



CALIFORNIA ASSOCIATION OF REALTORS®

presents

The Residential Real Estate Transaction Guide

California Department of Real Estate Disclaimer Statement:

This course is approved for Continuing Education credit by the California Department of Real Estate. However, this approval does not constitute an endorsement of the views or opinions which are expressed by the course sponsor, instructor, authors or lecturers.

Introduction

This course is intended as a practical, day-to-day map, designed to walk you through a typical residential real estate transaction, step by step. It suggests and recommends the use of checklists; its table of contents is a checklist in itself. **It also recommends the use of California Association of REALTORS® (C.A.R.) Standard Forms. Whenever a form is referred to with letters or with a letter and number in parentheses, the reference is to C.A.R. forms.**

Also, if a particular Legal Q&A or Legal Brief would be beneficial for more detailed information, it is referenced at the end of the chapter. Legal Q&A's and Legal Briefs are written by C.A.R.'s Legal Services and provide detailed coverage of legal subjects.

For convenience, the author has used "he," "his," or "him" without intending to indicate any particular gender. The term "broker" means a licensed broker. The term "salesperson" means a licensed salesperson. The term "listing broker" means the broker who is representing the seller. The term "selling broker" means the broker who is representing the buyer. The term "listing agent" means the broker or salesperson acting through the broker who represents the seller. The term "selling agent" means the broker or salesperson working through the broker who is acting on behalf of the buyer.

When using this guide, please be mindful that all suggestions and forms are based upon the law as known to exist at the time of publication. The Legislature makes frequent additions or other changes to the laws regarding real estate, and appellate courts make new interpretations of the Legislature's

enactments. Therefore, **the prudent licensee should be engaged in continuing education.**

Please also be mindful that, although this guide is intended to be used on a step-by-step basis, in reality, you will sometimes be accomplishing several steps concurrently.

Agency

The first part of the guide shows you how to document your relationships with your clients. This is the time when you are granted authority to act as their agent and enter into fee agreements with them.

Disclosure

It is extremely important for the listing agent to learn whatever he can about the particular property, including its condition and history, from the seller as well as available records of the seller, and from a diligent visual inspection. All material facts should be noted for disclosure to the buyer. Both positive and negative aspects of the property should be noted by both listing agents and selling agents, for advertising purposes as well as for presentation and disclosure purposes.

In order to obtain maximum legal protection, all negative factors should be disclosed in writing to the buyer, regardless of how the transaction is affected; and all positive assertions should be carefully verified and stated only when there is certainty about their accuracy.

The Offer

The steps dealing with the making of an offer and the entering into the contractual relationships between Buyer and Seller are very important. A special effort should be made to assure that the parties understand the terms and conditions of everything they sign. Wherever an arbitration clause appears, it is to everyone's advantage to understand and make an informed decision about whether or not to initial and make the clause apply to his or her transaction. Sometimes, the use of the arbitration process avoids more lengthy and costly resolutions of disputes, should they arise.

Trust Funds

Special attention should be given to the handling of trust funds to ensure that they are dealt with in the most thorough and careful manner and with proper record-keeping.

Escrow

During the escrow period, it is important to keep track of the various inspection and other contingency timeframes, ensuring that reports and inspections are ordered early enough so that they can be dealt with and reviewed in a timely fashion. Great care should be given to see to it that the buyer's objections to reports and other contingency items are made in writing and delivered to the seller or listing agent within the timeframes provided for in the purchase agreement. Listing agents and

sellers must similarly be alert and aware, so that the required repairs or other acts and duties of the seller may be completed within the time required.

During this same series of steps, both listing agents and selling agents should be careful to remain in close contact with the escrow company, help keep the inspection companies within the necessary timeframes, and follow through to be sure that the Report of Preliminary Title is obtained and carefully examined by the parties. **Be aware that there are some practices that differ between Northern and Southern California. It is important here to remember that a licensee is neither an attorney nor an accountant, and professional advice might be required by the parties at any given stage. Don't be afraid to suggest that they consult appropriate professionals.**

Although this guide attempts to walk you through the transaction with simple directions, **the disclosure portion requires the use of highly technical forms.** Do not allow these forms to frighten you. **Caution is wise in this area, and it is difficult to over-disclose.** The greater the number of disclosures made, the less likely a required disclosure will be inadvertently missed. Like anything else, the more you work with disclosure forms, the easier they will be to use.

Buyer's Final Verification of Condition

Prior to the close of escrow, no matter how often the property may have been visited before, the buyer may conduct a final inspection of condition. The purpose of this inspection is to verify representations previously made, that promises made have been met, and that the property is in the same condition as when the offer was made.

The salesperson should always look first and foremost to his broker for advice, guidance, and information. In this field, ignorance breeds lawsuits.

Remember, this is the way you make a living. Be educated, be thorough, and conduct yourself as the professional you are.

PRACTICE POINTER:

Members of the California Association of REALTORS® can use the C.A.R. Legal Hotline as a further source of advice, guidance, and information. The information provided is intended for the use of the REALTOR® making the inquiry. This is a service provided by membership in C.A.R., available 9:00 a.m. to 6:00 p.m., Monday through Friday, by calling (213) 739-8282. Brokers, Office Managers, Designated REALTORS®, and Program subscribers should use their own designated Legal Hotline number: (213) 739-8350.

Remember, the information provided through C.A.R.'s Legal Hotline is for the use of the REALTOR®. Buyers and Sellers should each seek their own legal or other professional advice when needed. Advise your client, in writing, to seek an appropriate professional when the situation calling for it arises. Do not practice law or accountancy.

Getting Started: Agency Relationships and Duties

Step 1: Get a Listing Agreement

Before a transaction has both a buyer and a seller, the listing agent should begin by obtaining a listing agreement, or **Residential Listing Agreement-Exclusive (RLA)**. This form engages the broker as the listing broker, describes the property, includes the requested terms of sale, and authorizes a **Multiple Listing Service publication of the property data**. It warrants that the seller is the owner or has the authority to execute the listing contract. It provides for the rate of commission to be paid to the listing broker and explains the agency relationship between the listing broker and the seller. It authorizes the listing broker to receive a deposit towards the purchase price and authorizes the use of a key-box and sign.

This form is particularly important to the salesperson working with the seller, because it is the basic agreement between the seller and the listing agent. All such agreements **must** be set forth in writing in order to be enforceable. Therefore, it should be prepared by the salesperson who obtains the listing, with the seller's input, at the very outset of the relationship.

PRACTICE POINTER:

If a listing agreement appears on a form other than the **Residential Listing Agreement- Exclusive (RLA)** and does not contain a key-box authorization, the listing agent may want to have the more complete protection provided by the **Keysafe/Lock Box Addendum and Tenant Permission to Access Property (KLA)**.

This form refers to the listing agreement, authorizes the use of the lock box, and adds cautions and disclaimers. It is prepared by the listing agent and executed by the seller and any tenant who might be present on the premises. Its use is strongly recommended with tenant-occupied property.

PRACTICE POINTER:

The listing agreement contains an optional arbitration clause. Determine your office policy regarding the signing of an arbitration clause. Generally speaking, arbitration is quicker, simpler, and probably less costly than litigation.

PRACTICE POINTER:

If you have been representing a landlord pursuant to a **Lease Listing Agreement (LL)** and a buyer for the property appears, before you present the

buyer to the owner, be sure to prepare and have the owner sign a **Residential Listing Agreement (RLA)**. The Lease Listing Agreement may not protect your commission in the event of a sale.

Step 2: Get a Buyer-Representation Agreement

Often, a prospective buyer is willing to work for a period of time exclusively with a single broker. In that event, the selling agent should begin the relationship by obtaining a Buyer-Representation Agreement, or **Buyer Representation Agreement Exclusive (BRE)**. This form grants an exclusive right to locate a particular type of property, which it describes generally, in a particular price range, in a general location and upon preferred terms.

If the buyer is unwilling to commit to an exclusive relationship with the broker, the **Buyer Representation Agreement Non-Exclusive (BRNE)** may be appropriate. **This agreement requires a buyer to compensate the broker if he or she introduced the buyer to the property during the contract period and the buyer acquires this property during the contract period or subsequent protection period.**

If the buyer is unwilling to compensate the broker, or to work exclusively with the broker, then the **Buyer Representation Agreement (Non-Exclusive/Not for Compensation) (BRNN)** should be entered into as **this agreement establishes the rights and responsibilities of the buyer and broker.**

Each agreement is, in effect, an engagement contract for the selling broker for the period of time which it covers, and sets out the broker's authority, compensation (**BRE and BRNE**), and nature of the relationship. **Just as a listing agreement is the basic agreement between the seller and the listing agent, each of these documents is the basic agreement between the buyer and the selling agent.** The agent should prepare the Buyer-Representation Agreement with input from the buyer, at the very outset of the relationship.

PRACTICE POINTER:

It is sometimes difficult to get a buyer to sign a **Buyer Representation Agreement Exclusive**. If you plan to invest significant time with a buyer, it is prudent to insist on having this agreement signed. The reluctant signer may be telling you that he is just a "lookie-loo." Should your competition actually write an offer on this buyer's behalf, this contract (**BRE**) may be the only evidence you have to protect your commission claim.

You might look at the Buyer-Representation Agreement as a tool for pre-qualifying the buyer. Most often, the buyer's reluctance simply results from his being uncertain as to whether he really wants to make a purchase. It also may be that the potential buyer merely wants to "use" you and ultimately write the offer with a friend or relative who is also a salesperson.

