

Section THREE

VIII. The Listing Agreement:

The Listing Agreement is the contract that **expressly**, in writing, creates the **Agency Relationship** between the **Broker** and the Seller. This contract sets forth the terms on which the seller will sell. The amount of commission to be paid as well as when the broker has earned that commission is also stated. The contract also authorizes the **Broker** to act on behalf of the seller and sets forth the duties and obligations of both the **Broker** and the seller. The listing agreement authorizes the **agent** to hold a deposit on behalf of the seller and establishes a method of dispute resolution (**mediation**, and **arbitration** or **litigation**). There are varying types of listing agreements;

Open Listing

An **open listing** authorizes the **agent** to find a buyer for the property and obligates the seller to pay compensation only if, and when that **agent** procures a buyer resulting in a closed sale. The **open listing** is not exclusive to any one **broker**. Sellers may sign as many **open listings** with as many **brokers** as they wish. The seller will only be obligated to pay the **broker** that procures the ultimate buyer of the property. Under an **open listing**, the seller may still procure a buyer on their own and not be obligated to pay any **broker**. An **open listing** does not have to have a termination date. The listing will be terminated upon the sale of the property and **does not** require that the seller inform any of the **brokers** of the termination. This listing does carry with it the duties and obligations of the **agent** to the **principal** and to all parties involved in a purchase transaction.

Exclusive Agency Listing

A seller can sign an **Exclusive Agency Listing** with only one **broker** (or risk the possibility of being obligated to pay compensation to more than one **broker**). The **Exclusive Agency Listing** authorizes the **broker** to procure a buyer and to **cooperate** with other **brokers**. The seller will be obligated to pay compensation to the listing **broker** when a buyer is procured by that **broker** or by any **cooperating broker**. However, with the **Exclusive Agency Listing** sellers may still procure a buyer themselves without being obligated to pay compensation to any **broker**.

Exclusive Authorization and Right to Sell

C.A.R.'s form RLAA, **Residential Listing Agreement – Agency (Exclusive Authorization and Right to Sell)** is provided for members for this purpose. The **Exclusive Authorization** is similar to the **Exclusive Agency** agreement with one major exception, with the Exclusive Authorization the seller would be obligated to pay the listing broker even if the seller should procure the buyer.

With any Exclusive Listing it is important to know that the contract **must include a definite termination date**. **Business and Professions Code Section 10176 (f)** states that it is a violation when

“Claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to perform any acts set forth in Section 10131 for compensation or commission where the agreement does not contain a definite, specified date of final and complete termination.”

Another important item has to do with the commission. For an agreement to pay a real estate commission to be enforceable in a court of law it must be in writing and the following statement must be included in the agreement, in bold type:

“Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between Seller and Broker (real estate commissions include all compensation and fees to Broker).”

Real Estate commissions **are not** set by law nor can they be set by any group or organization. For example, an **MLS cannot** establish a rule that commissions must be a certain amount or rate. A group of **Brokers cannot** get together and agree that all will charge the same commission amount or rate. This would be a violation of Federal Anti-Trust laws. It is permissible, however, for an individual broker to set an office policy establishing an acceptable amount or rate of commission. A seller may wish to negotiate this commission but the **broker** has no obligation to agree to a lesser amount.

Other Written Agreements Related to Listings:

Single Party Compensation

If a **licensee** has a buyer that is interested in purchasing a specific property and the seller is unwilling to sign any of the listing agreements already mentioned, the **licensee** could request that the seller agree to a **Single Party Compensation** agreement that would obligate the seller to pay compensation only if the buyer named in the agreement should purchase the property. This agreement could expressly create an **agency relationship** between the **licensee** and the seller or it could expressly state that the **licensee** does not represent the seller but only the buyer.

Net Listing

A **Net Listing** could be in the form of any of the agreements mentioned above. The primary characteristic of the **Net Listing** is that it does not state a specific dollar or percentage amount of compensation. Instead, the **Net Listing** states that the **agent** will receive as compensation any dollar amount over the net proceeds to the seller that is specified in the agreement. As an example, if the agreement states that the seller is to net \$400,000.00 and the **agent** procures a buyer resulting in a sale of \$450,000.00, the **agent** will receive the difference after deducting the seller's costs in the transaction. If the seller's costs for escrow, title and other related matters amounted to \$10,000.00, the broker would receive \$40,000.00 as compensation.

While a **Net Listing** is not illegal, there are a number of potential problems with such an agreement. If the property's value is actually much higher than the sales price necessary to meet the seller's net and the agent receives the difference, it could be argued that the **agent** did not disclose a very important **material fact**, the market value of the property. Ask yourself the

following question; if the seller knew that the market value of the property was \$450,000.00 and a sale would net the seller approximately \$420,000.00, would the seller agree to net only \$400,000.00 and let the agent take the balance? With a **Net Listing**, the **agent** must disclose the amount of compensation to all parties in the transaction.

