



Courtside Real Estate

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July 2024 Updates to C.A.R. Forms, VOLUME III

It is time for the new and revised C.A.R. form release relating to the N.A.R. settlement of the Sitzer/Burnett case (the “Settlement”). Many of our readers are familiar with C.A.R.’s last minute decision to pivot and delay the June release of the standard forms impacted by the Sitzer/Burnett settlement (the “Settlement”). When it comes to the release of the forms impacted by the Settlement and the new MLS rules, there has been confusion, chaos, and questions aplenty. While Volume I of this article attempted to outline the changes being made to the forms affected by the Settlement, the delay of the June release, combined with new changes implemented by C.A.R. to account for additional Department of Justice (“DOJ”) inquiries and concerns, rendered Volume I out of touch with what the forms will actually look like come their implementation on August 17.

As a result, we are publishing Volume III to discuss and explain some of the changes that C.A.R. has made over the last month. It is imperative you review these forms. It is the purpose of this article to give you a head start on understanding and educating yourself (and others) on what the changes look like and how they will impact day-to-day practice in the real estate industry. Remember, C.A.R. delayed the release of the forms to ensure more stringent compliance with DOJ’s position regarding the Settlement.

Before moving into the specifics of the changes to the forms, it is important to keep in mind several big picture

points. These “big picture” items will help contextualize *why* certain changes are being made to the forms. For one thing, the DOJ has repeatedly represented that it wishes the Settlement went further. Particularly, DOJ has explicitly expressed it wants all mentions of broker-to-broker compensation sharing eliminated. This of course, is an overflow from DOJ’s fundamental premise that offers of compensation between brokers create anti-competitive markets that ultimately harms consumers. As an offshoot of trying to accomplish the goal of eliminating offers of compensation wherever they may be found, DOJ directed its attention to C.A.R.’s standard forms, issuing a formal inquiry into the forms in June. This formal inquiry is ultimately what triggered the delayed release of the June forms impacted by the Settlement. Keeping these points in mind, many of the changes to the July 2024 release reflect these broader concerns..

Note: The authors of this article neither endorse nor oppose the statements or premises assumed by the DOJ (or the forms). To the extent they are mentioned here, it is to help animate and add context to the specific changes being made to the forms and educate users of the forms as to the changes. Further, we believe many of the DOJ positions may be overreach.

Buyer Representation and Broker Compensation Agreement (“BRBC”)

Here, many of the observations of Volume I of this article regarding the big picture changes to the BRBC hold true, specifically, the grid (added in the initial June iteration) remains. There have been, however,

significant changes related to the grid on the first page and its contents and notices.

Notably, the updated BRBC explicitly defaults to being a non-exclusive agreement and now includes Paragraph 2A(2), where this default status can be changed. Complimenting this change, the BRBC now explicitly defines what “Exclusive Representation” means, adding paragraph 15, and setting it aside with its own spot for the buyer to initial. Remember, one of the key issues animating the Sitzer/Burnett case (and one of DOJ’s express concerns) is ensuring a level playing field for consumers. One way the changes to the BRBC seek to accomplish this is through providing ample notice of things that C.A.R. views as effecting consumer rights, such as, agreeing to an exclusive representation agreement (or referencing the new Buyer Compensation Advisory form that outlines some of the fundamental issues consumers need to know related to broker compensation).

Additionally, in seeking to synthesize the form to the DOJ’s concerns, C.A.R. reorganized the “Broker Compensation” section, particularly, paragraphs E-E(3). Among the changes from the June release, is an isolated and bolded notice that commissions are not fixed by law. This notice is further augmented by citing to the *substantially revised* C.A.R. Broker Compensation Advisory (“BCA”). Readers will note, the first iteration of the BCA was released May 9, 2024, to get ahead of some of the upcoming changes. The new July release of the BCA, however, includes substantial changes to what was released in May. These changes are discussed in more detail, *infra*.

Residential Listing Agreement (“RLA”)

Much like the BRBC, the RLA went through significant changes from its June 2024 version, especially when it comes to the contractual terms laid out in the Grid on pages 1–2. Immediately, users of the RLA will notice it incorporates identical changes that the July 2024 BRBC underwent. For example, Paragraph 2C provides an emboldened and set apart notice that commissions are not set by law. This paragraph goes on to cite the new

BCA form discussed in detail *infra* (also cited to in the BRBC).

Further, Paragraph 2C includes some of the biggest changes to the RLA, which is not surprising given this section deals with broker compensation and some of the big picture concerns of the DOJ. Specifically, Paragraph 2C(1), specifies that the compensation discussed in the RLA is applicable to the seller’s side of the transaction *only*. This provision reflects the changes to the real estate industry after the Settlement, specifically, that buyers and sellers must now have their own separate compensation agreements with their respective brokers (assuming they are represented) in the transaction. In Paragraph C(2), the RLA addresses issues raised when a buyer comes into the transaction unrepresented. In these situations, the seller’s agent will have more work to do most of the time, and as such, may want to negotiate a larger commission. Importantly, as mentioned above, Paragraph 2C begins with a specific reference to the BCA which includes information and notice provisions regarding unrepresented buyers, underscoring the point that while the BCA is not technically required to signed as a part of the RLA, it would be wise to include it to ensure all parties are informed about the compensation rules embodied in the RLA.

