



REPORT ON C.A.R. PROPOSED SELLER LISTING AGREEMENT

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Executive Summary

Realtor groups across the country are in the process of redrafting their standard forms for real estate contracting in the wake of the National Association of Realtors settlement agreement (“NAR Settlement Agreement” or “NAR Settlement”).¹ The California Association of Realtors (“C.A.R.”), one of the largest trade associations in the United States with more than 180,000 members,² has recently released draft forms that are intended to become operative in the summer of 2024. One such form is the Residential Property Listing Agreement (“Listing Agreement” or “Agreement”).³

No seller will read this monster of a document—much less be able to understand it. The author, a tenured law professor who has been teaching Contract Law for fifteen years, had difficulty getting through the document. It is unrealistic to think that the average seller will understand anything more than, perhaps, 20% of this document. Granted, consumers often sign contracts they do not understand. They sign up for credit cards, book flights, and order goods online without ever reading or understanding the terms and conditions that govern their contract. Selling your home, however, is different. Your home usually represents your most valuable asset. And the outlay for broker commissions is typically in the tens of thousands of dollars—sometimes as much as, or more than, the cost of a new car! According to one website:

The current average real estate commission in the U.S. is approximately 5.49%, divided between the listing agent (2.83%) and the buyer’s agent (2.66%). . . .

At this rate, U.S. home sellers pay real estate agent fees of about \$8,235 on a \$150,000 home and \$38,430 on a \$700,000 home. For a home valued at the median price of \$431,000, this translates to just over \$23,000 in total realtor fees.⁴

With a transaction of this magnitude, sellers need to understand exactly what they are agreeing to. There is no reason why a listing agreement needs to be virtually indecipherable.

¹ <https://www.realestatecommissionlitigation.com/admin/api/connectedapps.cms.extensions/asset?id=5fa6cf55-60a3-4473-8eb5-85ba512cfbe4&languageId=1033&inline=true>.

² <https://www.car.org/aboutus/mediacenter/newsreleases/2024-News-Releases/settlementopenletter>.

³ Formerly available at https://balboateam.com/wp-content/uploads/2024/05/BRBC_6-2024_draftv8.1.pdf (link subsequently disabled by website). The author understands that this is a draft form and in a state of flux. Accordingly, section numbers may not correspond to future drafts of the Agreement.

⁴ <https://listwithclever.com/average-real-estate-commission-rate/>.

The Listing Agreement contains provisions that are substantively unfair to a seller (discussed in Parts II and III). For example, the Listing Agreement authorizes a seller’s broker to attempt to sign up unrepresented buyers who attend open houses or other property showings. In other words, the Listing Agreement functions to pre-authorize a conflict of interest that the realtor *plans to create*. The NAR Settlement, which precipitated these form changes, did not envision a seller’s broker using the “requirement” for buyer representation agreements to his advantage to secure clients.

There are a number of other problematic features of the Listing Agreement: it steers sellers in the direction of compensating buyer’s brokers, it specifically asks sellers if they would be willing to consider designating a percentage of the list price as “concessions” (thus making “concessions” the new realtor compensation field), it does not lay out the compensation options clearly, and it has a field for additional compensation to the broker if the buyer is unrepresented.

Part I: Reader Comprehension

The proposed Listing Agreement is a whopping seven pages long (almost 7,000 words). The sheer amount of information will be overwhelming to a prospective seller. There is virtually zero chance that a seller will slog through this document.

Formatting and Cross-Referencing

Like the Buyer Representation Agreement, the Listing Agreement is single spaced, pure text in what appears to be 10 or 11-point font. There is no white space between provisions. Sections appear to bleed into one another. The numbering and lettering schema is confusing.

There are over 50 internal cross-references.⁵ There are an additional 25 cross-references to separate documents and attachments.⁶ This amounts to a total of at least 75 cross-references.

The portions of the Listing Agreement that appear to be emphasized (other than the chart) are not the most important provisions of the contract. For instance, Section 8 has a box around it, signaling to the seller that it is particularly important. Similarly, “Additional Mediation Terms” and “Arbitration Advisory” are in all bold text, also suggesting they are to be emphasized (strangely, the section on “Mediation” itself is not bolded, just “Additional Mediation Terms”). Random words appear to be bolded such as “Public Marketing” (Section 9.B.) and “MLS rules require” (Section 9.A.).

⁵ The number was derived by using a search for the word “paragraph” and subtracting instances where the term was not used as a cross-reference.

⁶ This number was derived by using a search for the expression “C.A.R. Form.”

Further, provisions are scattered throughout the contract with no regard to where they would be best placed. For instance:

- The section on “Attorney Fees” (Section 20) comes before the section on “Dispute Resolution” (Section 23) with two completely unrelated provisions in between (“Management Approval” and “Successors and Assigns”).
- The “Deposit” section is randomly interspersed between “Broker’s and Seller’s Duties” and “Agency Relationship.”
- The sections about the MLS and marketing the property are all over the place (*See, e.g.*, Sections 7, 8, 9, 10, 12.B, 12.C., 15, 16, 17, 18).
- Items included in the sale or excluded from the sale are found in Sections 6, awkwardly positioned between “Seller Concessions” and “Multiple Listing Service.”
- Broker’s and Seller’s Duties are lumped into the same section even though they are completely different duties (Section 12).

