

# Brown Paper Bagging It...

... NOT ALLOWED!

Many readers would assume, that after a sale has gone through as a thank you to the Captain and crew of the yacht successfully sold, a tip from the broker to those parties is quite acceptable. In fact you'd think it was just as appropriate beforehand; however, a bribe in advance to make a sale happen is inappropriate and illegal. Well, according to Eric J. Goldring, if those are your views you would be very, even calamitously, mistaken. Although there are some variations that could allow such a payment to be proper this is not a grey area at all; instead it is an extremely clear function of the relationship between Master, Owner, Broker and Purchaser. Eric explains...



It all seems so simple: An owner wants to sell his yacht. All he needs is a purchaser and, possibly, a yacht broker to assist in procuring the purchaser. Right? Wrong. In most superyacht transactions there is significant interjection of a fourth party: the captain. The captain may play a very important role in the sale of a superyacht; whether it be superficially as a guide or a showman or, more substantively, as a confidante of the owner and/or a knowledge base or facilitator for the prospective purchaser, all the while possibly wishing to become (or becoming) the employee of the purchaser. But to whom do the captain's allegiances lie? To whom

does he report? And from whom should he be receiving compensation?

During the 2007 Global Superyacht Forum there was a discussion about the propriety of yacht brokers directly compensating captains for assisting them in the sale of a superyacht. There was discussion about when that might be appropriate and, to the shock of many regularly involved in commercial transactions, the answer provided was not a uniform, "Never." While there was agreement that payments by the yacht broker "as part of a transaction" were improper, somehow the

payment of a 'thank you' after the transaction was completed was asserted by some to be appropriate, as if the timing of the payment was more relevant than the payment itself.

## Why is a Yacht Broker's Payment to a Captain 'Material'?

When an owner sells his yacht he is contracting with a yacht broker to use his/her best efforts to: (a) find a qualified and willing purchaser; (b) to sell the superyacht at terms which are acceptable and, of course, (c) to maximise the purchase price. While this may seem obvious in concept, the reality of the superyacht industry is that there are a limited number of qualified brokerages and a high demand for qualified captains, and, unlike real estate, yachts are effectively living and breathing entities which, dependent on a captain's care, can be seen as a functional work of art or a hull surrounding problems.

Coupled with that are the issues associated with owners that rely on their captains as confidantes not only as to what occurs on their yacht, but also what the value and marketability of their yacht may be, what his impression is of the potential purchaser and, of course, which yacht broker to use and, once chosen, how he/she is performing. These factors give many captains the potential to have great leverage. If a captain encourages one deal because he might be receiving a 'gift', or he doesn't really cooperate with a particular yacht broker or won't recommend a particular purchaser, because he hasn't received assurances of 'special compensation', it is clear that the owner is not being served properly. The question then becomes, "Is that captain working for the owner, for the yacht broker or for himself?"

The use of unspoken payments (unspoken to the owner, at least) places the captain in the position of accepting what in the American vernacular – though of Russian origin – is called a "vig": an off-the-top payment for protection or permission. Bookmakers use this concept to make money on wagers regardless of the outcome and, as they are interested in getting 'action' on each side of the bet, they minimise their risk and always collect a commission.

## The Owner/ Broker Relationship

Yacht brokers enter into agreements, of various names, with owners confirming their relationship. Yacht brokers readily acknowledge the relationship and market themselves with phrases such as, "Our luxury yacht sales team make(s) sure your interests stay in the

forefront of all negotiations. We will continue to remain by your side long after the ink on the contract has dried." That is not just hype; it is an accurate statement of what is required of yacht brokers by law.

When exploring the special relationship between the yacht broker and the owner, the United States and European laws are consistent. A Florida state court, in discussing yacht brokers, put it succinctly: "The law in Florida is that when a broker undertakes to act...he stands as a fiduciary to this client. This relationship demands the utmost good faith and full disclosure..." The Supreme Court of Florida has indicated the high standard demanded of a broker as being comparable to that of a lawyer or banker in that his relationship to the public exacts the highest degree of trust and confidence.... Because of the close relationship which calls for trust and confidence, the broker must act in good faith and with loyalty towards his principal. A broker has imposed upon him during the period of such relationship with his principal the legal obligation to inform with fairness, promptness, and completeness, concerning all facts within his knowledge which are or may be material to the situation in connection with which he is employed."

It would seem, therefore, that transparency, disclosure and an on-going obligation of loyalty are inextricable from the relationship. The only 'grey' area – if there is one – would be if the "period of such relationship" ends when that ink dries. As noted above, it is that supposed 'grey' area that some assert makes those undisclosed payments acceptable.

## The Yacht Broker/ Captain Relationship

In the very document that creates a fiduciary relationship, the Central Agency Sales Agreement (also called a listing agreement), where the owner retains the yacht broker to assist in the sale of his yacht, that 'grey' area becomes 'crystal clear'. There is language in the Mediterranean Yacht Brokers Association (MYBA) contract, with similar language in almost every central agency agreement, which states: "The Owner shall advise the Captain of the vessel that the Broker is the central agent and therefore that the Captain and the Crew of the vessel should give every assistance to the Broker to promote the sale of the vessel..."

It seems very simple: The yacht broker contracts with the owner to assure that the captain's obligation is to assist the broker in his/her efforts to sell the yacht. The owner's employee (the captain), with a consistent obligation to be faithful to the owner, simply does what he is supposed to: His job. The relationship between

the yacht broker and the captain is one of contract with the owner. There is, therefore, no doubt that the "period of relationship" does not end on the sale because the payment arises solely out of that relationship. So, the 'grey' area is not grey at all. Further, even if the relationship with the captain was not one of "contract", the fiduciary obligation to provide the owner with all of the information which "is or may be material" to the sale needs to be disclosed. As has been shown, it simply cannot be legitimately argued that a payment related to the sale may not be "material".

## From Whom should a Captain accept Payments?

The short answer is: Only his owner. It does become more complicated in situations where a captain is going to stay with the superyacht after the sale because there is an unavoidable conflict between loyalties to his present owner and his future owner. However, as this point is generally known by each party it is transparent and each owner (old and new) can make an informed decision as to matters (such as price and terms) based upon that known material fact. In such instances, should the selling owner wish to provide a bonus to his captain upon the sale that would be perfectly acceptable; as would a signing bonus by the purchasing owner... but not one funded by the yacht broker. Similarly, a 'gift' from the purchaser who does not subsequently employ the captain would logically be equally inappropriate; being fairly seen as a 'payoff' or an otherwise inappropriate factor influencing the transaction.

As hopefully has been shown, under no circumstances could the yacht broker appropriately provide any compensation to the captain unless it was disclosed to the selling owner in the Central Agency Sales Agreement – for if it was done any other way, the owner would not have all of the material information when entering into his fiduciary relationship with the yacht broker, which is the foundation for the remainder of their dealings. As a concluding point: There are many activities which have been engaged in over the years in the yachting industry; most before it could legitimately be called an industry. Now with truly its own economy and superyachts worth unimaginable amounts, it is time to engage in the elevating of our standards and practices to those who guide the most distinguished industries.

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*Captains' 'commissions' were also discussed at the GSF 2007 Captains' Summit. To read the transcript visit [www.synfo.com/captainssummit](http://www.synfo.com/captainssummit)  
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