



**WEST COAST
RESOLUTION
GROUP**

THE TIMES THEY ARE A CHANGIN' FOR CALIFORNIA REAL ESTATE AGENTS

*Jane A. Rheinheimer,
West Coast Resolution
Group Mediator*

It's January 2, 2025. You are a San Diego real estate agent, ready to hit the ground running in the new year. You have clients from out of town interested in looking at homes listed for sale, and you have a full day of showing appointments booked. Sounds promising, doesn't it? But hold the presses – do you have a written buyer-broker compensation agreement signed by your clients in hand before you step into that first property? Do you want to get paid if your clients buy one of the properties you show them? (Of course you do.) Do you want to put your real estate license at risk? (Of course you do not.) Why are you asking me these questions, Jane?



As most of you know by now, California enacted legislation, effective January 1, 2025, which profoundly affects the way real estate agents and brokers are required to do business in the state moving forward. The new legislation was passed as AB 2992 in the late fall of 2024 and became effective on January 1, 2025, as California Civil Code section 1670.50. Other statutes have also been added or modified to conform with the new legislation. AB 2992 requires agents representing buyers to have a written buyer-broker compensation agreement¹ with their clients in order to be paid a commission on a real estate transaction.

Traditionally the seller of real property enters into a commission agreement with a listing broker/agent² where the commission to be earned is negotiated and specified in the listing agreement. Although the numbers have changed over the years, a

typical commission in San Diego is currently 5 or 6 percent of the ultimate sales price of the property on a residential transaction.

The listing broker has traditionally then offered to share a portion of the commission with “cooperating brokers” who bring buyers to the property. The usual split is 50/50 although it is not uncommon to see 60/40 or other splits, usually with the cooperating broker earning the larger share of the split. The split between listing and cooperating brokers is negotiable, as are all real estate commissions. For decades, listing brokers have advertised the split offered to cooperating brokers when they market the property through a multiple listing service (MLS).

This practice has concerned consumer advocacy groups who have argued that brokers representing buyers will steer their clients to properties where a higher commission is offered to the cooperating broker. It has also given rise to concerns about “fee fixing” by brokers, even though commissions are required to be negotiable. Critics point out that commissions paid to real estate agents on the sale of residential properties in the US are significantly higher than in most other countries. The widespread availability of search engines and platforms that permit buyers to find properties on their own has caused heightened scrutiny of the value that real estate agents bring to the table in residential transactions.

All of this came to a head when, in 2019, a federal class action lawsuit was filed in the United States District Court for the Western District of Missouri. *Burnett, et al. v. The National Association of Realtors, et al.* brought alleged violations of the federal Sherman Antitrust Act and several Missouri antitrust statutes against the National Association of Realtors and some of the most

preeminent residential real estate brokerages in the country. The case went to trial in October, 2023, and resulted in a unanimous jury verdict finding all defendants liable for engaging in price-fixing conspiracies to the detriment of residential home sellers.

NAR ultimately ended up settling the case post-trial in March, 2024 for \$418 million. The settlement required NAR to agree to change its policies on the way in which real estate commissions are paid and advertised by its member associations.

The *Burnett* settlement sent shockwaves through the real estate community, prompting state legislatures across the country to move quickly to pass laws that were in line with the NAR settle

The new California legislation requires, among other things, the following:

- A buyer-broker compensation agreement must be executed between a buyer’s agent and a buyer “as soon as practicable” but in any event no later than the execution of a buyer’s offer to purchase real property.
- The legislation applies to both residential and commercial real estate sales, but not to leases and rental agreements.
- If the buyer’s agent/broker is a member of a multiple listing service (and virtually all of them are), the buyer-broker compensation agreement must be signed by the prospective buyer **before touring** a residential property consisting of one to four residential units.³
- Listing brokers are now **prohibited** from advertising or mentioning commission split in the MLS.⁴

The changes to the law require that the buyer-broker compensation agreement include the following:

- An election of whether the agreement is exclusive (the buyer is required to work with one particular agent or broker) or non-exclusive (the buyer retains the right to work with multiple agents or brokers);
- How much the buyer’s broker will be compensated, whether in terms of percentage, flat fee, or hourly rate;
- Who is going to pay the buyer’s broker’s compensation, whether it be the buyer, the seller or someone else;
- The specific services that the buyer’s broker will provide to the buyer, i.e., property search, showings, contract negotiation, transaction documentation;
- When compensation will be paid; and
- Contract termination terms, i.e., what happens if the buyer or the broker wants to cancel the agreement?

There are also mandatory time provisions included in the new legislation:

- If the buyer is/are an individual person or persons (as opposed to a corporation, LLC or registered partnership), **the buyer-broker compensation agreement cannot last for a period of longer than 90 days.**
- The agreement can be renewed if the parties desire to do so, but again, not for a period of longer than 90 days at a time if the buyer is a natural person(s).
- The agreement cannot be renewed automatically, but must be renegotiated every 90-day period and memorialized in a dated and signed written agreement.