This is not a comprehensive list of the formatting problems with the Agreement; it is simply intended to provide a flavor for the ways in which basic internal organization is lacking.

The document would be much more readable if divided into something resembling the following sections:

1. Broker Compensation
2. Agency Relationship
3. Broker’s Duties
4. Seller Representations and Duties
5. Seller MLS and Marketing Choices
6. Termination Provisions
7. General Contractual Provisions

The Summary Chart

The chart format used on pages 1 and 2 of the Listing Agreement suffers from the same flaws as its Buyer Representation Agreement counterpart.⁷ Here, there are a total of five grayed out areas: one is for the overall headings in the chart, and four are for subheadings. But not all sections of the chart have subheadings (for instance, Section 2.(D) appears to be under heading C, and Sections H-L appear to be under Section G). In other words, there is no central organizing principle in the structure of the chart.

More importantly, it will not be clear to a seller how this chart relates to the rest of the document. Section 2 states that the items in the chart “are contractual terms” and that

⁷ See Report on C.A.R. Buyer Representation Agreements, Section I.

the rest of the document provides “further information.” A seller could easily conclude that only the chart is binding and/or significant.

Far Too Much Logistical Information/Background in the Listing Agreement

The Listing Agreement contains far too much background information⁸ on the MLS and various logistical issues; moreover, all this information is scattered throughout the document (*See e.g.* Section 7, 8, 9, 10, 12.B, 12.C., 15, 16, 17, 18). It is not clear why this information is not streamlined and all in one place. A contract is not the place to spell out what an MLS is, how offers might be presented, or the pros and cons of a seller reading a supplemental offer letter. Certainly, all this information should be discussed and worked out between the parties. But putting this all in the Listing Agreement serves to detract from more important provisions of the contract, including the compensation and agency provisions.

Unclear Provisions and Lack of Consistency in Language/Defined Terms/Structure

There are numerous provisions in the Listing Agreement that are unclear. For instance:⁹

- Section 9 is titled “Public Marketing of Property” and references a “Clear Cooperation Policy” and MLSs that do not have “Clear Cooperation Policy.” This policy is never defined, and it is unlikely that a seller will have any idea what Section 9 is all about.
- Section 4.D.(2) does not adequately communicate to a seller how far beyond the termination of the Listing Agreement his obligation to pay compensation extends. The provision, with its two cross references and four subsections, is very difficult to understand.
- The “Arbitration Advisory” in Section 23.C. provides “If Seller and Broker desire to resolve disputes arising between them through arbitration rather than court, they can document their agreement by attaching and signing an Arbitration Agreement (C.A.R. Form ARB).” It is not clear what happens when only one of the parties “desire[s] to resolve disputes” through arbitration.

There is also a lack of consistency in defined terms, subheadings, and formatting:¹⁰

- The Agreement refers to “Buyer” and “buyer” as well as “Seller” and “seller” when they are intended to refer to the same entity.¹¹

⁸ The Listing Agreement has eleven references to the Seller being “advised” of certain things.

⁹ These examples are intended to be illustrative, not exhaustive.

¹⁰ To avoid duplication, additional examples of problematic sections can be found in the Report on C.A.R.’s proposed Buyer Representation Agreement (e.g., Entire Agreement Clause; entity buyers; legally authorized signers, etc.).

¹¹ More than halfway through the document, on page 5, “Buyer” strangely becomes a defined term and refers specifically to a dual agency situation. However, “Buyer” is thereafter used interchangeably with “buyer.”

- The Agreement sometimes refers to “the buyer” and sometimes refers to “buyer.”
- The Agreement refers to the “real estate purchase agreement,” “purchase agreement” and “sales agreement” to refer to the same thing (none of these is a defined term).
- “Sale” and “transaction” appear to be used interchangeably.
- The Agreement refers to “Property” and “property” when referring to the same thing.
- “Broker” is used to refer to the seller’s broker but is sometimes incorrectly capitalized to refer to other brokers (*See, e.g.*, Section 2.C(7)).
- Certain sections refer to “Brokers” plural, when “Broker” singular is intended (*See, e.g.*, Section 2.G(2), and 4.B.(2)).
- “Beginning Date” is capitalized but not a defined term.
- “Days” is capitalized but not a defined term.
- “Broker Identified” Prospective Buyers appears to be capitalized (Section 2.C(6)) but is not a defined term. [Note: “Prospective Buyers” is a defined term].
- Some headings are in all capital letters; others are in lowercase letters (*See, e.g.*, Section 9 (four subheadings in all caps and two subheadings in lower case letters)).
- There are several commas at the end of sentences in the chart, instead of periods (*See, e.g.*, Section 2.C.). Some sections have punctuation at the end of the sentence and others do not.
- Section 2.(C)7 of the chart is titled “Seller Obligation to Pay Previous Brokers” but then contains a space to denote a previous listing (which may not have culminated in an obligation to pay that broker).
- When discussing the MLS, the Agreement refers to “Broker’s MLS” (Section 7.C.), “the MLS” (Section 8), a “Local MLS” (Section 8.D.), an “MLS that . . . cover[s] the geographic area where the Property is located.” (Section 8.D.), and a “reciprocating MLS” (Section 8.A.). It will be impossible for a seller to keep track of what any of this means.
- The plural of MLS is not MLS’s (*See, e.g.*, Section 9.F.).
- It is not clear why “Internet” is capitalized (*See, e.g.*, Section 10).
- It is not clear what the capitalized terms in Section 10.B. refer to: “Seller can instruct Broker to advise the MLS that Seller does not want visitors to MLS Participant or Subscriber Websites or Electronic Displays that display the Property listing to have the features below (C.A.R. Form SELI).”¹²

¹² Additionally, no seller will understand what this means even if the terms were explained.