In maybe the most significant change to the RLA, C.A.R. removed mention of the risks and benefits of listing a property on the MLS. In fact, nearly any mention of the MLS and how it functions related to marketing the property can now be found in the new MLS Addendum (“MLSA”), discussed in more detail *infra*. Paragraph 2E(1) now directs sellers to the MLSA wherein the details of how the property will be marketed on the MLS are outlined (or what potential impacts of choosing not to market via the MLS will be).

Buyer Compensation Advisory (“BCA”)

As noted above, the BCA is an altogether new form (as of May 2024). While first released May 2024, it went through substantial revisions in June and July 2024 after the DOJ inquiries and is being re-released. For practical purposes, it is more of an informational form and

contains signature blocks for the seller/buyer to acknowledge the terms of the BCA have been: “[R]ead, understood, and received.”

Readers should note that, *for the most part*, the contents of Paragraph 1 apply to sellers and Paragraphs 2 and 3 apply mostly to buyers. This is qualified with “for the most part” because 1B is relevant to both sides of the transaction as is 2B. Notwithstanding this, both sides of a given transaction should read and understand the full form to understand both sides of the transaction. Like the BRBC, with the BCA, we have a form that doubles down on the notice to the Buyers that commissions are not set by law and are negotiable. (BCA, ¶ 2A.) Further, the form puts Buyers on notice that the Settlement requires buyer’s brokers to have a written agreement with a buyer prior to showing or giving a tour of a property. (BCA, ¶ 2B.)

In addition to the aforementioned revisions, there are also two new sub-paragraphs under Paragraph 1 that, from a legal perspective, address some more controversial elements of real estate practice. First, Paragraph 1B gives notice that listing agreements are permitted to include optional compensation amounts owed to the seller’s broker “for situations where the broker takes on additional responsibilities or workload.” While the form itself notes the seller’s broker is not required to work for the buyer as an agent, it advises seller’s brokers who chose not to represent buyers in that type of situation to use the C.A.R. Buyer Non-Agency form (the “BNA”). Given the potential Fair Housing Act and implied agency implications of this section, Brokers would do well to heed this advice as the BNA fully informs the unrepresented (and sometimes unaware buyer) that the Seller’s Broker owes fiduciary duties to the seller, and not the buyer.

In the second new paragraph, Paragraph 1C, the BCA advises sellers and buyers as to the realities of “Dual Agency.” Dual Agency can occur in various circumstances but essentially boils down to a brokerage (or broker) being an agent to the respective parties on opposite sides of the transaction. As the BCA notes, this is permitted under California law. Given what it means to be someone’s agent (and the fiduciary duties an

agency relationship entails), however, brokerages, brokers, and agents alike should all be wary of venturing into dual agency transactions. Moreover, this is likely to be an area of enforcement the Department of Real Estate (“DRE”) focuses on in the initial time period after the implementation of the terms of the Settlement.

All in all, practitioners should use the BCA as a part of their normal course of business. It gives your clients much of the information related to broker compensation that they need to be aware of when entering into a transaction under the terms of the Settlement. Underscoring its importance, it is directly referenced in two of the most common forms used in day-to-day practice, the BRBC and RLA (as discussed above).

Multiple Listing Service Addendum (“MLSA”)

Much of what is in the MLSA will look familiar, seeing as much of the information was previously included in the RLA. There is critical new language added to the MLSA that addresses the details of seller concessions on the MLS. Remember, the DOJ has indicated its primary concern with eliminating offers of broker compensation from the MLS, is that advertising such offers (on the MLS or elsewhere) stifle competition and allegedly leads to steering. Commonly, steering is understood as the practice of buyer’s brokers directing their clients to properties that offer the best compensation for the buyer’s broker, as opposed to leading their clients to the property that best suits the needs of the client. Those that support the DOJ’s position note that, historically, the most common way steering occurred was through buyer’s brokers utilizing the MLS compensation fields to steer their clients to the properties with the best compensation. Under the Settlement, this will no longer be possible because broker compensation fields are being eliminated from the MLS altogether.

Despite the compensation fields being eliminated from the MLS, many agents and brokers have acutely noted that there can be a somewhat blurry line between what constitutes a “concession” verses an offer of

compensation. Meaning, some agents may try to utilize seller concessions as a workaround for advertising broker compensation. Seeing as the DOJ would undoubtedly oppose the industry merely playing word games with the terms of the Settlement, the MLSA details a specific definition of what a concession is. Specifically, MLSA, Paragraph 5A notes: "Concessions are monetary payments that a seller agrees to contribute towards a buyer's expenses.... Concessions may include ... buyer broker compensation."

Importantly, the MLSA then goes on to note that concessions cannot specify they are to be used for broker compensation and do not constitute "promises to pay." (*Ibid.*) Essentially, the MLSA outlines the permissible uses of concessions while noting that, ultimately, any agreement as to the seller compensating the buyer's broker will not be binding unless included in the purchase agreement, and although such compensation cannot be advertised on the MLS, it can be included in a buyer's offer as a term of the offer and thereafter negotiated.

Conclusion

While there are more forms that were changed from June to July, the changes discussed herein represent the most significant changes made to the most widely used C.A.R. forms. Most all other changes to already existing forms addresses the needed changes to language discussing broker compensation.

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