PRACTICE POINTER:

Although the Agency Disclosure Law does not contemplate the use of a Buyer-Representation Agreement, it would be prudent to give the buyer a **Disclosure Regarding Real Estate Agency Relationships (AD)** prior to having the buyer sign a Buyer-Representation Agreement. (See Step #5.)

Step 3: Market the Property

Local ordinances may limit the use of signs, balloons, flags, or other marketing devices. Even when permitted, neighbors may complain about the placing of these items, parking issues, noise making, or other disturbances. Bear in mind also that if you are conducting an open house, you are working in and inviting strangers into the seller's home.

PRACTICE POINTER:

When conducting an open house, make sure you are properly staffed so as to protect yourself and the property. Advise the seller to remove any valuables to a safe location.

Show the Property

Before you start your showing, make your own inspection and be certain that the property appears to be safe and ready for the showing.

Showing Property as a Listing Agent

You want to present the property in its best light, but it is important not to exaggerate or make representations which you have not verified yourself.

Only state that you know something if you have verified it yourself and know it from your own knowledge. If you are repeating what the seller states, be sure to point out to the buyer and the selling agent that you don't know it of your own knowledge, but were only told by the seller.

If you know of defects, point them out at the first opportunity. Don't just show the best side of the property. Answer all questions fully.

Be especially careful about such things as boundary lines, drainage, environmental hazards, and square footage.

PRACTICE POINTER:

Treat all questions by a buyer as very important. Try to obtain an answer **from the seller**. If you have not conducted your own investigation of the underlying facts, give the buyer the seller's answer and state that you have not checked

out the information yourself. **You cannot be sure of your information without checking; never guess!**

PRACTICE POINTER:

Should a buyer ask about boundary lines, reply: "That is beyond my expertise. If you have a need for specific boundary information, you should hire a professional to conduct a survey."

Showing Property as a Selling Agent

If the listing agent cannot answer your questions and answers cannot be readily obtained by a reasonable investigation, invite the prospective buyer to retain an appropriate professional (e.g., land surveyor, home inspector, soils engineer, plumber, electrician, etc.) to conduct a further investigation.

Be Aware of Fair Housing Laws

The provisions of the Federal Fair Housing Act apply not only to discriminatory actions by sellers, but by brokers as well. **The Federal Fair Housing Act makes it unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, in the sale of residential housing:**

- To refuse to sell after a bona fide offer has been made;
- To refuse to negotiate to sell, or to "steer" a prospective buyer into or away from an area;
- To discriminate against any person in the terms, conditions or privileges of the sale;
- To make or publish or cause to be created a notice, statement or advertisement regarding the sale of a residential property that indicates either a preference, limitation or discrimination or an intention to make such a preference, limitation or discrimination;
- To represent to any person that a dwelling is not available for inspection or sale when the dwelling is in fact available;

- To induce or attempt to induce for profit any person to sell a dwelling by representing that such persons in a protected category are or may be entering the neighborhood (a practice known as "blockbusting"); or
- To discriminate in the sale or otherwise make unavailable or deny a dwelling or discriminate in the terms, conditions, or privileges of sale or in the provision of services or facilities in connection with that dwelling, to any buyer because of a handicap of that buyer, a person residing in or intending to reside in that dwelling after it is so sold or made available, or any person associated with that buyer.

Under the current laws, unless special rules are complied with, children may not be barred from living in "adults only" communities, and handicapped individuals may not be denied access to single or multi-family dwelling units.

The Federal Fair Housing Act also makes it unlawful for an agent to discriminate, not only in connection with the purchase and sale of residential properties, but also in connection with the making or procuring of loans secured by residential property or providing other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling, and the selling, brokering, or appraising of residential real property.

Legal Q&A: Signs: Can They Be Regulated and to What Extent?

Step 4: Recommendations and Referrals

Licensees are called upon to make many referrals to settlement services providers. These providers might be title companies, escrow companies, termite inspectors, home inspectors, geologists, soil engineers, and others. **Be careful when making such recommendations. Refer only those people with whom you or your broker have had a relationship and whose performances, over a period of time, have proved to be of excellent quality.** If you refer someone without having good reason to do so, and that person fails to perform his duties properly, you might be held responsible for the carelessness of your referral.

It is always best to work with familiar settlement services providers because they work well with you. Such persons help to avoid a broad variety of problems that can occur, or at least can minimize them, because of the close working relationship.

Regardless of your relationship with persons you refer, you must not receive a commission, fee, or other form of payment by way of compensation or inducement for making the referral. Violations of this rule may make you subject to license suspension or revocation by the Department of Real Estate as well as liable for violation of a federal law called the Real Estate Settlement and Procedures Act (RESPA).

On the other hand, you are perfectly free to receive bona fide payments for goods, facilities, or services which you actually provide or perform. However, these payments must be reasonably related to the value of your services or the things provided.

Legal Brief: Referral Fee Chart

Step 5: Make an Agency Election, Disclose It, and Confirm It in Writing

In every sale involving real property improved with one-to-four dwelling units, you must provide the buyer and the seller with a disclosure form entitled Disclosure Regarding Real Estate Agency Relationships (AD). The listing agent must deliver this form to the seller prior to entering into a listing agreement.

The selling agent must deliver this form to the buyer as soon as practical, prior to the buyer's execution of the offer to purchase. Since the Buyer Representation Agreement may be thought of as the buyer's-selling agent's version

of a listing agreement, it would be prudent for the selling agent to deliver an AD to the buyer prior to the buyer's signing of the Buyer Representation Agreement.

The selling agent must also provide a disclosure form to the seller, prior to presenting the offer to the seller. Therefore, if the selling and listing brokers are not the same, the seller will get two disclosure forms. Each of these should be an original, not merely a copy of another such form. Each time your client receives an agency disclosure form, he should sign it, acknowledging receipt.

Sometimes one salesperson within a given office will represent both the seller and the buyer. Other times, one salesperson within an office will represent the seller, and another salesperson within the same office will represent the buyer. In either case, **the broker is then known as a dual agent.**

You may act as a dual agent only with the knowledge and consent of both the seller and the buyer. All agents have the duties of diligent exercise of reasonable skill and care, of honest and fair dealing, of good faith, and of disclosure of all facts which materially affect the value or desirability of the property. **A dual agent also owes both the seller and the buyer the duty of utmost care, integrity, honesty, and loyalty in his dealings with either of them.**

The dual agent must provide a disclosure form showing the dual agency to the buyer as soon as practical, prior to the buyer's execution of the offer to purchase. The dual agent must provide the same disclosure to the seller, as soon as practical, before presenting the offer to the seller.

An agent may elect to act exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller. An election must be made at the earliest practical moment. Although the election may be disclosed orally, it must be confirmed in writing in either the purchase contract or in a separate writing, signed by the seller, the buyer, and the agents prior to or at the time the purchase contract is signed by the buyer and seller. The language of this disclosure is regulated by law. The **California Residential Purchase Agreement and Joint Escrow Instructions (RPA-CA)** purchase contract, as well as the form entitled **Confirmation: Real Estate Agency Relationships (AC-6)**, contains the required language.

PRACTICE POINTER:

Your office should have a policy to guide you through the agency election process. Check with your broker.

PRACTICE POINTER:

You are not required to confirm an agency relationship using a separate confirmation form if the agency confirmation portion of the RPA-CA is properly completed in full.

Legal Brief: Agency Disclosure and Confirmation

Step 6: Input Property Data into a Multiple Listing Service

Once you have obtained a Residential Listing Agreement (LA), you should prepare, using information obtained from the seller, but verified by you, an MLS (Multiple Listing Service) data input sheet. This will be used to generate the MLS publication, which is an electronic readout from the MLS system or a page in the MLS book stating the details of the property. **The MLS listing is the seller's representation of what he is placing on the market and offering for sale.** One cannot emphasize too strongly the importance of the information shown being accurate.

Under the law, a licensee who places a listing or other information in the Multiple Listing Service is responsible for the truth of all representations and statements of which that licensee had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy. **The MLS listing, after having been fully filled out, should be signed by the listing agent.**

As the listing agent, you should obtain a printout of the MLS listing as soon as it is placed into the electronic system or the MLS book and have it reviewed by the seller. Should any detail of an MLS listing need to be changed at any time, an MLS listing change form may be used. It is filled out and executed in the same manner as is the MLS data input sheet. Copies of all of these documents should be maintained in the office file, along with a copy of the property flier, if any is used, in the marketing of the property.

If your seller does not want this property marketed in the MLS, you will need to have your seller sign the Seller Instruction to Exclude Listing from the Multiple Listing Service (SEL) and the MLS opt out form required by your MLS.

PRACTICE POINTER:

Representations about lot size or square footage of improvements often lead to problems because there appear to be several differing methods for measuring. If you are pushed for a number, use "approximate," "Seller states that," or "according to the Assessor's Records" as a preamble. Size of a property may be material and agents' misrepresentations on this subject have been the source of many lawsuits.

Self-Check Questions

- 1. The Residential Listing Agreement-Exclusive (RLA) form engages the broker as the listing broker, describes the property, includes the requested terms of sale,**

and authorizes a multiple listing service publication of the property data; it is the basic agreement between the seller and the listing agent.