- There is inconsistency between the terms “opt out” and “opt-out” (See, e.g., Section 10.C.).
- It is unclear why Section 12.C. refers to Buyer “Supplemental” Offer letters, when that term is not used again.
- “Manager” is capitalized but is not a defined term (See Section 21).

There are numerous grammatical and syntax errors in the Listing Agreement as well. For instance:

- 4.C.(1): Paragraph 2C(3) is for any additional compensation due Broker if buyer is unrepresented or [sic.] other specified reason.
- 4.D.(1) . . . provided the Buyer completes the transaction or is prevented from doing so be [sic.] Seller.
- 4.F.(3) If the Property is sold to anyone listed above [sic. where?] during the time Seller is obligated to compensate another broker: (i) Broker is not entitled to compensation under this Agreement; and
5. . . . Concessions identified in a [sic.] MLS listing, [sic.] must not specify the concessions are to be used for broker compensation.
- 6.B. . . . Seller will provide to Buyer, as part of the sales agreement, copies of lease documents, or other documents obligating Seller to pay for any such leased or liened item. Seller will provide to Buyer, as part of the sales agreement, copies of lease documents or other documents obligating Seller to pay for any such leased or liened item. [sic., duplicative].
- 9.C. . . . Unless specified in paragraph 2F(2), Seller does authorize [sic.] Broker to utilize Coming Soon status, if any. [sic.]
- 9.E. Whether paragraph 9D(1) or 9D(2) applies, as specified in paragraph 2F(3), Seller understands and agrees that should any public marketing of the Property occur, the Property listing will be submitted to the MLS within 1 business day [sic., incomplete sentence].
- 10.B.(1) COMMENTS AND REVIEWS: The ability to write comments or reviews about the Property on those sites; or the ability to link to another site containing such comments or reviews if the link is in immediate conjunction with the Property display. [sic., sentence fragment].

- 10.B.(2) AUTOMATED ESTIMATE OF VALUE: The ability to create an automated estimate of value or to link to another site containing such an estimate of value if the link is in immediate conjunction with the Property display. [same]
- 12.B. Additionally, certain buyers may not be able or allowed to pay compensation to a buyer's broker. These buyers may request for seller to pay buyer's broker through a term or concession request in the [offer?,] purchase agreement or through a separate compensation agreement, if Seller has not authorized Broker in this Agreement to pay the full amount buyer owes buyer's broker, or any amount.
- 12.C. . . . Broker will inform Seller that an offer has come in, but will not submit [sic. the?] offer to Seller, unless specifically instructed otherwise, in writing. Local MLS rules may impact this practice and whether it [sic.] will provide any benefit to Seller. Broker and Seller may amend this instruction by agreeing in writing [sic.].
- 12.C. Whether overt or unintentional, Buyer Letters may contain information about a buyer's ~~or seller's~~ protected class or characteristics.¹³
15. Broker is not responsible for loss of or damage to personal or real property, or person [sic.],
14. Seller agrees: (i) to take reasonable precautions to safeguard and protect valuables that might be accessible during showings of the Property; and (ii) to obtain insurance to protect against these [sic.] risks. . . . Seller is advised to post [sic.] notice disclosing the existence of security devices.
- 16.A . . . If Seller is concerned, Seller should request that Broker provide [sic., Seller with?] any third parties' agreement impacting the Images. . . .
- 16.B. Seller acknowledges that unauthorized persons may take images who do not have access to or have not read any limiting instruction in the MLS or who take [sic.] images regardless of any limiting instruction in the MLS.

¹³ It does not make sense to say that a letter to a seller contains information about the *seller's* protected class or characteristics (it is only the buyer that has protected status). Additionally, the first part of the phrase should read, "Whether intentional or unintentional" since overt is not the opposite of unintentional.

* * *

To be clear, this Report has not chronicled all the issues in the Listing Agreement with formatting, clarity, grammar and the like. The above was intended to simply provide concrete illustrations of the widespread structural problems with the contract.