Another potential problem results if a buyer makes an offer to purchase that will net the seller the dollar amount agreed upon but leave little or nothing to compensate the **agent**. Since **agents** are required to present all offers to the seller, **agents** might find that they would receive little or no compensation. In such a situation might an **agent** choose not to present the offer to the seller, in violation of Real Estate Law? Hopefully not, but **agents** might be tempted because they would want to be compensated fairly for their work.

The potential for problems makes a Net Listing an undesirable method of establishing compensation for the agent. However, if used, there must be full disclosure of the compensation to all parties or the compensation could be construed to be **Secret Profits**.

Other types of listing agreements would be specific to the type of property being sold or to specific situations. If the property to be sold is in Probate, there are special listing forms to use for Probate sales. C.A.R. publishes listing agreements specifically for land sales, commercial and investment property sales, for sale of manufactured housing and for agreements to rent or lease real property.

If an agent desires to purchase a property that he or she has listed for sale, that agent must go to great lengths to insure that the seller is treated fairly and honestly and that the negotiated sales price is a fair one for the seller. If the agent intends to flip the property (turn around and sell it immediately for a profit), that fact must be disclosed to the seller.

IX. Buyer Representation Agreement

The **Buyer Representation Agreement** has been mentioned previously. With this agreement a licensee can become the **Agent** of the Buyer by an **Expressed Agreement**, in writing.

C.A.R. makes form BRE, **Buyer Representation Agreement - Exclusive** available to members for this purpose. The **Buyer Representation Agreement** works much like a **Listing Agreement** with a seller. It establishes a time frame during which the buyer agrees to work exclusively with a particular broker. The agreement spells out the duties and obligations of the **broker** and the buyer and sets the compensation to be paid to the **broker**. The buyer would agree to compensate the **broker** should the buyer purchase a property within the time period stated in the agreement. A specific geographical area can be written into the agreement as well as a time frame. For example, the agreement could read that the buyer agrees to compensate the **broker** X% of the purchase price of any property that the buyer acquires within the county of San Luis Obispo, CA during the agreed upon period of time. Of course, this would require that the necessary **Notice** that commissions are negotiable be included in the agreement. A definite termination date would also be required as discussed with the Listing Agreement.

Under this agreement, the buyer could owe the **broker** a commission even if the buyer should purchase through another **broker** or from a “for sale by owner” within the given geographical location and time period. Should the buyer choose to purchase a property that was listed through the **MLS** and there is an agreement to pay the **broker** through the **MLS**, the **Buyer Representation Agreement** may provide that any commission due to the **broker** through the **MLS** would offset that commission owed by the buyer.

For example, if the **Buyer Representation Agreement** specified that the buyer would pay the **broker** a 3% commission and the **broker** is paid 3% through the **MLS**, the buyer would owe nothing to the **broker**. If, on the other hand, the **MLS** commission to the **broker** was only 2.5%, the buyer would owe the **broker** .5%. It **would be legal** for the **broker** to collect a full commission from the buyer as well as the commission from the **MLS** as long as the fact that the **broker** is receiving compensation from is disclosed to all parties involved in the transaction.

Just as with any other agreement between the **broker** and a buyer or seller, the **Disclosure Regarding Real Estate Agency Relationships** must be given to the buyer prior to executing a **Buyer Representation Agreement**.

Another format of the Buyer Representation Agreement (C.A.R. form BRNN, Buyer Representation Agreement–Non-Exclusive/Not for Compensation) does not include compensation for a **broker**. This is a revocable agreement and either party can cancel the agreement in writing.

The agreement allows for a **Dual Agency** but it also allows for a checked box indicating that Broker would represent the buyer only but that the broker would be precluded from showing any of the broker’s listings to the buyer. Another **agency** option, if checked, states that the **broker** does not list property and therefore does not represent sellers. In this case, the **broker** would represent the buyer exclusively.

An **Authorization to Acquire Property** can be used when the buyer wishes to hire an **agent** to help in the acquisition of a specific property or type of property. With their own personal purchases (**self dealing**) **agents** must not put themselves into the position of competing with the buyers that they represent.

X. Obligations and Duties of an Agent:

Article 1 of The National Association of Realtors’® Code of Ethics states that,

“When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly.”

An agent is obligated to follow the instructions of the principal as long as those instructions are related to the object of the agency agreement and as long as the instructions are not illegal. For example, the agent, under a Listing agreement, would not be obligated to pick up the seller's dry cleaning should the seller ask for that to be done.

Also, should the seller ask the agent to exclude certain people from making offers – based on race, color, national origin, familial status and other “protected classes” – the agent would not have to and should not follow those instructions. It is illegal to discriminate based on the “protected classes” mentioned above. In fact, if a seller insists on this type of discrimination, the agent should walk away and not agree to represent the seller.