- a. True
- b. False

2. A buyer can only enter into an exclusive relationship with the broker.

- a. True
- b. False

3. The Federal Fair Housing Act makes it unlawful for an agent to discriminate, because of race, color, religion, sex, handicap, familial status, or national origin, in the sale of residential housing.

- a. True
- b. False

4. Under the Federal Fair Housing Act, it is not unlawful for an agent to discriminate in connection with the making or procuring of loans secured by residential property or providing other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling, and the selling, brokeraging, or appraising of residential real property.

- a. True
- b. False

5. When making recommendations and referrals to settlement service providers, it is customary to receive a commission, fee or other form of payment by way of compensation or inducement for making the referral.

- a. True
- b. False

6. The form entitled Disclosure Regarding Real Estate Agency Relationships (AD) must be provided to the buyer and the seller in every sale involving real property improved with one-to-four dwelling units.

- a. True
- b. False

7. If one salesperson within an office represents the seller and another salesperson within the same office represents the buyer, the broker is then known as a dual

agent.

- a. True
- b. False

8. The MLS listing is the seller's representation of what he is placing on the market and offering for sale.

- a. True
 - b. False
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Dealing with Offers

Step 7: Prepare and Deliver the Offer

The Purchase Agreement

The first writing that will bring the buyer and the seller together is the California Residential Purchase Agreement and Joint Escrow Instructions (RPA-CA), usually known as a "purchase agreement" or "purchase contract." It should be prepared by the selling agent and signed by the buyer.

In the event that the property is a mobile home, a specially designed purchase contract should be used. The **Manufactured Home Purchase Contract and Joint Escrow Instructions (MHPA)** contains substantially all of the terms of the form RPA-CA and also contains additional terms and provisions which particularly pertain to a mobile home sale.

In either event, the signed purchase contract is delivered to the listing broker, usually containing an acknowledgment that the selling agent has received a deposit towards the purchase price.

If the seller signs the offer to purchase, he accepts the terms of the offer.

This means that the seller is acknowledging that the deposit has been made in accordance with the provisions of the purchase contract and that the contingencies and any addenda are acceptable. **These include:**

- price
- specifics about the identity of the escrow company
- when and how the escrow will be opened and handled
- when the deposit will be delivered to escrow or the broker's trust account
- how prorations will be dealt with
- when occupancy will be delivered
- the buyer's rights
- time limits for inspections
- respective duties of the seller and buyer

- fixtures and personal property being transferred with the title to the real estate
- means of resolution of problems and disputes
- the identities of the listing and selling agents

One caution: merely signing the purchase agreement does not constitute an acceptance. The acceptance is not complete unless and until it is personally received by the buyer or the buyer's named authorized agent. The RPA-CA specifically requires such communication of acceptance and authorizes delivery in person, by mail, or by facsimile.

Sometimes it is convenient to use a contract **Addendum (ADM)** as an attachment to a purchase agreement when there is insufficient room to detail specific terms within the printed form.

A **Counter-Offer (CO)** may be necessary until the parties have come together as to basic terms. Each counter-offer proposes a change in terms, but does not become effective until both parties have agreed to the same set of terms.

Once the parties have acknowledged in writing that they have a meeting of the minds on all contract terms and acceptance is personally received by the offeror, they have a contract. The contract sets forth all of the terms, conditions, rights and obligations to which the parties have agreed. **The purchase contract is the main governing document in the purchase and sale transaction, and it is the document creating a binding legal relationship between the buyer and the seller.**

Adding to the Purchase Agreement

Various supplements or addenda that add additional terms or contingencies to the contract have been designed for use with the RPA-CA. Your office may also use "local" supplements and addenda that are specific to your particular real estate office or geographical location.

If the buyer wants to add a term to the contract providing that the seller will pay for a pest inspection and report and also pay for Section One or Section Two pest control work (as identified in the pest report), the buyer would use the **Wood Destroying Pest Inspection and Allocation of Cost Addendum (WPA)**.

If the buyer or the seller wants the contract to be contingent on either the buyer's sale of an existing home or the seller's finding a replacement property, he would use the Contingency for Sale or Purchase of Other Property (COP).

The **Purchase Agreement Addendum (PAA)** also can be used to add additional terms and contingencies to the contract. The PAA can be used when the contract is in a back-up position, when the seller will occupy the home after close of escrow, when an existing tenant is to remain in possession after close of escrow, and when the contract will be contingent on secondary financing, short pay-off to lender, or court confirmation.

PRACTICE POINTER:

Whether you are a selling agent or listing agent, take time with your clients. Make certain that they understand each of the provisions of the purchase agreement. Also, make certain that your clients understand what their range of choices are as to each provision. **Be sure that the choices are theirs, not yours.**

PRACTICE POINTER:

In order to complete any transaction properly, without missing a step, you should create (if your office does not already have one available) a checklist. This is one of the best reference documents which the transaction file will contain. The checklist is a day-to-day reminder as to what still needs to be done, depending upon whether one is the selling or listing agent. Each agent should complete his own form and retain it in his office file as a permanent record. It should be carefully and faithfully maintained. Using a checklist makes your work easier. **Do not rely on your memory or a collection of loose notes. Be sure. Follow your checklist.**

Legal Brief: C.A.R.'s Counter-Offer Form

Step 8: Deposit Funds into Escrow

When the buyer's agent has obtained the deposit check from the buyer, regardless of to whom this check is payable, it represents trust funds. The **California Residential Purchase Agreement and Joint Escrow Instructions (RPA-CA)** instructs the escrow holder and the brokers that the buyer's deposit into escrow or into the broker's trust account represents the "**good faith deposit**" toward the completion of the transaction.

If the check is payable to the broker and will be held in Broker's Trust Account, before depositing it, the broker should log the check into the real estate office's trust log, **Trust Bank Account Record for All Trust Funds Deposited and Withdrawn (TAA)**. **When the contract is accepted, the deposit check must be deposited into the broker's trust account within three business days.** Once the funds have cleared, the broker should log a check out to the escrow company, using the same columnar record.

If the check is payable directly to the escrow company, it must be logged in as part of the **Trust Funds Received and Released (Not Placed in Trust Bank Account) (TF)** maintained by the broker. Unless otherwise agreed to in writing by the buyer and seller, **after acceptance of the contract, the funds must be delivered to escrow within three business days.** When the good faith deposit is delivered to the escrow company, a receipt should be obtained for it.

PRACTICE POINTER:

The handling of trust funds is randomly audited by the Department of Real Estate. All checks must be recorded as required by Department of Real Estate Regulations.

PRACTICE POINTER:

The C.A.R. publication, "**Real Estate Trust Fund Records and Requirements**," is an important and valuable guide to the handling of and accounting for trust funds.

The **Receipt for Increased Deposit/Liquidated Damages (RID)** is a multi-use form. It can be used as a receipt for an increased deposit and, separately, it can be used to insert a liquidated damages provision into the purchase contract. When an amount is to be added to the deposit, a **Receipt for Increased Deposit/Liquidated Damages (RID)** should be used to show the increase. It requires only the signature of the broker receiving the funds if it is merely an acknowledgment of a deposit. However, if it is to be used for the purpose of adding a liquidated damages clause or adding to the amount of the deposit that will be subject to a liquidated damages clause, both the seller and the buyer must initial and sign.

Using a **liquidated damages** clause may be very helpful to determine in advance and quantify the seller's damages when the buyer fails to perform his duties in connection with the purchase contract. It provides that the seller shall retain a portion of the good faith deposit instead of suing for damages. The amount to be retained, or to be recovered out of escrow, is generally the buyer's initial deposit or as increased by use of the RID. If the property contains one-to-four units, one which the buyer will occupy, California Civil Code 1675 limits the amount the seller can retain **up to 3% of the total purchase price or the actual deposit made, whichever is lower**. Practically speaking, for other types of property, the courts have told us that the amount agreed upon in advance cannot generally be greater than 3% of the total purchase price.

Step 9: Open Escrow

Now that a contract exists and a deposit is in hand, it is appropriate to open an escrow. **Usually, the escrow holder, whether a title company or separate escrow company, is a completely separate entity, unrelated to any of the parties or licensees.** It serves as a neutral third party, or "stakeholder," to receive a purchase price from the buyer and to deliver, in exchange from the seller, the title transfer documents (usually a Grant Deed).

The escrow holder must act in strict accordance with detailed instructions. The **California Residential Purchase Agreement and Joint Escrow Instructions (RPA-CA)** operates as both a purchase contract and as joint escrow instructions. The escrow holder will provide additional general provisions describing rights, obligations and duties of the parties on the one hand and the escrow holder on the other. These general provisions will be prepared by the escrow holder when the

licensee arranges for escrow to be "opened" and must be signed by both the buyer and seller, if requested by the escrow holder.

Additionally, although your commission agreement may be written into the escrow instructions, you are not a party to the escrow (see Step #10). However, the RPA-CA states that brokers are a party to the escrow for the sole purpose of compensation.

There are some important differences in the handling of escrows in Southern California from those in Northern California. In Southern California, escrows are most often handled by independent escrow companies. In Northern California, title insurance companies usually handle the escrow transaction, as well as issue title insurance.

In Southern California, both parties to the transaction usually sign the same escrow instructions. In Northern California, each party usually signs a separate set of escrow instructions. The escrow officer must be certain that there are no conflicting provisions. If there are conflicts between the escrow holder's general provisions and the RPA-CA, the general provisions will prevail as the escrow holder's duties only.