Part II: Compensation and Dual Agency Provisions

There are several troublesome substantive provisions of the Listing Agreement concerning compensation and dual agency that warrant examination. First, the average seller will not fully understand how the compensation provisions work. Second, it is not clear why the seller offers additional compensation to *the seller's broker* to then potentially pay the buyer's broker. Third, the Listing Agreement is designed in such a way to encourage the current practice where sellers continue to pay buyer broker compensation. Fourth, it appears that brokers will begin to utilize a seller concession field on local MLSs to communicate offers of compensation. Fifth, the Listing Agreement creates a false impression about the terms of the NAR settlement with respect to buyer representation agreements. The Listing Agreement plainly states that brokers intend to actively solicit buyer-clients interested in a seller's property, thereby placing them in a clear conflict of interest situation. And finally, the Listing Agreement is silent on what happens when a seller offers a buyer's agent a commission that exceeds the amount that the buyer's agent agreed to in a representation agreement with a buyer.¹⁴

¹⁴ There is an additional, perhaps less pressing, concern with the Listing Agreement. The NAR Settlement Agreement "require[s] REALTORS® and REALTOR® MLS Participants to disclose to prospective sellers and buyers in conspicuous language that broker commissions are not set by law and *are fully negotiable.*" The Listing Agreement contains several references to negotiable commissions:

- 2.C. Broker Compensation: 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 Buyer and Broker (real estate commissions include all compensation and fees to Broker). See attached Broker Compensation Advisory (C.A.R. Form BCA).
- 4. COMPENSATION TO BROKER: 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).
- 4.B.(1) ADVISORY: Compensation is negotiable and Seller is not required to pay . . .

The first two provisions specify that commissions "may" be negotiable. The Settlement Agreement, on the other hand, requires that the language state that the commissions "are fully negotiable." While perhaps a semantic difference, the language provides a signaling function for a prospective seller. The expression "may be negotiable" suggests less willingness to negotiate than "are fully negotiable."

Compensation Provisions

The compensation provisions in the Listing Agreement will be confusing to a seller, who will be faced with a “choose-your-own-adventure” series of possibilities:

1. Amount Paid for Own Broker
2. Plus (potentially)

Amount to be Offered to Own Broker to Share with Buyers’s Broker

OR

Amount of Concessions to be Offered to Seller Directly

3. Plus (potentially)

Additional amount to be paid to Own Broker if Buyer is Unrepresented

4. But (potentially)

Discounted commission if Own Broker (individual) serves as a dual agent

This will all be incredibly confusing to a seller who will not appreciate the distinction between offering additional compensation to his own broker (to be shared) versus offering concessions to a buyer. Additionally, most sellers will also not understand that discounting is sometimes done if their individual agent also represents the buyer.¹⁵ In fact, the default in the chart is the opposite—that the broker earns full commission on both ends.

The field that provides for “additional” compensation if the buyer is unrepresented¹⁶ would likely strike the average consumer as distasteful. The seller’s broker has agreed to represent the seller in this transaction; the representation status of the buyer does not change their obligations in any way. The seller’s broker may have to work harder to effectuate the deal—or may not.¹⁷ Either way, the financial obligation of the seller should not change.¹⁸

¹⁵ But not if the same brokerage represents the buyer. In this case, the full commission is payable. *See, e.g.*, <https://realestate.usnews.com/real-estate/articles/what-is-dual-agency> (quoting realtor stating that “some agents offer a discounted commission in a dual agency situation”).

¹⁶ The author suspects that some seller’s agents will simply refuse to deal with unrepresented buyers and not present offers submitted by them. While this is clearly a breach of their obligation to their client, the client will be none the wiser. This will create pressure on buyers to hire an agent, further perpetuating the current model of real estate commissions and driving up the cost of housing.

¹⁷ Buyers can be unrepresented for a variety of reasons. For instance, a lawyer may proceed with a real estate transaction without an agent. In such circumstances, it is unlikely that the seller’s agent will do more work than in the case of a represented buyer.

¹⁸ Agents do not return a portion of the commission if the house sells quickly with no hiccups.

To allow additional compensation for a seller's broker if the buyer is unrepresented works to the disadvantage of everyone but the broker. Sellers will have to pay more than the agreed amount with no additional benefit. Buyers will (indirectly) pay more than they should, even though they are not getting any additional benefit. The only party that benefits here is the broker.¹⁹

Lack of Clarity on Paying Seller's Broker to then Pay Buyer's Broker

Section 2.C(2) states "Optional additional compensation, if any, to Seller's Broker to be offered to Buyer's brokers [sic]." It is not clear why the seller must give additional compensation to the seller's broker to, in turn, pay the buyer's broker. Section 4.C.(1) elaborates on this and states that this amount is "for the buyer's side of the transaction if buyer is represented by Broker or another broker." At least two questions remain: (1) What happens to this amount if the buyer is unrepresented? and (2) What happens to this amount if the buyer representation percentage is less than the offered amount? This section should raise eyebrows about the seller's agent potentially pocketing the excess funds.²⁰

Moreover, it is not clear whether there are two or three different options for compensating a buyer's broker. The C.A.R. Compensation Advisory suggests that the seller may: (1) Authorize shared compensation; and (2) Offer compensation directly to the buyer's broker. A third option, of course, would be to agree to pay a buyer's broker indirectly as a concession. Yet, the Listing Agreement seems to contemplate a hybrid of (1) and (2) above: "additional compensation . . . to Seller's Broker to be offered to Buyer's brokers [sic]."²¹

The lack of transparency regarding exactly how the compensation obligation is supposed to work will create the potential for opportunistic agents to take advantage of their clients.