The Obligations and Duties of an agent owed to their principal as well as to other parties to a transaction are spelled out in C.A.R.'s **Disclosure Regarding Real Estate Agency Relationships**. These are the duties and obligations as set forth in California **Civil Code Section 2079.16**.

The **Principle Duty** that an **Agent** owes to their **principal** is a “**Fiduciary Duty** of utmost care, integrity, honesty, and loyalty in dealings with the” **principal**. This **Fiduciary Duty** is, in the eyes of the law, the highest duty that an **agent** can owe to their **principal**. One can think of a **Fiduciary Duty** in terms of acting like a **Trustee** for a third party. The words **honesty, loyalty and trust** are the key words associated with the term **Fiduciary**.

Even though an **agent** owes this **Fiduciary Duty** only to their **principal** that **does not** mean that the **agent** can be dishonest, mislead or fail to act diligently with other parties to the transaction. In fact, the Civil Code clearly states that the agent owes to all parties to the transaction:

“(a) Diligent exercise of reasonable skill and care in performance of the agent’s duties. (b) A duty of honest and fair dealing and good faith. (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.”

Material Facts are those facts affecting the decision of the buyer to buy and at what price and/or affecting the decision of the seller to sell and at what price. A discussion of this topic will come later.

An **agent** representing the Seller has the **Fiduciary Duty** of utmost skill and care to the seller and to both the seller and buyer the duties outlined in (a) through (c) above.

An **agent** representing the Buyer has the **Fiduciary Duty** of utmost skill and care to the buyer and to both the seller and buyer the duties outlined in (a) through (c) above.

In a **Dual Agency**, the **agent** represents both Buyer and Seller and has the **Fiduciary Duty** of utmost skill and care to both parties and to both parties the duties outlined in (a) through (c) above. When taking on a **Dual Agency**, the agent is taking on much more responsibility, and very likely, much more liability.

It may appear that the **Fiduciary Duties** owed to the principal are no different than the other duties owed to both parties. However, as mentioned, the **Fiduciary Duty** is the highest duty an agent has. It is stated that the **agent** “has the following **affirmative obligations** to their **principal**: *“The Fiduciary Duty of utmost care, integrity, honesty and loyalty in dealings with”* their **principal**. An **affirmative obligation** owed to a **principal** may differ from the obligation owed to other parties to the transaction in that the **agent’s affirmative obligation** might require that the **agent** take steps to discover information that might be pertinent to their principal’s decision to purchase or sell a property and at what price.

This means that an **agent** must be honest with all parties to the transaction. The **agent** must treat all parties to the transaction fairly. The **agent** must act in good faith with all parties to a transaction. The **agent** must use diligent skill and care in the performance of their duties with all parties to the transaction. The **agent** must disclose all known material facts to all parties to the transaction. On top of this, to their **principal**, the **agent** has the **Affirmative Obligation** of the **Fiduciary Duty**.

One might ask the meaning of diligent skill and care in the performance of an agent’s duties. In a case where something goes wrong and an agent is sued, the diligent skill and care in the performance of the agent’s duties might very well be questioned. The plaintiff’s attorney will most likely try to show that the agent failed to exercise such diligent skill and care. The attorney will try to establish the “standards” for the industry. That is to say, what would be the norm throughout the entire population of real estate licensees in a similar situation? Both the plaintiff’s attorney’s and the defendant’s attorneys will call expert witnesses to testify as to the industry standards.

An over simplified example of this might be that the buyer sued the **agent** because the buyer did not get the best possible loan for their particular situation. The buyer claims that the **agent’s** failure to sit down with the buyer and the lender together to be sure that the buyer obtained the best loan possible was negligence on the part of the **agent**. Especially today, where the loan products available are so diverse, the **agent** rarely attempts to guide the buyer into a particular loan program. **Agents** tend to leave that duty to the lender who is much more familiar with the loan products and with the buyer’s financial situation. Although expert witnesses might be found to say that **agents** do, as a norm, meet with the buyer and lender to help make such determinations, in reality the norm is otherwise.

In another example, the buyer sues the **agent** because the **agent** failed to arrange for a Pest Control inspection called for in the contract and, after the close of escrow it was discovered that there were termites and other wood destroying pests. While our real estate contracts try to make the buyer responsible, as much as possible, for their own inspections, it is generally accepted practice that the **agent** does order the inspection and by not doing so, may have failed to exercise diligent skill and care in the performance of their duties.

In both of these examples, the fictional facts have been over simplified. Many issues and facts go into deciding the verdict in any lawsuit. Basically, only one issue or fact is dealt with above. Also, please note that it is the author’s opinion only in both of these situations as to the standards

of practice in the industry. It is also true that different parts of the state may have slightly different ways of doing things. These examples were used only as an attempt to explain the meaning of “diligent skill and care in the performance of an agent’s duties.”

Note: You must complete the “Section 3 Assessment” before advancing to the next section.

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