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### Buyer Broker Representation Agreements – Why You Should Use Them



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Buyer Broker Representation Agreements are contractual Agreements between a potential buyer of real property and a real estate broker. While often under-used in the real estate industry, these forms can provide a great benefit to your real estate practice.

The California Association of REALTORS® (“C.A.R.”) created three types of Buyer Broker Representation Agreements:

1. Buyer Representation Agreement - Non-Exclusive/Not for Compensation (“Form BRNN”)
2. Buyer Representation Agreement – Non-Exclusive (“Form BRNE”)
3. Buyer Representation Agreement – Exclusive (“Form BRE”)

These forms were in response to the 1998 case of *Field v. Century 21 Klowden-Forness*. In *Field*, the California Court of Appeal held that the two-year statute of limitations in the Civil Code section 2079 series does not apply to claims of breach of fiduciary duty brought by a buyer against that buyer’s agent. Questions were raised about whether any other statutory limits found in section 2079 applied to buyer’s agents, leading to the creation of California jury instructions which expand the fiduciary duties an exclusive buyer’s broker owes a buyer. As a result, buyer’s agents could no longer look to the statute for protection, definition or clarity relating to the buyer-broker relationship – leading to these forms and current California Jury Instructions.

There are three key features of these Buyer Broker Representation Agreements. First, in using a Buyer Broker Representation Agreement, the parties are able to define the scope of the tasks and duties to be performed by buyer and broker. Second, it provides a written consent to a dual agency should one develop. Finally, depending on which type of Buyer Broker Representation Agreement is used, the agency relationship may be non-exclusive and may be revoked at any time by either buyer or broker.

Yet, there are particular differences with each form. For instance, the BRNN is revocable at any time and is non-exclusive.

This means that the buyer is not tied to that specific broker. The form also does not provide for broker compensation.

The BRNE allows for the broker to be compensated for services rendered on behalf of the buyer. The broker will be paid only if that broker introduces the purchased property to the buyer or otherwise acts on the buyer’s behalf. It is non-revocable and has a definite commencement and termination date that must be written into the contract. Further, there is a mediation and optional arbitration paragraph, as well as an attorney’s fees paragraph. It is also non-exclusive, which provide flexibility for a potential buyer and dissuades any unconscionable action by the broker.

The final form is the BRE, which has a section in the form that provides for compensation, and is non-revocable. Further, it is exclusive, meaning the buyer will be obligated to pay a commission even if the buyer finds the property himself or uses another broker. It contains a mediation paragraph, an optional arbitration paragraph, and an attorney’s fees paragraph. Finally, it provides a definite commencement and termination date that must be written into the contract. However, there have been complaints that some brokers have used this form to create extended and unconscionable commencement and termination terms within the contract.

The use of these forms can act as a great risk management tool by putting each of the parties’ duties and obligations in writing, and informing the buyer of the broker’s responsibilities and limitations early in the transaction. However, each form needs to be carefully read. The forms identify what services are performed by the broker, what services are performed by others, and may protect the buyer-broker commission. Brokers should use these forms properly and should refrain from using commission rate as a guiding force in selecting property for a potential buyer. Doing so would not be acting within the buyer’s best interest, which is a breach of a broker’s fiduciary duty to his or her client.

More importantly, use of one of these forms also satisfies Article 9 of the National Association of REALTORS® Code of Ethics. Article 9 provides:

*Continued ...*

REALTORS®, for the protection of all parties, shall assure whenever possible **that all agreements related to real estate transactions including, but not limited to, listing and representation agreements, purchase contracts, and leases are in writing in clear and understandable language expressing the specific terms, conditions, obligations and commitments of the parties.** A copy of each agreement shall be furnished to each party to such agreements upon their signing or initialing. (Amended 1/04) (Emphasis added.)

Article 9 could be interpreted to require the use of the Buyer-Broker Representation Agreement. While not required by law, it may be required for REALTORS®. In any event, the use of one of these forms is recommended as for any professional relationship for services, it is good to have a written document establishing all parties' expectations.

It is best to have buyer sign these agreements at the earliest possible time in the relationship with the buyer or no later than when an offer is written. It would also be good practice to provide a buyer with one of these Buyer Broker Representation Agreements any time that an Agency Disclosure form ("C.A.R. Form AD") is given to a buyer.

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