The Listing Agreement and Accompanying Broker Compensation Advisory Encourages Sellers to Pay Buyers' Brokers

¹⁹ Brokers usually steer their clients away from unrepresented buyers, further entrenching the current model which requires a buyer to hire an agent to be taken seriously. See https://www.reddit.com/r/realtors/comments/1cwtqzy/i_dont_think_buyers_know_what_they_are_getting/ ("Also, as a listing agent, I definitely warn clients about unrepresented buyers submitting offers. They usually have no idea what they are doing (although they think they do), are emotional, and can f**k up a deal or tie up the house over a disagreement. Getting the most for a house is important, but the best chance to close when selecting an offer is just as or more important. With offers that are decently similar, im recommending those with representation every time.") (errors in original).

²⁰ Unfortunately, this is often what happens now—and is not something most buyers understand. A number of brokerages charge, for example, 6% to the seller on the theory that 3% will go to the buyer's agent. If the buyer is unrepresented, the listing agent usually pockets the entire amount. It is hard to understand why the seller's broker should get 6% for doing the same work he was willing to do for 3%.

²¹ See Section 2.(C)(2).

Even though there are disclaimers that commissions “may be” negotiable, the forms strongly point sellers in the direction of offering additional compensation to a buyer’s broker. For instance, the first line of the Compensation Advisory states:

1. WHEN SELLERS LIST THEIR PROPERTY FOR SALE THROUGH A REAL ESTATE BROKER THEY AGREE TO PAY THE SELLER’S BROKER WHEN ESCROW CLOSES. THE SELLER MAY ALSO AUTHORIZE THE SELLER’S BROKER TO SHARE COMPENSATION WITH A BUYER’S BROKER OR MAY AGREE TO DIRECTLY PAY THE BUYER’S BROKER.

It does not list the third option: the seller may choose *not* to pay for the buyer’s broker at all. The Compensation Advisory then rattles off a list of reasons why the seller would want to offer compensation to the buyer’s broker. This is under the heading “Offering Compensation to a Buyer’s Broker is Negotiable.” A more accurate heading would read “Offering Compensation to a Buyer’s Broker is Entirely Optional.” Likewise, the Listing Agreement contains a subheading reading “Offer to Compensate Buyer’s Broker” right after the seller’s obligation to pay his own broker.

Seller Concessions

The Listing Agreement now contains a completely new section dealing with “Seller Concessions.” It is likely that the “Seller Concession” field in the MLS will become the new way of advertising commissions. The Listing Agreement defines “seller concessions” to include “broker compensation.” It states that “Concessions must be allowed to be used for any permissible expense or cost.” The Listing Agreement provides that:

Seller authorizes Broker to put in the MLS that Seller is willing to consider offers asking for concessions, with an amount up to ____% of the purchase price OR \$ ____.

It is interesting that the concession field specifies a *percentage* of the purchase price as the first option. It would not be surprising to see the number “2.5%” or “3%” routinely populate this field.²²

All of this is a blatant attempt to get around the NAR Settlement provision that prohibits offers of compensation on the MLS. When one MLS in California recently announced this new concession field, brokers on an online forum admitted that this was “the new

²² The following guidance shows that the number can be a percentage of the purchase price. <https://go.crmls.org/concessions-in-price-faqs/>. See also <https://notoriousrob.substack.com/p/a-few-random-thoughts-and-questions> (“We’ll see if that’s how it works out. And I still maintain that if four years from now, 97% of the MLS Concessions fields say, ‘The seller offers 2.5% in concessions’ that somebody big somewhere is getting sued.”).

commission field” and appeared to be a “loophole” that would subject NAR to further legal scrutiny.²³

Sellers’ Brokers Using Open Houses and Showings to Sign Up Buyers

The dual agency provisions in the Listing Agreement are problematic, as they signal what sellers’ brokers plan to do going forward: use open houses²⁴ and showings to solicit buyer clients, which, in turn, compromises their fiduciary duty to their seller.

Section 14 provides:

C. (1) POSSIBLE DUAL AGENCY WITH BUYER: (1) Depending upon the circumstances, it may be necessary or appropriate for Broker to act as an agent for both Seller and buyer, exchange party, or one or more additional parties (“Buyer”). Broker shall, as soon as practicable, disclose to Seller any election to act as a dual agent representing both Seller and Buyer. If a Buyer is procured directly by Broker or an associate-licensee in Broker’s firm, Seller hereby consents to Broker acting as a dual agent for Seller and Buyer. In the event of an exchange, Seller hereby consents to Broker collecting compensation from additional parties for services rendered,