Although determining who pays the fees is negotiable between the parties, in almost all California counties by general practice, the seller pays the title insurance premium and only half of the escrow fee. In a few counties in Northern California, the buyer pays both the title insurance premium and the escrow fee.

PRACTICE POINTER:

The escrow holder must comply only with written, mutual instructions of the buyer and seller. The escrow holder will not take sides in any dispute nor provide legal advice. Remind your principal to consult an appropriate professional if a dispute arises.

PRACTICE POINTER:

The "boiler plate" provisions of the escrow instructions are very important. Avoid possible disputes or adverse criticism by being sure that your client reads and understands these provisions.

Self-Check Questions

1. The California Residential Purchase Agreement and Joint Escrow Instructions (RPA-CA), usually known as the "purchase agreement" or "purchase contract," is the first writing that will bring the buyer and seller together and should be prepared by the selling agent and signed by the buyer.

a. True

b. False

2. The mere signing of the purchase agreement by the seller constitutes an acceptance of the offer.

a. True

b. False

3. If the buyer or the seller wants the contract to be contingent on either the buyer's sale of an existing home or the seller's finding a replacement property, he would use the Contingency for Sale or Purchase of Other Property (COP) form.

a. True

b. False

4. When the contract is accepted, the deposit check must be deposited into the broker's trust account within seven (7) business days.

a. True

b. False

5. Since a licensee's commission agreement may be written into the escrow instructions, he/she is party to the escrow.

a. True

b. False

6. The escrow holder is not a separate entity and must be closely related to either the buyer or the seller.

a. True

b. False

7. The escrow holder must comply only with written, mutual instructions of the buyer and seller, and the holder must not take sides in any dispute nor provide legal advice.

a. True

b. False

Escrow

Step 10: Get a Commission Instruction

Having "opened escrow," the broker will wish to prepare and have the seller sign a **commission authorization and instruction. This is not a standard form.** It is in writing, usually prepared by the escrow company and signed by the seller. **It is the instruction to the escrow company for the payment of the commission that has already been agreed to.** If the buyer is separately paying a commission, the buyer should also sign an authorization and instructions. The RPA-CA provides that the brokers can submit any separate written commission agreement they have with either buyer or seller, and the escrow is to use that agreement as an instruction to pay commissions.

TO: _____ [Escrow Company] ESCROW NO. _____

AT THE CLOSE OF YOUR ABOVE NUMBERED ESCROW, YOU ARE AUTHORIZED AND INSTRUCTED TO PAY THE FOLLOWING:

TO:_(BROKER_"A")_____ THE SUM OF \$ _____

TO:_(BROKER_"B")_____ THE SUM OF \$ _____

TOTAL COMMISSION \$ _____

YOU WILL PAY SAID COMMISSION ONLY AT THE CLOSE OF ESCROW AND CHARGE MY ACCOUNT WITH THE AMOUNT THEREOF, OR IF NECESSARY, I WILL HAND YOU FUNDS REQUIRED TO PAY SAME.

WE HEREBY IRREVOCABLY ASSIGN TO BROKER(S) NAMED ABOVE A PORTION OF OUR SALE PROCEEDS IN AN AMOUNT SET FORTH ABOVE. THIS ASSIGNMENT PROVIDES FOR DISBURSEMENTS OF SAID COMMISSION TO BROKER(S) BY ESCROW HOLDER UPON CLOSE OF ESCROW.

ESCROW COMMISSION INSTRUCTIONS MAY NOT BE AMENDED OR REVOKED WITHOUT WRITTEN CONSENT OF THE BROKER(S) NAMED HEREIN.

SIGNATURE (Seller)

PRACTICE POINTER:

The following is a sample form for a commission instruction:

Step 11: Be Educated About Disclosures

The failure to make accurate or complete disclosures is the basis for the most serious and frequent lawsuits against real estate professionals. You should carefully read through the disclosure sections of the purchase contract. Make

certain that you and your client both understand the subject matter and the information that must be furnished in writing.

The Real Estate Transfer Disclosure Statement (TDS) is the most often used disclosure statement, since it is required in connection with the sale of almost every one-to-four unit residential property. It is even required in an "As-Is" sale.

As to other items which need to be disclosed after you have signed the TDS, even if you have no form that tends to cover a given subject, any material fact you become aware of should be reported to the buyer, in writing, if it could materially affect the desirability or marketability of the property.

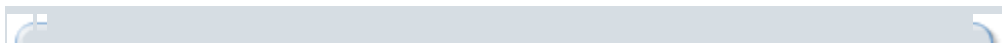
The **Supplemental Statutory Disclosure (SSD)** provides a form for the seller to make disclosures about the property being in a zone or district allowing manufacturing, commercial or airport use. Additionally, the seller can make disclosures if the property is located within a mile of a former military ordnance location, if there has been a release of an illegal controlled substance on the property, or if there was a death on the property within the past three years.

The law does not require the seller and the seller's agent to affirmatively disclose to the buyer the fact that someone has died while on the premises, if the death happened more than three years prior to the date the buyer offers to purchase the property. However, since the fact of such death within three years of the offer date is probably material, it should be disclosed.

Even where you have no affirmative duty to disclose that an occupant died on the premises or the manner of the death, if you are asked whether such an event occurred, you must answer truthfully no matter when the death occurred. There is no requirement that you voluntarily disclose the fact that a prior occupant of the premises was infected with HIV- or AIDS-related illnesses. However, if you are asked, you should respond that the law does not require you to disclose that information. One further warning: never misrepresent the truth. If you address either the subject of AIDS or death at all, make a complete and full disclosure.

For any item not covered by any of the foregoing, the best approach is to create, in an informal letter, a statement of the material item of disclosure and have the buyer date and sign an acknowledgement of receipt. **Do not balk at making the disclosure for fear that it will cause the deal to unravel. A broken deal is always better than a lawsuit or a complaint before the Department of Real Estate.**

The Seller Property Questionnaire (SPQ) provides an additional opportunity to review with the seller features of the property which may require disclosure to the buyer. It is not a required form, but its use is strongly suggested in order to obtain more information about the property and reduce any questions about the seller forgetting a potentially material fact.



PRACTICE POINTER:

Keep these points in mind:

- You cannot over-disclose.
- Disclosures should be in writing and receipted for by the buyer and the selling agent.
- The earlier a disclosure is made, the better.

PRACTICE POINTER:

C.A.R. publishes information on many important subjects which a licensee must deal with, known as "Legal Briefs" or "Legal Q & A's" or just "Q&A' s." These are available from C.A.R. upon request and are available on C.A.R.'s website and should become part of your office library. You can present copies of applicable Q&A' s to your client whenever necessary.

Among these is a Q&A called "Sales Disclosure Chart for REALTORS®," which not only lists and tells you how and when to make disclosures, but also acts as a checklist. You should refer to this chart in every sale transaction.

Legal Q&A's: **Sales Disclosure Chart for REALTORS®**
 Disclosure of Death and AIDS and the Prohibition Against
 Discrimination on the Basis of AIDS

Step 12: Inspect Visually and Report

Now that the purchase agreement, along with its supplements and addenda, the commission agreements and instructions, and escrow instructions, has been prepared and signed, it is time to make disclosures.

The Real Estate Transfer Disclosure Statement

The Real Estate Transfer Disclosure Statement (TDS), must be prepared (even in an "As-Is" sale) if the property is improved with one-to-four dwelling units, unless it is part of a subdivision for which a public report is required or some other exemption applies. The TDS is a form dictated by the California Legislature.

This form asks about:

- appliances
- heating systems
- air-conditioning
- septic tanks
- security gates
- alarms

- household appliances
- rain gutters
- sewers
- pools
- spas and other amenities
- systems, such as electrical, sewer, gas, and water
- roofs
- fans
- fireplaces and other items connected with the property

It also asks about various parts of the structure itself. The TDS seeks to determine whether everything is in good operating condition and free from defects. It also specifically asks about various conditions generally affecting the property, such as:

- the presence of additions without permits
- environmental hazards (including mold)
- encroachments
- features in common with adjoining landowner's property
- flooding
- drainage or grading problems
- neighborhood noise problems or other nuisances
- restrictions on property use
- a homeowners' association
- abatement notices or citations against the property
- existing or threatened lawsuits which might affect the property.

If the seller is aware that any of these or several other conditions exist, the seller is required to explain each of them in as much space as might be necessary to make a full disclosure.

The preparation should be done by the seller with knowledge he has gained by his own experience. It is important that the seller do this in order that the disclosures are not said to be those of the seller's agent. The seller should carefully identify any problems existing with the property of which he has any knowledge. He then signs it.

PRACTICE POINTER:

You should never fill out the seller's portion of the TDS for the seller. Deliver the TDS as soon as is practical before transfer of title, preferably even before the buyer makes an offer.

Additional Requirements Regarding the Transfer Disclosure Statement (TDS)

The listing agent should review the seller's responses to the questions asked by the TDS and, if the seller has missed something or erred in making a response, the listing agent should question the seller and give him an opportunity to change or correct his own answer. If the seller fails to do so, the listing agent must be careful

to disclose, in full, any defect known to him but not disclosed by the seller. If there is insufficient space in the TDS, the listing agent may use a separate sheet of paper to complete his response. He then signs it.

Both agents must conduct a reasonably competent and diligent visual inspection of accessible areas. You need not climb up in attics nor are you required to view or supply permits concerning title or use of the property.

