

California Listing Agreements and Modifications

In California, there are 5 basic types of listing agreements that can be obtained from the California Association of Realtors ("CAR"):

1. Exclusive Authorization and Right to Sell (Form RLA)
2. Residential Listing Agreement Seller Reserved (Form RLSR)
3. Non-Exclusive Authorization and Right to Sell (Form RLAN)
4. Single Party Compensation Agreement (Form SP)
5. Commission Agreement (Form CA)

Each form has characteristics unique to the contractual relationship they create.

The preferred and typical agreement is the **Exclusive Authorization** because it provides the strongest rights to the broker to collect a commission. The seller may be liable for the commission if the property is sold, transferred, leased, withdrawn from sale or made unmarketable. Rights to a commission may even extend beyond the specified listing period under some circumstances.

Care must be given to the necessary contents of the agreement including identity of the parties, beginning and ending date for the listing, and commission rate or amount. This listing agreement may be a binding contract for a broker to recover a commission for the sale of real property even if it was not executed by all of the owners.

Under the Statute of Frauds set forth in Civil Code § 1624(a)(4), an agreement authorizing an agent or broker to purchase or sell real estate is invalid unless it is in writing and subscribed by the party to be charged or by the party's agent. Any agency authority to enter into a contract required by law to be in writing must also be given by an instrument in writing under the equal dignities rule in Civil Code § 2309.

The California Supreme Court has recognized that the Statute of Frauds was not enacted to afford persons a means of evading just obligations, and if after consideration of the surrounding circumstances, the pertinent facts and all the evidence in a particular case the trial court concludes the enforcement of the agreement will not subject the defendant to fraudulent claims, the purpose of the Statute will be best served by holding the note or memorandum sufficient even though it is ambiguous or incomplete.

When ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty. The agreement must still provide the essential terms that cannot be supplied by extrinsic evidence, but extrinsic evidence can be used to explain essential terms that were understood by the parties but would otherwise be unintelligible to others.

A cardinal rule of construction is when a contract is ambiguous or uncertain, the practical construction placed upon it by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties, and this rule governs the interpretation of a memorandum under the Statute of Frauds.

The **Residential Listing Agreement Seller Reserved** was revised December 2018, and it was formerly known as the Residential Listing Agreement-Agency (formerly Form RLAA). It is the same as the Exclusive Authorization, except for paragraph 3G, that allows the seller to reserve the right to sell the property directly to a purchaser without any obligation to pay compensation to the broker, unless otherwise specified in paragraph 3C or elsewhere in writing. It allows the seller to avoid paying a commission to the broker if the seller finds the buyer. It also creates the potential for a dispute between the seller and listing broker regarding who found the buyer.

The **Non-Exclusive Authorization** or "Open Listing" is used by a seller to employ a broker on a the non-exclusive basis, and this allows the seller to sell the property either directly to a buyer, or through another broker, without any obligation to pay compensation to the broker, unless otherwise specified. This agreement should be avoided by the broker because it allows the seller or other brokers to compete with the listing broker, and it can result in the listing broker's marketing efforts being used by the seller or other broker without compensation to the listing broker.

The **Single Party Compensation Agreement** is used to limit the buyer to a specified person, and it can provide for a commission if the seller accepts an offer from the buyer to purchase or exchange the property during the specified compensation period, or if the seller enters into a lease agreement with the person as a tenant during the compensation period. It is useful where the seller and buyer know each other due to the services of the broker, but they are unable to decide on a purchase or lease until sometime in the future.

The **Commission Agreement** is the simplest form, it provides for execution by either a buyer or seller, and it provides for payment of a commission if the property is sold and escrow closes. A seller may also owe the commission if the seller defaults on the purchase agreement. If the buyer defaults, the commission is only due if the seller collects from the buyer.

In a recent case, the broker entered into an exclusive authorization with the seller for a 3% commission. After a short time of marketing, the broker informed the seller that the commission needed to be increased to 4% to provide an additional percentage to the buyer's agent.

The problem was the broker used the commission agreement to increase the commission rate from 3% in the exclusive authorization to the 4% in the commission agreement. This supported the seller's argument that the commission agreement superseded the exclusive authorization, and the commission was not

owed under the more restricted commission agreement because the property was not sold and escrow did not close.

The better practice if modifications become necessary after entering into the listing agreement, is to execute either:

- a. A new listing agreement with a signed provision that the prior listing agreement was terminated by the parties; or
- b. A **Modification of Terms/Addendum to Authorization and Right to Sell** form (CAR form MT)

Use of the Modification of Terms provides the option to change specified terms of the listing agreement including the listing price, price range, lease or rental amount to be charged, the expiration date, and other changes. The Modification of Terms specifically provides that all other terms of the listing agreement, buyer representation agreement, or other agreement remain in full force and effect, except as modified in the Modification of Terms.

LESSONS:

1. The listing agreement is the contract that provides the broker a legal right to recover a commission, and extensive care should be given to its selection, preparation, and execution. It is often the most important document that will determine if the payment of a commission will be legally required
2. All of the owners of real property should be determined by the broker in preparing the listing agreement, and all owners' signatures should be obtained on the listing agreement. Avoid reliance on representations that the signer was an agent for the other owners - get all owners to sign.
3. If the listing agreement is properly prepared and signed, the commission may be earned when a sale contract is entered into between the seller and buyer, even if the sale was never consummated with a closing of escrow. In some cases, the commission may also be owed after the listing period expires.
- 4.. Modifications to the listing agreement should use the Modification of Terms form, or a new listing the references termination of the preceding listing agreement.