²³ https://www.reddit.com/r/realtors/comments/1d2u9d6/question_about_new_law/ (“Yes. Interesting, I thought they were going to allow percentages from what I was reading a couple weeks back. As Shakespeare said, “A rose by any other name...” this is just the new commissions field.”); (“Not to mention that the DOJ has already tipped their hand that they will be suing after this is all said and done, with their recent “no commissions anywhere” statement. I give it a max of six months before they sue NAR for violating the spirit of the settlement by allowing the “concessions loophole” and allowing agents to advertise commissions outside of the MLS. I know I’m not the only one who has thought of this.”); https://www.reddit.com/r/realtors/comments/1d2y298/ca_mlss_adds_new_fields_that_allow_sellers_to (“you wouldn’t think they’d be so brazen as to put “broker fees” in there. A simple “Seller willing to provide \$X” that just so happens to be around the typical agent fee boils the blood of the current WH DOJ but I still don’t know what they can do about it, legally/fair trade.”); https://www.reddit.com/r/realtors/comments/1cwtqzy/i_dont_think_buyers_know_what_they_are_getting/ (“The California regional mls (CRMLS) just announced new fields coming soon. Seller willing to entertain concessions (yes or no) Amount ____ \$ or %[.] So I guess this is their solution for listing agents to put how much seller is offering buyer agents without directly saying it.); (“Concessions will become the new commission field... at least in the MLS. However it will become tricky with other concessions (repair credits, etc.) and buyers may hit their loan limit of concessions fast.”). *See also* comments on <https://www.inman.com/2024/05/29/nations-largest-mls-now-allows-listings-to-show-seller-concessions/> (“So basically this is the same horse pulling a different buggy?”; “Y’all are drinking some bad cool-aid if you think this “skirting the point” approach will survive DOJ & other scrutiny.”).

²⁴ This is already a common practice and only likely to become more common. *See* https://www.reddit.com/r/realtors/comments/15007oc/dual_agency_lowered_commission/. At three separate open houses the author recently attended, the seller’s agent was not present at all. Instead, the seller’s agent sent another agent to host the open house. These agents represented themselves as “a buyer’s agent” not “the seller’s agent.” They were not able to answer any questions about the property. It was clear that: a) the seller’s agent was abdicating his or her duties to the seller; and b) the brokerage was attempting to sign up clients at the open house by having a buyer’s agent be the only agent present.

provided there is disclosure to all parties of such agency and compensation. . . .

(2) Showing Properties: Seller acknowledges that real estate brokers must have a representation agreement with a buyer before showing properties to that buyer. Seller consents to Broker entering into a Buyer Representation and Broker Compensation Agreement with a buyer, and that by doing so the brokerage company will become a dual agent representing both buyer and seller.

D. UNREPRESENTED BUYERS: If a buyer interested in viewing Seller's property is not already represented by a real estate broker, and such buyer refuses to be represented by Broker, Seller authorizes Broker to obtain a signed document from such buyer refusing representation by Broker. Broker shall provide such buyers, at the earliest practicable time, a disclosure of non-representation, such as Buyer Non-Agency (CAR Form BNA) or Open House (Property Tour) Visitor Non Agency Disclosure (C.A.R. Form OHNA).

E. CONFIRMATION: Broker shall confirm the agency relationship described above, or as modified, in writing, prior to or concurrent with Seller's execution of a purchase agreement.

These provisions mean that a seller must agree *in advance* that his agent is also permitted to act for a buyer. It appears that a seller has no choice in the matter; if they want to be represented by a California Association of Realtors' broker, they must accept dual agency.

Perhaps this would not be as problematic but for Sections C.(2) and D. The provisions state that:

Seller acknowledges that real estate brokers must have a representation agreement with a buyer before showing properties to that buyer. Seller consents to Broker entering into a Buyer Representation and Broker Compensation Agreement with a buyer, and that by doing so the brokerage company will become a dual agent representing both buyer and seller.

UNREPRESENTED BUYERS: If a buyer interested in viewing Seller's property is not already represented by a real estate broker, and such buyer refuses to be represented by Broker . . .

Collectively, these provisions reveal what sellers' brokers intend to do: sign up buyers as clients at open houses or other showings with the goal of collecting double commission²⁵—something directly contrary to the interests of the seller.

The “plan” appears to involve leaving sellers and buyers with a misimpression about the NAR Settlement. Section C.(2) of the Listing Agreement states that “real estate brokers must have a representation agreement with a buyer before showing properties to that buyer.” This implies that a buyer is not able to view a property *without* a broker, something that is patently untrue.²⁶ The NAR Settlement states that a broker will not be able to collect compensation unless he has a buyer representation agreement in place prior to the buyer viewing a property. The NAR Settlement does not prohibit a seller's agent, acting for the seller, from showing the property to a buyer at an open house or otherwise.²⁷ There is no requirement—and no reason—for a seller's agent to try to enter into a buyer representation agreement with a buyer viewing the seller's property.

There is a very important distinction between what the NAR Settlement provisions provide and what brokers are publicly claiming:

What Settlement Provides: In order to collect a buy-side commission, a broker must have a representation agreement in place before a buyer tours a property.

What Brokers are Claiming: A buyer may not view a property without a representation agreement in place.²⁸

²⁵ This is sometimes referred to as “double ending” or “double dipping.” See <https://www.inman.com/2024/06/04/will-dual-agency-become-common-after-nars-settlement/>. See also https://consumerfed.org/press_release/double-dipping-real-estate-agents-overcharge-consumers-billions-of-dollars-annually/.

²⁶ Unfortunately, this is a myth that is being perpetuated in the real estate world. For example, Zillow has recently announced a “touring” agreement which purports to allow buyers access to properties without committing to paying any commission. Notably, Zillow has stated that “The proposed NAR settlement outlines the requirement that buyers have written agreement with agents before touring.” See <https://www.zillowgroup.com/news/zillows-touring-agreement/>.