Although there are other disclosure requirements, this is the main disclosure statement about the value or desirability of the property and it must be very carefully prepared. It is the responsibility of the seller's agent to deliver it to the buyer's agent and obtain the signatures of the buyer's agent and of the buyer, in order to confirm their having received it. A fully executed, dated copy should go into the escrow and a copy retained in the agent's file.

PRACTICE POINTER:

Remember: **You must keep copies of your business records for three years.** Should you be required to prove that these forms were completed and delivered, you will be able to do so.

When there is both a listing agent and a separate selling agent in a transaction, the agent who obtained the offer (i.e., the selling agent) is responsible for delivery of the disclosure form to the buyer.

If the buyer receives the TDS after the purchase contract is signed, the buyer has time to cancel the contract (three days if obtained in person; five days if delivered by mail). Should the buyer find something disclosed that is unacceptable, the buyer may cancel the purchase contract.

In the event that an amended disclosure is made prior to the close of escrow because the seller becomes newly aware of an adverse condition materially affecting the property or wants to correct a prior representation, the amendment must be made in writing and delivered in the same manner as was the TDS. The buyer then has the same time to cancel the contract as if the amended disclosure were the original TDS.

If the listing agent cannot obtain a completed TDS, signed by the seller, he must notify the buyer, in writing, that the buyer has a right to receive the TDS.

Summary of Steps Required to Complete the Transfer Disclosure Statement (TDS)

- Sellers must complete Sections I (relating to conditions shown in inspection reports) and II (relating to other conditions in the form as a disclosure checklist).
- Listing agents should complete Section III (relating to the listing agent's inspection and knowledge).

- Selling agents should complete Section IV (relating to the selling agent's inspection and knowledge).
- All parties and agents acknowledge receipt of a copy of this document in Section V.

NOTE: Certain types of sales are exempt from the TDS requirement. They include probate sales, transfers pursuant to court order, transfers from one co-owner to one or more other co-owners, and transfers to an owner's spouse or children.

PRACTICE POINTER:

Another disclosure which must be made is the existence of local hazards other than those covered by other disclosure forms. These are best disclosed in the TDS, in both the seller's sections (I and II) and the agents' sections (III and IV).

Legal Q&A: Transfer Disclosure Statement Law

Step 13: Remind Principal of Deadlines, Rights and Duties

The RPA-CA provides for specific timeframes for the seller to make disclosures and for the buyer to make investigations and review seller disclosures. **Among the required seller disclosures are:**

- the TDS;
- the Special Taxes Levies Notice (Mello-Roos and 1915 Bond Act);
- geologic, earthquake, and seismic hazards;
- special flood hazards;
- state fire responsibility areas;
- environmental hazards (including mold) and release of controlled substances;
- lead-based paint;
- military ordnance and industrial use zones; and
- disclosure that the property is in a common interest development (if applicable).

The purchase agreement sets out the parties' respective rights or duties as to inspections, investigations, tests, reports, surveys, and other procedures designed to verify the condition of the land, the improvements, and the land boundaries.

Home inspection companies, geologic and soils engineers, and other experts should be called upon to do these inspections. Degrees of inspections and testing are indicated by the nature, location, and condition of the property. **Although a matter of contractual agreement, the buyer typically pays for most of these inspections.**

Removal of Contingencies

The RPA-CA provides that the buyer must act within a specific timeframe to either remove these contingencies or cancel the contract. The buyer does not have to make requests of the seller; the buyer can simply cancel if the buyer does not approve of the condition of the property. Additionally, **the buyer has cancellation rights in connection with the statutory disclosure rights, such as the TDS or Natural Hazards Disclosure Statement (NHD).**

If the buyer does not remove contingencies or cancel the contract within the timeframe, the seller can cancel the contract. However, **before the seller can cancel, the seller must first give the buyer a Notice to Buyer to Perform (NBP). The NBP must give the buyer at least 24 hours to either remove the contingency or cancel the contract.** This gives the buyer "one last chance" to perform before the seller has the right to cancel. Although they are not required to, the buyer and seller can, of course, negotiate for repairs on the property.

If you are the listing agent, make sure your seller is aware that if the buyer does not remove his contingencies in writing, then the buyer retains the right to ask for repairs, remove contingencies, or cancel the contract.

PRACTICE POINTER:

Calendar and follow up on every inspection or investigative report. There are many calendar and scheduling programs that make this process "automatic."

Addenda to Purchase Agreement

There are several addenda designed for use in assisting seller disclosure, buyer requests, and contingency removal.

The seller can use the **Homeowners' Association Information Request (HOA)** to obtain documents from the HOA. The **Supplemental Statutory Disclosure (SSD)** can be used to disclose airport, commercial or industrial use, former military ordnance locations near the property, and death on the property.

The **Receipt for Reports (RFR)** can be used by the seller to document delivery of reports to the buyer, and it can be used by the buyer to acknowledge receipt of reports. The **Contingency Removal (CR)** can be used by the buyer to remove contingencies in writing.

The **Request for Repair (RR)** can be used by the buyer and seller to reach a written agreement regarding repairs to the property. If the seller has not provided a required disclosure, the buyer can document that and request disclosure by the seller by using a **Notice to Seller to Perform (NSP)**. The buyer can use the **Verification of Property Condition (VPC)** to document that the property has been maintained and that agreed-to repairs have been completed.

Step 14: Get a Title Report

The Report of Preliminary Title (prelim) is prepared and issued by a title company. It shows the condition of a particular title as a preliminary step to the issuance of a policy of title insurance. The seller's agent should arrange with the title company called for in the purchase contract for the issuance of a report as early as possible after escrow has opened. By acting promptly, the agent allows the seller maximum time to cure any defects or other items which might make the property otherwise undesirable or unmarketable.

This report not only assists in showing who is the true owner of the property, but also what liens, easements, or other encumbrances of record affect the property.

The escrow company will also be interested in examining the prelim. Curing defects may affect the disbursement of funds when the escrow closes (such as paying off recorded lien holders).

A copy of the prelim is given to the buyer as well. **If the buyer has no objections to the Report of Preliminary Title, he should acknowledge to the seller in writing, through the escrow company, that he has accepted the title in accordance with the report.** On the other hand, if the buyer has some valid objections to the prelim, they should be presented, as promptly as possible, in writing, to the seller. The purchase contract should be consulted regarding the limitations of presenting objections.

After a Report of Preliminary Title has been accepted, it will result, upon payment of the premium, in the issuance of a title policy.

PRACTICE POINTER:

The most commonly used title insurance policies in California are the California Land Title Association (CLTA) Standard Form and the American Land Title Association (ALTA) Owner's Policy.

The ALTA policy is especially valuable to an owner who requires more extensive coverage and fewer exclusions than are provided for in the CLTA policy. In an ALTA policy, the buyer has the option, for the payment of an additional premium, to include within the coverage such items as matters that would be discovered only by reasonable inspections or surveys of the property or by inquiring of the persons in possession. Have the title insurance company explain the differences between the CLTA and ALTA policies, including costs and coverages to your client.

PRACTICE POINTER:

CAUTION: The RPA-CA requires delivery of an ALTA/CLTA Homeowner's Policy of title insurance. This type of policy offers enhanced coverage in terms of certain post-policy forgeries, boundary disputes, transfers to trusts and permit problems. Unless otherwise agreed to by Buyer and Seller in writing,

Buyer must be provided with this type of policy at close.

PRACTICE POINTER:

If you become aware of any defect in the title or of a specific exception of record, an immediate call should be placed to your broker for direction. This may be one of those times to consult an appropriate professional.

Legal Q&A: Title Insurance

Step 15: Order Inspections and Reports

The purchase contract should indicate who must provide and who must pay for certain inspections and reports, including the pest control report, and if provided for, sewage system and well inspections and a natural hazard zone report. The purchase contract also provides the number of days within which these inspections and reports must be delivered to the buyer.

If the seller has the obligation under the **Wood Destroying Pest Inspection and Allocation of Cost Addendum (WPA)** to effect repairs, or if no repairs are necessary, a completion certificate must be provided to the buyer, per the WPA. Also per the WPA, **the buyer may request, in writing, further inspection of inaccessible areas recommended in the termite report within the allotted time. If infestation is found, all expenses must be paid by the party previously designated to pay for Section 1 or 2 work. If no infestation is discovered, all expenses must be paid for by the buyer.**

PRACTICE POINTER:

When the buyer is delivered a copy of the Pest Control Report, he should sign a receipt for it.

Legal Brief: Pest Control Services Agreements

Step 16: Comply with Smoke Detector and Water Heater Bracing Laws

Smoke Detectors

Since 1986, the State of California has required the installation of a smoke detector in every dwelling unit. Local ordinances may require smoke detectors as well.

The smoke detector must be of a kind approved by and installed in accordance with State Fire Marshal's regulations. In older structures, generally, a battery-operated smoke detector will satisfy the state law, but a local ordinance might require one

that is permanently wired or electrically operated. **It is the responsibility of the seller to install the detector**, but subject to negotiations, either the buyer or seller may be required to pay the costs of acquisition and installation.

The seller must state, in writing, that the dwelling has operable smoke detector(s) in compliance with state and local law. Signed by the seller, the statement should be acknowledged by the buyer.