Of paramount importance, **sales transactions that are completed without the buyer-broker compensation agreement in place are potentially voidable and will expose the noncompliant buyer’s agent and broker to disciplinary action by the California Department of Real Estate and possible loss of license.**

The seller of property can still agree to pay, through its listing broker, all or a portion of the buyer’s agent’s commission. Even with such an agreement, however, **the buyer’s agent must still have a written buyer-broker compensation agreement in hand in order to comply with the new requirements.** Any amount that the seller/seller’s broker pays toward the buyer’s agent commission set forth in the buyer-broker compensation agreement is credited to the buyer’s obligation under the agreement.

It is inevitable that the new legislation will spawn its own subspecies of real estate disputes. Claims involving contract formation, breach of contract, and breach of the real estate agent’s standard of care are all potentially implicated.



- What happens, for example, if the buyer's broker agrees in writing to a certain amount of commission, say 2.5% of the sales price, and then learns that the seller is willing to pay 3%? How much does the buyer's broker get? The changes in the law say that the broker gets the amount in their contract with the buyer, and they cannot amend their buyer-broker compensation agreement after learning that the seller is willing to pay more than the amount stated in the agreement.
- How about the situation where a buyer doesn't have the money to pay their broker's commission? Or what if the buyer has a loan product that precludes any of the loan proceeds being paid toward the buyer's broker's commission? Are those buyers going to end up representing themselves in the transaction, and what implications does that have for liability analysis, particularly for the seller and the listing broker?
- What if the seller agrees to pay the buyer's agent's commission but only in exchange for the buyer giving up certain rights, or signing a release of future claims regarding the condition of the property? What is the buyer's broker's fiduciary obligation to his or her client if the seller puts "strings" on the deal?
- What if, in an attempt to obtain a buyer's signature on the buyer-broker compensation agreement, a buyer's broker overpromises services beyond those normally contemplated by the standard of care, i.e., offering to research a property's permit history or potential for development?
- How about the common situation where the same broker is on both sides of the transaction, either through same-agent dual agency or, as is more common, where both the listing agent and the buyer's agent are affiliated with the same brokerage? How confidential are commission split agreements going to be in these instances?

The new changes in the law were created to promote "transparency" to the consumer, both buyers and sellers, into how California real estate brokers are compensated. It will require buyers' agents to compete for business, to market their individual skills representing buyers and to discuss in depth with their clients what value the agent brings to the transaction. Ideally, this will translate to more open and ongoing communication between agent and client. The new laws will also give agents some assurance that their buyer clients will not "ghost" them after the agent spends weeks or months trying to finding a suitable property for the buyer.

Also worth noting, the CAR form buyer-broker compensation agreement contains a mandatory mediation provision, much like the CAR form residential purchase agreement, so the immediate need for mediators who are readily familiar with the new laws is crucial.

The real estate mediators at West Coast Resolution Group are uniquely positioned to assist brokers, buyers and sellers in navigating the disputes that will inevitably follow implementation of the new legislation. Whether your case is at the pre-litigation/mandatory mediation stage or whether it has ripened into a full-blown lawsuit, we can help you find workable solutions that will save all parties time, expense and the mental/emotional exertion that naturally comes with litigation. If you are a broker, buyer, seller or attorney involved in a real estate dispute, contact us to learn how mediation can provide a cost-effective and efficient resolution to your conflict.

¹ The California Association of Realtors® has updated its form BRBC Buyer Representation and Broker Compensation Agreement, among other forms, to reflect the new changes in the law. Please note: it is anticipated that this form will continue to be updated and modified by CAR as licensees begin using it statewide, so be on the lookout for further changes.

² Technically commissions are earned by brokers who then split them with agents pursuant to the terms of a separate independent contractor agreement.

³ This requirement contemplates that the buyer’s agent is actually anticipated to perform services on behalf of the buyer. In other words, if a broker is holding an open house and an unaccompanied buyer visits the property, no buyer-broker compensation agreement is required and no agency relationship is created. If, however, an agent calls to make an appointment to show the same property to a potential buyer, the agreement is required before showing, assuming the buyer’s agent is a member of an MLS.

⁴ This theoretically precludes buyers’ agents from “shopping” commissions or steering their clients to properties that offer a more lucrative split to the buyer’s agent. There are other ways of determining what split, if any, is being offered; they just can’t be advertised or referenced in the MLS.



JANE A. RHEINHEIMER

Jane Rheinheimer is an expert neutral with 34+ years’ experience resolving employment and real-estate disputes with parties from diverse industries. With her top-of-the-line diplomacy and problem solving approach, Jane is passionate and committed to guiding her clients to resolution.

For more information or to schedule a case, please contact Jane at jrheinheimer@westcoastresolution.com or call 619-238-7282.