²⁷ See <https://www.nar.realtor/the-facts/nar-settlement-faqs> (“If an MLS Participant hosts an open house or provides access to a property, on behalf of the seller only, to an unrepresented buyer, will they be required to enter into a written agreement with those buyers touring the home? No. In this case, since the MLS Participant is only working for the seller, and not the buyer, the MLS Participant does not need to enter into a written agreement with the buyer.”).

²⁸ See, e.g., <https://www.robbyenglish.com/blog/do-i-have-to-sign-a-buyer-representation-agreement-before-looking-at-homes/#:~:text=The%20short%20answer%3A%20Yes%2C%20you,agreement%20before%20seeing%20one%20home> (“Do You Have to Sign a Buyer's Representation Agreement? The short answer: Yes, you absolutely and unequivocally now have to sign one. In accordance with new National Association of REALTORS changes, any and all home buyers must sign a buyer representation agreement before seeing one home. In addition, should you want to visit an open house that is being held by someone other than the listing agent, you too will have to sign an agreement with that agent probably covering just that home should you decide to purchase it.”).

This is an extremely important distinction. The focus of the settlement is on *agent responsibilities*—i.e., an agent must have a written agreement before acting on behalf of a buyer.²⁹ This has morphed, unfortunately, into the very different proposition that a *buyer must have* a representation agreement in place to view a property.

It appears that sellers' brokers may attempt to intimidate unrepresented buyers into hiring them as a buyer's broker, as evidenced by the statement: "If a buyer interested in viewing Seller's property . . . *refuses* to be represented by Broker, Seller authorizes Broker to obtain a signed document from such buyer refusing representation by Broker." The term "refuses" (rather than "chooses"), coupled with the "requirement" for a buyer to sign a form "refusing representation," leads one to believe that brokers will use this as a scare tactic.³⁰

In fact, there is evidence to suggest this is already happening. A recent post by a prospective buyer on Reddit reads:

Was at a open house and the buyer agent at the open house was trying to get me to sign Seller and Buyer disclosure agreement? I was debating between her and a family friend. Is this normal?

At the open house, she did not disclose that she was a buyer agent for the same broker as the seller agent. She asked if I had a agent and I said I had a family friend who will be. . . .

During the tour, she kept trying to convince me to go with her. Towards the end, I did not commit to her. She tried to get me to sign a buyer-seller disclosure. I refused. She was being pushy and made it sound required. I refused again and she eventually wrote in the signature section "I refuse." We later on agreeing that if I will reach out if I move forward with her.

Is this normal having to sign this when I am not a client of hers? I didn't like how pushy she was.

²⁹ See <https://www.nar.realtor/magazine/real-estate-news/law-and-ethics/the-truth-about-the-nar-settlement-agreement> ("NAR also agreed to create a new rule *requiring MLS participants* working with buyers to enter into written agreements with their buyers before the buyer tours a home."); <https://www.nar.realtor/the-facts/written-buyer-agreements-101> ("Beginning August 17, 2024, an MLS Participant "working with" a buyer will be required to enter into a written agreement with the buyer prior to touring a home, including both in-person and live virtual tours.").

³⁰ A useful parallel can be drawn with refusing medical advice. Doctors often make patients sign a document if they are proceeding against medical advice in order to get the patient to understand the gravity of the situation. Here, a requirement for a buyer to sign some form of document may convince them to simply "hire" the broker on the spot.

I feel like she was getting me to sign to show that I am a client of hers and only I can make a offer with her for this [house].³¹

As the post suggests, buyers will not understand any of this. And sellers' brokers will have plausible deniability when pressed by buyers; they will point to the provision in the NAR Settlement Agreement that states "all REALTOR® MLS Participants working with a buyer [must] enter into a written agreement before the buyer tours any home."³² Misinformation will be everywhere, all of it to the detriment of sellers and buyers.

From the perspective of the seller signing a listing agreement, why would he want his agent to use an open house or showings as an opportunity to solicit clients, thereby placing the broker in a direct conflict of interest situation? If anything, common sense dictates that a seller would prefer to deal with an unrepresented buyer, thereby potentially saving an extra 3% commission.³³

Contractual Silence on Commission Overage Amounts

If a seller authorizes his broker to offer the buyer's agent a certain commission (say, 3%) and the buyer's agent's compensation is capped at a lower amount under the Buyer Representation Agreement (say, 2%), it is not clear what happens to the additional 1%. It would stand to reason that this 1% reverts to the seller since the seller authorized a percentage *for buyer broker commissions*. If the buyer's broker is not entitled to the full amount, that money should not be reallocated to the buyer for other purposes. Worse yet, it could be that sellers' brokers attempt to keep the overage amounts themselves. Section 2.C(2) refers to additional compensation *to seller's broker* to be "offered" to buyer's broker, but it does not state what happens if the offer is not accepted.

Moreover, as a practical matter, it is unclear how a seller will be able to determine whether the full offered percentage should be paid. Does the buyer ask to see the Buyer Representation Agreement? There is much potential for mischief here, including the possibility (discussed in a separate Report on C.A.R.'s Buyer Representation Agreement) that buyers' brokers will attempt to modify a representation agreement. In short, the seller who authorizes a certain percentage of commission is operating blind and will not know if he is paying more than the Buyer Representation Agreement provides.