Some sales are exempt from this requirement. These include: probate sales, transfers pursuant to court order, transfers which require a public report, transfers by foreclosure, and transfers between existing co-owners or spouses. Dwellings that have fire sprinkler systems may also be exempted by the State Fire Marshal.

Mobile home sales also fall within the smoke detector disclosure requirements under the Department of Housing and Community Development Regulations.

Water Heaters

The law also requires an owner of any real property containing a water heater to brace, anchor, or strap the water heater to resist falling due to earthquake motion. The law is applicable to all existing water heaters, as well as new and replacement water heaters sold in California.

The seller must certify to a buyer, in writing, that the water heater bracing requirement has been complied with, including any requirements under any applicable local ordinances. This certification must be in writing and may be done in existing transactional documents, such as a real estate purchase contract, a transfer disclosure statement, or a local option disclosure statement.

PRACTICE POINTER:

The use of **Water Heater and Smoke Detector Statement of Compliance (WHSD)** will satisfy both smoke detector and water heater bracing disclosures and will serve as proof of compliance.

Legal Briefs: **Water Heater Bracing and Disclosure Requirements**
 Smoke Detector Requirements

Step 17: Comply with Hazards Laws

Geologic, Seismic, Flood, Fire, and Lead-Based Paint Disclosures

Certain required hazard disclosures on residential one-to-four units are covered by the form, **Natural Hazard Disclosure (NHD)**.

This form must be used by the seller whenever the property is located within a special flood hazard area, earthquake fault zone, seismic hazard zone, inundation zone, very high fire severity zone or state (fire)

responsibility area (SRA). If the zone maps or lists of the location of the maps or lists is posted at the County Recorder's, Assessor's, or Planning Commission's office, or if the seller or seller's agent has actual knowledge, the seller must make the required disclosure if the property is located within such a zone or area.

If the property is located in either fire zone, the seller must also disclose to the buyer that the property owner is subject to certain maintenance requirements.

In addition, if the area is an SRA, the seller must disclose to the buyer that the state may not be responsible to provide fire protection services unless they have contracted for those services with a local firefighting agency. The NHD encompasses both of these additional disclosures.

The seller or seller's agent, by law, must disclose to the buyer if the property is located within an earthquake fault zone, a seismic hazard zone, a flood hazard zone or an inundation zone.

The buyer has the same three-day right to rescind the contract based on the NHD disclosures as he enjoys with the TDS.

After preparation, the NHD, which is a disclosure document and a warning to the buyer about the possibility of the existence of a special risk and an invitation to investigate further on his own, must be signed by the seller and seller's agent. The buyer should acknowledge receipt by signing it.

The seller or seller's agent can verify the existence of these zones (areas) by checking the appropriate maps or lists. Alternatively and commonly done in most transactions, private companies will provide this service for a fee. If a private company prepares this report, there is a check box on the NHD form to indicate this fact.

The seller's agent must give to the seller, and the seller must give to the prospective buyer, additional information concerning geologic and seismic hazards in the form of a booklet entitled "**Homeowner's Guide to Earthquake Safety**" if the property was built prior to 1960 and meets other requirements.

If an agent or the seller voluntarily provides the booklet entitled "**Environmental Hazards: A Guide for Homeowners and Buyers**" to the buyer, neither the seller nor the seller's agent will be required to provide additional information regarding common environmental hazards. This does not do away, however, with the seller's or agent's duty to disclose known environmental hazards. **The "Environmental Hazards Guide" also includes a discussion of mold.**

PRACTICE POINTER:

The California booklet, "**Environmental Hazards: A Guide for Homeowners and Buyers,**" may be used instead of the federal booklet.

Federal regulations require the seller to give to the buyer a federal lead-based paint booklet entitled "**Protect Your Family from Lead in Your Home.**" This booklet discusses the dangers of lead-based paint. These federal regulations give the home buyer a ten-day right (or other negotiated period) to test, at the buyer's expense, for lead-based paint hazards. In addition, the seller must disclose known paint hazards and deliver a lead paint disclosure form to the buyer. **C.A.R. Form FLD, Lead-Based Paint and Lead-Based Paint Hazards Disclosure, Acknowledgement and Addendum for Pre-1978 Housing Sales, Leases, or Rentals**, will satisfy this requirement.

The federal regulations do not apply to housing for the elderly or handicapped or to any housing built after 1977.

PRACTICE POINTER:

Get a signed receipt for delivery of each booklet from the buyer. Remember to disclaim any expertise on geologic or environmental matters. If the buyer still has questions, direct him to an appropriate professional of his choosing.

FHA/HUD Disclosures

On all FHA sales, including sales of HUD-owned property, regardless of when built, a buyer must be provided with an **FHA Inspection Disclosure Form**. The disclosure provides information on the importance of obtaining a general home inspection and how a borrower may pay for it. The use of **HUD Notice to Purchasers: For Your Protection: Get a Home Inspection (HID)** will satisfy this requirement.

On all HUD-owned property, the buyer must be provided a note that HUD is making no representation regarding the presence of radon gas or mold on the property. In addition, the buyer releases HUD from liability in connection with radon gas and mold. The use of **Radon Gas and Mold Notice and Release Agreement (RGM)** will satisfy this requirement.

**Legal Briefs: Federal Lead-Based Paint Hazards Disclosure
Federal Flood Insurance Disclosure**

Legal Q&A: Natural Hazard Disclosure Statement

Step 18: Get an Affidavit for Waiver of Tax Withholding Requirements

Federal Tax Requirements

Under federal law, a buyer/transferee of real property must withhold tax if the seller/transferor is a "foreign person." Transfers are exempt if the purchase price is \$300,000 or less and the buyer plans to use the property as his residence. If this is the case, have the buyer sign the **Buyer's Affidavit (AB)** and keep it in your file.

Other tax withholding exemptions apply as well. Most common is the exemption for transactions in which the seller furnishes the buyer an affidavit stating that the seller is not a foreign person and listing the seller's U.S. taxpayer identification number.

If a transaction is for a price of more than \$300,000, in order to protect the buyer, the selling agent should make sure that the seller prepares and signs a Seller's Affidavit of Non-Foreign Status (AS), or "FIRPTA Affidavit." This protection is for the selling agent as well, for he has potential liability for failing to withhold the tax along with the buyer. For federal tax purposes, it is clearly an essential item for the escrow company in order that they know how to dispose of the seller's funds.

No funds need be withheld if the seller signs the AS, stating that he is not a "foreign person." However, **if funds are to be withheld, they must be equal to 10% of the gross sales price. The amount withheld must be sent to the Internal Revenue Service at the close of escrow.**

California Tax Requirements

Under California law, the buyer is required to withhold 3 1/3% of the gross sales price and, at the close of escrow, forward this sum to the California Franchise Tax Board (FTB), unless an exemption applies. This requirement is also imposed when the seller's proceeds are to be distributed to the seller's "financial intermediary." **The transaction is exempt if any one of the following applies:**

- The sales price in the transaction is not more than \$100,000;
- The buyer does not receive written notification of the withholding requirement from the escrow company;
- The property is being involuntarily converted and will qualify for nonrecognition of gain under Internal Revenue Code 1033;
- The seller is a corporation qualified to do business in California or has a permanent place of business in California;
- The property is the seller's principal residence within the meaning of IRC 121;
- The transaction will result in a loss or zero gain for California income tax purposes;
- The property was last used as the seller's principal residence without regard to the two-year test; or
- The seller is a partnership or qualified LLC with title to the property recorded in the name of the partnership or LLC.

There also may be partial exemption from withholding if the sale is part of an IRC 1031 exchange or is an installment sale.

PRACTICE POINTER:

The **Seller's Affidavit of Non-Foreign Status (AS)** may be used to show qualification of the sale for the California exemption. If the exemption applies, there will be no need to withhold money. **The AS is a combination federal and state compliance form.**

Federal Withholding: The Foreign Investment in Real Property Tax Act (FIRPTA)

Step 19: Transfer Seller's Third Party Contracts and Obtain a Home Warranty Plan

Insurance policies and service contracts, such as for heating/cooling systems and pool/spa systems, are usually assignable. Check with the issuer of the policy and determine whether they are assignable. The prepaid premium for the policies may be prorated between the parties.

If the purchase agreement calls for a home warranty plan to be issued, it should be paid for in accordance with the terms of the purchase contract.

Home warranty plans are combination insurance policies and repair contracts for some of the operating devices, such as furnaces, air-conditioning, and electrical and gas appliances included within the sale. They protect the buyer from a breakdown of these devices during the insurance contract period, generally for one year from the date of purchase.

Unless the written warranty states otherwise, roof warranties are enforceable for their entire term by subsequent purchasers, automatically, by operation of law.

PRACTICE POINTER:

If the parties negotiate as part of the purchase contract to assign service contracts, the seller should be asked to sign a writing stating that he or she will be responsible for causing the transfer of all such service contracts. If such a writing is not obtained, a post-closing responsibility may remain for the agents.

PRACTICE POINTER:

If asked to recommend a home warranty company, submit at least three names of reputable companies and let the buyer/seller choose.

Step 20: Make Loan Cost Disclosures

California Real Estate Law requires that the Mortgage Loan Disclosure Statement (Borrower) (MS) be provided to a borrower by a real estate licensee who has arranged the real property loan for compensation.

