them to reduce their commission before the closing. These agents (and their brokers) must decide whether they want to stick to their original written commission agreement or amend their agreement and take a reduced commission at closing.

If the broker does not want to reduce the agreed-upon commission, neither the broker nor the agent should hold up the closing of the property. Doing so could be viewed as a breach of their fiduciary duty. Instead, they could ask the title company to escrow any amount in

dispute until a court can rule on it or, if the client will not agree to that, wait until after closing to sue on the written commission agreement.

Myth No. 5: Brokers Can Place Lien on Property for Failure to Pay Commission

A broker *cannot* place a lien on a residential property for failure to pay a commission. A lien can be placed on a property only if it is allowed under some statutory authority. The legislature has not provided any such authority for unpaid real estate commissions on residential properties. This is due to general legislative goals to protect citizens' homestead properties.

As set out earlier, statutory authority does exist for a real estate agent to sue on a written commission agreement. However, if it is a commercial transaction, an agent *can* place a lien on the property for failure to pay an earned commission if she follows the requisites set out in Chapter 62 of the Texas Property Code.

Myth No. 6: Agents Need Written Agreement to Split Commission

Although a written agreement to split a commission is always advisable as it provides concrete evidence of a claim, the law does not require agents to have a written agreement to enforce commission disputes between themselves. In fact, the plain language of the Texas Real Estate License Act states that the requirement to have a written agreement to sue for a commission does not "apply to an agreement to share compensation among license holders" [Sec. 1101.806 (a)(1)]. This interpretation of the statute has been upheld by Texas courts over the years.

Myth No. 7: An Agent Can Accept a Bonus Directly from a Client

This situation usually arises in the context of a builder bonus, where a builder offers a cash or merchandise bonus over and above commission paid to an agent who has completed some number of transactions with a builder. However, the agent cannot accept that bonus unless it is paid through their broker, or their broker has given the agent written permission to accept the bonus.

TREC Rule 535.3 specifically states, "A salesperson may not receive a commission or other valuable consideration except with the written consent of the salesperson's sponsoring broker or the broker who sponsored the salesperson when the salesperson became entitled to the commission or other valuable consideration."

"Valuable consideration" has been broadly interpreted and includes any type of merchandise, including tickets to sporting events, that has some value. How much value? What about a $20 Starbucks Card? TREC Rule 535.3 does not define valuable consideration, but another TREC rule does and can help inform how TREC might interpret valuable consideration in this situation.

TREC Rule 535.20, which deals with referrals from unlicensed persons, states valuable consideration includes any payment of money and merchandise having a retail value greater than $50. Note this definition is tied specifically to the referral rule. The best course of action is for an agent to get written permission from his broker before accepting any bonus, whether it is from his own client or another entity, like a builder.

Further, the agent is required to obtain consent from her client if a commission, rebate, or fee is to be paid by a person the agent does not represent in the transaction [TREC Rule 535.148(a)]. In the builder scenario, the agent likely represented the buyer or buyers and should disclose and get written consent from her client before accepting any additional payment related to the transaction or transactions.

Lewis (kerrilewis13@gmail.com) is a member of the State Bar of Texas and former general counsel for the Texas Real Estate Commission.

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