Part III: Other Problematic Provisions

³¹ https://www.reddit.com/r/realtors/comments/1dbxa69/was_at_a_open_house_and_the_buyer_agent_at_the/ (post removed by user but archived by author).

³² See NAR Settlement Agreement, Section H.58.(vi).

³³ Of course, a seller's broker would prefer not to deal with an unrepresented buyer because of the perception that this requires more work for them.

The focus on this Report has largely been on the compensation and dual agency provisions of the Listing Agreement. This focus should not detract, however, from other problematic terms in the Agreement. These include:

1. **Dispute Resolution (Section 23):** The Listing Agreement contains the same mediation provision as the Buyer Representation Agreement and the same critiques apply.³⁴
2. **Disclosing Offers (Section 12):** Section 12.A.(iii) provides that it is within the presumptive discretion of the broker to disclose whether offers have been made on the seller's property, and how much the offers were for. While the seller can opt out of this in writing, he is unlikely to notice this provision buried deep in the fine print.
3. **Commission Owed in the Absence of a Sale (Section 4.E.):** An additional area of concern is the provision that commission is due even when an actual purchase and sale is not consummated. If a seller collects damages from a buyer for breach of contract, he owes commission to his agent for this non-completed sale.
4. **Withdrawing Property from Market (Section 4.C.):** If the seller withdraws the property from the market without the broker's consent, he will owe the commission. It is unclear how this section interfaces with the cancellation clause.
5. **Management Approval (Section 21):** Where an agent signs the contract on behalf of the broker, the brokerage has five days to cancel the agreement. This means that the seller could think he has a binding contract, only to have the brokerage decide to cancel it for whatever reason.

Conclusion

The proposed Listing Agreement suffers from many of the same weaknesses as the Buyer Representation Agreement. The Agreement is overwhelming and will not be read, or understood, by the average seller. And yet the seller is supposed to warrant that he "has read, understands, received a copy of and agrees to the terms of" the Listing Agreement. The Agreement contains so much dense information, including over seventy-five cross-references, that the average consumer will get absolutely lost in it (provided he even tries to decipher it).

Substantively, several provisions should concern sellers and other real estate stakeholders. The compensation provisions are very confusing, and a seller will not be

³⁴ See Report on C.A.R. Proposed Buyer Representation Agreement.

able to distinguish between the practice of offering shared compensation, offering direct compensation, or offering concessions. The Agreement and the accompanying Compensation Advisory strongly push sellers into offering compensation to buyers' brokers for fear that, if they do not do so, their property will not sell. One compensation provision, in particular—the one that offers *extra* compensation to a seller's broker for simply doing what the broker already agreed to do—will strike the public as a pure money grab.

A particularly problematic provision is the one that telegraphs that sellers' brokers will attempt to secure contracts with buyers interested in viewing a seller's property (Section 14.C.). There is a fundamental difference between a dual agency situation arising from an existing client base and a dual agency that is actively pursued and solicited by a seller's agent. Making buyers sign documents "refusing representation" at open houses or showings serves no purpose other than to scare them into signing with the broker.

On a different note, the Listing Agreement contains a field that authorizes a broker to list seller concessions on the MLS in the form of a percentage of the purchase price. This will undoubtedly become the new MLS compensation field and litigation will ensue.

There is no reason why a residential listing agreement must be this complicated and confusing. The best course of action would be for the California Association of Realtors to abandon this Listing Agreement in its entirety and start from scratch.

About the Author

Tanya Monestier joined the University at Buffalo Faculty of Law in July 2022 as a Professor of Law. She teaches Contracts, Sales, and Conflict of Laws. Monestier's work has been published in leading academic journals, including *Cornell Law Review*, *Wisconsin Law Review*, *Boston University Law Review*, *Cardozo Law Review*, *American University Law Review*, *Hastings Law Journal*, and the *Ohio State Law Journal*. Monestier's academic work has been cited by numerous trial and appellate courts, including by the Supreme Court of Canada, the Second Circuit Court of Appeals, the Ninth Circuit Court of Appeals, and dozens of federal and state courts. Her amicus brief was recently quoted by the United States Supreme Court in *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2054 (2023) (Justice Alito, concurring). She is a Staff Editor for the *American Business Law Journal*.

Monestier has written articles in the areas of real estate and consumer protection. Her article, *Fixer Upper: Buyer Deposits in Residential Real Estate Transactions*, 80 OHIO ST. L. J. 1149 (2019) argues that buyer deposits often operate as unlawful penalties. The article is cited in a leading Property Law case book. Monestier's follow-up article, *Cake-and-Eat-It-Too* clauses was recently published in *Wisconsin Law Review* (*Cake-And-Eat-It-Too Clauses*, 2024 WISC. L. R. 87 (2024)).

Monestier graduated first in her class from Osgoode Hall Law School in Toronto, Canada. She clerked for the Honorable Justice Frank Iacobucci at the Supreme Court of Canada. Monestier then earned an LL.M. from Cambridge University, graduating with first class honors and receiving a specialty designation in Commercial Law. Prior to entering academia, she practiced in-house at a pharmaceutical company, specializing in class action litigation.

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