If the seller is carrying back a loan, which is secured by the property, he must disclose the exact terms of the financing being arranged. A **Seller Financing Addendum and Disclosure (SFA)**, thoroughly and fully detailing the financing transaction as between the seller and the buyer, must be completed. It is prepared by the person deemed an "arranger of credit" who, although a non-party to the credit transaction, is involved in developing or negotiating the credit terms and

participates in the completion of the credit documents for compensation, other than an attorney. **Generally, the arranger of credit is the agent who obtained the offer. The arranger of credit prepares and signs the SFA document and presents it to both parties for their signatures as well.**

PRACTICE POINTER:

The Mortgage Loan Disclosure Statement (Borrower) (MS) is a form prepared by the real estate licensee when he makes or arranges any loan secured by a lien on real property. This statement is not required when the lender involved is a bank, trust company, or savings and loan. It lists all of the details of the proposed loan. It should be signed by the loan arranger and receipt acknowledged by the buyer.

Legal Q&A's: **Real Estate Loan Disclosure Chart**
 Seller Financing: Minimum Interest Rates

Step 21: Deal with Purchase Agreement Changes or Cancellations

If the buyer cannot obtain the financing, effect the sale of his existing home, or complete any other items contained in the contingencies to the purchase agreement, but still wants to continue with the purchase of the property, he may execute a **Contingency Removal (CR)**. Referring to the purchase agreement, **this form identifies the contingencies which are removed and states that the buyer agrees to purchase the property subject only to the other terms of the purchase agreement, but not to these removed contingencies.**

If the parties wish to change their agreement they must, under the terms of the RPA-CA, only do so in writing signed by both the buyer and seller. They can use the **Addendum (ADM)** to document all changes to their agreement.

If the buyer removes contingencies and, without a valid legal reason, decides not to complete the transaction, but the seller wants to proceed, the seller has a remedy for damages. If the parties initialed a liquidated damages clause, the damages are pre-set.

A "liquidated damages clause" in a purchase agreement allows for the seller to retain the deposit as damages, in an amount not exceeding the lesser of the actual deposit made or 3% of the purchase price, upon the buyer's default (if the property is a buyer-occupied one-to-four unit residence). Keep in mind that the seller must still prove that the buyer breached the contract. The liquidated damages clause merely sets out the agreed-upon damages in the event of the buyer's default.

If the seller, without a valid legal reason, decides not to complete the transaction, the buyer can seek monetary damages in a lawsuit or may sue for "specific performance." **Specific performance is a remedy that, if ordered by a court, requires the seller, upon a tender of the purchase price, to transfer title to the buyer. In a court action, if the buyer proves his case, the court will actually deliver a deed to the buyer.**

Sometimes, the parties mutually agree not to go forward with the transaction, even though a purchase contract has been fully executed and even though an escrow has been opened. They may document their desires not to complete the sale through the execution of a **Release of Contract (RC)**. This form is prepared by either the listing agent or the selling agent. It describes and refers to the purchase contract and the property to which it applies and, if there is an escrow, it describes the escrow as well. It terminates both the contract and the escrow, with instructions to the escrow company for disbursement of the funds. It is signed by all parties and agents.

The execution of a Release of Contract is the simplest way to undo a purchase contract, assuming all parties are in agreement.

If either the buyer or seller asserts their right to cancel the contract under a provision of the contract and the other party does not agree to the disposition of the buyer's deposit, that buyer or seller can use the **Cancellation of Contract, Release of Deposit and Joint Escrow Instructions (CC)**. This allows the party to cancel the contract under a pre-agreed contractual provision while there still may be a dispute about canceling the escrow and dispersing funds.

PRACTICE POINTER:

Should the provisions of the termination of the purchase contract require more than a mutual release or should any special rights or duties be contemplated by the parties, it may be necessary to seek direction from your broker on how to proceed and as to whether or not to consult an appropriate professional. It may be necessary for the parties to prepare a much more formal release agreement.

Legal Q&A's:

- Arbitration and Mediation**
- Lis Pendens**
- Liquidated Damages and Deposit Forfeiture**

Step 22: Follow-up on Buyer's Walk-Through

The purchase agreement permits a walk-through inspection by the buyer. A report and acknowledgement of that inspection, **Verification of Property Condition (VP)**, should be prepared by the selling agent, signed by the buyer, and countersigned by the seller. It should list all of the items which the seller agreed to repair but which have not been repaired by the seller, and any item not maintained in substantially the same condition as when the contract was entered into. When thoroughly prepared and signed by the buyer, it constitutes a waiver by the buyer of any claim for the failure of the seller to repair or maintain any unlisted item.

The selling agent should be sure that the buyer is satisfied by the completion of the repairs to only the listed items. If other problems still remain to which the buyer objects, his objections should be reported to the listing agent, in writing.

The VP is also important because it acknowledges that the agents are not responsible for any unlisted, unrepaired items and promises to hold them harmless from any claim arising out of such items.

PRACTICE POINTER:

The Verification of Property Condition is not a contingency of the purchase agreement. It should not be used as a tool to start negotiations all over again. It merely serves to verify that the property is in the same condition it was at the time the contract was entered into and to check that promised repairs have been made.

Step 23: Get Special Documents for Condominium/P.D. Transactions

In a condominium/P.D. sale, the seller must deliver to the buyer all governing documents. These include Covenants, Conditions and Restrictions (CC&R's), which were created by the developer and publicly recorded when the property was first improved.

The purchase contract also requires the seller to provide to the buyer documentation regarding the following:

- any known pending special assessments
- claims
- lawsuits
- if a lawsuit for construction defects has been commenced against a builder of the development, a copy of the preliminary list of defects or a notice regarding the settlement agreement
- Articles of Incorporation and By-laws of the Homeowners' Association
- any other governing documents; most current financial statement available
- any statements regarding limited enforcement of age restrictions
- if applicable, current Homeowners' Association statement showing any unpaid assessments, fines or penalties levied on the owner's interest as well as late charges, interest and cost of collection
- and most recent twelve months of Homeowners' Association minutes, if available.

The seller can use the Homeowners' Association Information Request (HOA) to make a request to the Homeowners' Association for the required documents.

A federal law, the Americans with Disabilities Act of 1990 (ADA), is generally not of concern in residential property sales. It was designed to apply to commercial structures; however, it might apply to condominiums or common interest subdivisions.

PRACTICE POINTER:

When selling a condo, common interest or P.D. property, request the necessary documents as early as possible because they may be hard to come by if the volunteer officers of the Homeowners' Association are not in possession of the documents.

PRACTICE POINTER:

Make sure copies of common area keys, at buyer's expense, are available to the buyer. There is nothing more frustrating than wanting to go swimming your first weekend in your new home and not having access to the pool.

Legal Q&A's: Complying with Title III of the Americans with Disabilities Act of 1990

Americans with Disabilities Act of 1990 (Summary)

Disclosure Obligations When Selling Property in a Condominium or Other Common Interest Development

Homeowners' Associations and Common Interest Developments

Self-Check Questions

1. The commission authorization and instruction is not a standard form; it is the instruction to the escrow company for the payment of the commission that has already been agreed to.

- a. True
- b. False

2. The Real Estate Transfer Disclosure Statement (TDS) is the most often used disclosure statement but is not required in an "As-Is" sale.

- a. True
- b. False

3. The law does not require the seller and the seller's agent to affirmatively disclose to the buyer the fact that someone has died while on the premises, if the death happened more than three years prior to the date the buyer offers to purchase the property.

- a. True

b. False

4. There is no requirement that you voluntarily disclose the fact that a prior occupant of the premises was infected with HIV- or AIDS-related illnesses.

a. True

b. False

5. Real estate law requires you to retain copies of your business records for seven years.

a. True

b. False

6. Under the Wood Destroying Pest Inspection and Allocation of Cost Addendum (WPA), if no infestation is discovered, all expenses must be paid for by the buyer.

a. True

b. False

7. Under California law, the buyer is required to withhold 5 1/2% of the gross sales price and, at the close of escrow, to forward this sum to the California Franchise Tax Board (FTB).

a. True

b. False

8. The Mortgage Loan Disclosure Statement (Borrower) (MS) is a form prepared by the real estate licensee when he makes or arranges any loan secured by a lien on real property; this statement is not required when the lender involved is a bank, trust company or savings and loan.

a. True

b. False

9. "Specific performance" is a remedy that, if ordered by a court, requires the seller, upon a tender of the purchase price, to transfer the title of the property to the buyer.

a. True

b. False

10. The Verification of Property Condition (VP) is not a contingency of the purchase

agreement, but it is important because it acknowledges that the agents are not responsible for any unlisted, unrepaired items and promises to hold the agents harmless from any claim arising out of such items.

- a. True
 - b. False
-

Finalizing the Transaction

Step 24: Get Paid

On the closing date, the escrow company will issue a "settlement statement" or "closing sheet," accounting for all monies contributed to the escrow by each of the parties and all monies disbursed, for whatever purposes, identifying each separate disbursement.

These may include:

- the pay-off of a prior first or second trust deed
- escrow fees and costs
- commissions
- title insurance premiums
- recording fees and the like with credits and charges for items being prorated, such as taxes, utilities, and homeowner's insurance

The remaining balance will be shown as paid to the seller.

Congratulations! This is where you finally get paid for all your hard work. However, you are still not finished. Follow up with the escrow company in the event that the purchase was partly or wholly financed through the use of one or more notes secured by trust deeds, to be sure that each of the trust deeds has been recorded by the escrow company. At the same time, have the escrow company verify to you that the settlement statement has been delivered to both the buyer and the seller.

PRACTICE POINTER:

Follow your checklist and make sure that every step has been completed.

PRACTICE POINTER:

Do not dispose of your files, including any of your notes, checklists, or other materials. You may have occasion to revisit them long after closings have occurred. Remember, real estate law requires you to retain your files for three

years. The Internal Revenue Service (IRS), however, lengthens the retention time to five years for FIRPTA documents.

Legal Q&A's: Commissions
 Procuring Cause Guidelines

Step 25: Resolve All Disputes

If a dispute arises between the buyer and seller, or between the listing and selling agents, or any combination thereof, prior to or after the closing of escrow, it should be dealt with promptly. **There are several approaches a licensee can take regarding a dispute, but first and foremost, report the problem to your broker.**

A licensee may informally resolve a controversy through **discussions and negotiations with the parties themselves**. This can many times lead to an agreeable solution which once reached and placed into writing becomes a formal resolution. It would be wise, during this phase, to **have your broker involved and kept aware of all developments**. Obviously, an informal negotiation amongst the parties involved is the fastest and least costly method of resolving a dispute.

Another informal approach, and one that has experienced much success in dispute resolution, is **independent mediation**. Any person may serve as a mediator. No special licensing or training is required. Most often, however, mediators are lawyers or retired judges or other professionals. The actual mediation process is highly flexible, the underlying principle being that, when the parties have a chance to vent their feelings and complaints before an independent third party, they are more likely to come to a meeting of the minds. **The RPA-CA requires parties to mediate prior to commencing arbitration or court proceedings unless the matter falls within one of the enumerated control exclusions.**

To find out more information about the mediation process, contact your broker, your county or local bar association, your association/board attorney, or your personal lawyer.

Neither of the preceding approaches results in a "final" determination of issues, unless an agreement is reached and documented. What this means is that if an agreement is not made and the issues are not resolved, you still have other resources available such as **arbitration or trial proceedings**.

If all parties have initialed the arbitration clause in the purchase agreement, the next step is to initiate arbitration. This means that an independent third person not only hears the dispute, but decides it as well. The decision by the arbitrator is final and can be enforced in the courthouse.

An arbitrator does not have to be licensed nor specially trained, but should be a person who is well experienced or has had special training in real estate. Most often, retired judges and experienced lawyers are utilized. The RPA-CA requires that the

arbitrator shall be a retired judge or an attorney with at least five years of residential real estate law experience unless otherwise agreed.

Although there are costs involved in utilizing an arbitrator, it does tend to be much less expensive and is sometimes quicker than an actual court action.

If the arbitration clause in the purchase agreement has not been initialed and there is no other "agreement to arbitrate" between the parties, a more formal direction is to file a lawsuit. Here, a final determination is made by a judge or jury.

PRACTICE POINTER:

If you become a party to an arbitration or to a lawsuit, notify your broker immediately so that professional representation will be sought out at the earliest possible date. Do not attempt to represent yourself in an arbitration proceeding or in a lawsuit. This is the time when you need the advice of an appropriate professional.

C.A.R. Forms, Q&A's, and Legal Briefs

Standard Forms

Listed below is a list of C.A.R.'s standard forms referenced in this guide. A complete copy of all the C.A.R. forms can be obtained by purchasing the **Sample Forms Book** through Customer Service at (213) 739-8227.

Buyer-Representation Agreement-Exclusive (BRE)
Buyer-Representation Agreement Non-Exclusive (BRNE)
Buyer's Affidavit (FIRPTA Compliance) (AB)
Buyer-Representation Agreement (Non-Exclusive/Not for Compensation) (BRNN)
California Residential Purchase Agreement and Joint Escrow Instructions (RPA-CA)
Cancellation of Contract, Release of Deposit and Joint Escrow Instructions (CC)
Confirmation: Real Estate Agency Relationships (AC-6)
Contingency for Sale or Purchase of Other Property (COP)
Contingency Removal (CR)
Counter-Offer (CO)
Disclosure Regarding Real Estate Agency Relationships (AD)
Homeowners' Association Information Request (HOA)
HUD Notice to Purchasers: For Your Protection: Get a Home Inspection (HID)
Keysafe/Lockbox Addendum and Tenant Permission to Access Property (KLA)
Lead-Based Paint and Lead-Based Paint Hazards Disclosure, Acknowledgement and Addendum for Pre-1978 Housing Sales, Leases

or Rentals (FLD)
Lease Listing Agreement (Exclusive Authorization to Lease or Rent) (LL)
Manufactured Home Purchase Contract and Receipt for Deposit (MHPA)
Mortgage Loan Disclosure Statement (Borrower) (MS)
Natural Hazard Disclosure Statement (NHD)
Notice to Buyer to Perform (NBP)
Notice to Seller to Perform (NSP)
Purchase Agreement Addendum (PAA)
Radon Gas and Mold Notice and Release Agreement (RGM)
Real Estate Transfer Disclosure Statement (TDS)
Receipt for Increased Deposit/Liquidated Damages (RID)
Receipt for Reports (RFR)
Release of Contract (RC)
Request for Repair (RR)
Residential Listing Agreement-Exclusive (RLA)
Seller Financing Addendum and Disclosure (SFA)
Seller's Affidavit of Non-foreign Status and/or California Withholding Exemption (AS)
Seller Property Questionnaire (SPQ)
Smoke Detector Statement of Compliance (SDS)
Supplemental Statutory Disclosure (SSD)
Trust Bank Account Record for All Trust Funds Deposited and Withdrawn (TAA)
Trust Funds Received and Released (Not Placed in Trust Bank Account) (TF)
Verification of Property Condition (VP)
Water Heater and Smoke Detector Statement of Compliance (WHSD)
Wood Destroying Pest Inspection and Allocation of Cost Addendum (WPA)

NOTE: The following forms have been replaced effective April 24, 2007:

- **Buyer Broker Agreement Exclusive (Right to Represent) (BBE)**
- **Buyer Broker Agreement Non – Exclusive (BBNE)**
- **Buyer-Broker Agreement (Non-Exclusive/Not for Compensation) (BBNN)**
- **Water Heater Statement of Compliance (WHS) and Smoke Detector Statement of Compliance (SDS)**

Legal Q&A's and Briefs

The following is a list of the Legal Q&A's and Briefs, written by C.A.R.'s Legal Services, that you might find useful in using this guide.

Legal Briefs are short, two to three pages, while the Q&A's provide more detailed coverage of legal subjects and can be ten pages or more.

Q&A's and Briefs can be obtained by calling the C.A.R. Legal Hotline at (213) 739-8282 or downloading selected Q&A's and Briefs from www.car.org.

Risk Management Institute (RMI) subscribers can receive a complete version of C.A.R.'s Q&A's and Briefs through the searchable software product called "Q&A Express." Additionally, subscribers are mailed current Legal Q&A's and Legal Briefs monthly as they become available and can download updates to "Q&A Express" from a private website area for subscribers only. For more information on RMI and "Q&A Express," please call C.A.R.'s Risk Management Institute at (213) 739-8231.

Agency Disclosure and Confirmation
(Legal Brief) **March 8, 2004**

Americans with Disabilities Act of 1990 (Summary)
(Legal Q&A) **March 10, 1992**

Arbitration and Mediation
(Legal Q&A) **Revised May 13, 2003**

C.A.R.'s Counter-Offer Form
(Legal Brief) **Revised February 11, 2005**

California Withholding on the Sale of Real Property
(Legal Q&A) **Revised December 8, 2004**

Complying with Title III of the Americans with Disabilities Act of 1990
(Legal Q&A) **March 12, 1992**

Disclosure Requirements for Newly-Built Homes in a Subdivision
(Legal Q&A) **Revised February 13, 2003**

Disclosure of Death and AIDS and the Prohibition Against Discrimination on the Basis of AIDS
(Legal Q&A) **Revised August 31, 2005**

Divorce and Other Family Law Proceedings' Impact on the Transfer of Real Property
(Legal Brief) **Revised June 24, 2005**

Federal Lead-Based Paint Hazards Disclosures
(Legal Brief) **Revised September 28, 2005**

Federal Withholding: The Foreign Investment in Real Property Tax Act (FIRPTA) (Legal Q&A) **Revised February 10, 2004**

Homeowners' Association and Common Interest Developments
(Legal Q&A) **Revised December 12, 2003**

Liquidated Damages and Deposit Forfeitures
(Legal Brief) **May 2, 2003**

Lis Pendens
(Legal Q&A) **March 5, 1993**

Pest Control Services Agreements
(Legal Brief) **Revised June 24, 2005**

Procuring Cause Guidelines
(Legal Q&A) **November 26, 2002**

Real Estate Loan Disclosure Chart
(Legal Q&A) **July 25, 2000**

Real Estate Sales Disclosure Chart
(Legal Q&A) **Revised January 1, 2005**

Referral Fee Chart
(Legal Brief) **Revised September 12, 2005**

Signs: Can They Be Regulated and to What Extent?
(Legal Q&A) **Revised March 19, 2004**

Smoke Detector Requirements
(Legal Q&A) **Revised July 28, 2005**

Title Insurance
(Legal Q&A) **July 9, 1999**

Transfer Disclosure Statement Law
(Legal Q&A) **Revised May 30, 2003**

Water Heater Bracing and Disclosure Requirements
(Legal Brief) **Revised June 15, 2004**