

ENFORCING ORAL AGREEMENTS TO SHARE COMMISSIONS

Two licensed real estate agents working for the same broker orally agree to share commissions on transactions that they work on separately or together. They do so with the knowledge and consent of their broker. One of these transactions closes escrow, the broker receives the commission and then pays one of the two agents, but the agent who is paid does not honor the oral agreement that they have with the other agent. Can the agent who has not been paid enforce the oral commission sharing agreement or is such an agreement illegal if not in writing and signed by the broker?

A recent California Court of Appeal decision held that an oral commission sharing agreement under these circumstances was not illegal because the agent was seeking to collect a portion of the commission already paid to the broker and the oral agreement to share commissions with the other agent was made with the knowledge and consent of that broker. The Court of Appeal indicated that its holding was limited to these specific factual circumstances and was based upon its interpretation of current real estate law.

What I found interesting about the case, and important for all of us to consider, is why the dispute existed and how could it have been avoided. How many of us have entered into an oral agreement with a friend or colleague telling ourselves that we did not need a written agreement because our friendship was so strong and it would never deteriorate to the point that we could not resolve any differences? Human nature being what it is, what other explanations or rationalizations (e.g., time, money, etc.) were offered as a justification for not obtaining a written agreement before the transaction was finalized? Was it just the optimism and enthusiasm surrounding the venture that caused us to believe that everything would work out for the positive?

One of the best ways to overcome this optimism and enthusiasm is to have an agreement in writing between the parties at the outset of any relationship or before any transaction closes escrow. This rule applies not only to our personal transactions, commission sharing agreements between agents, but also to those clients we represent who are purchasing property together (e.g., parents and children, co-investors or joint venturers, and individuals who are not married).

With regard to commission sharing agreements, the Court of Appeal indicated that any such agreements would need to be made with the knowledge and consent of the broker. Again, one of the best ways to avoid any dispute is to obtain the knowledge and consent of the broker in writing. Don't rely on an oral discussion with the broker on this subject. A written agreement not only helps prevent misunderstandings between the two agents but also between the broker and those agents.

As with any agreement, it is best that it address all material terms including the parties, the subject matter, duties, the term of the agreement, commission splits including cost payments, payment to the broker and how the broker is to distribute payments to each of the agents, and what happens in the event that one of the agents leaves the brokerage. The foregoing list is illustrative but not exhaustive of all of the subjects that might need to be covered depending on the nature of the agreement and the relationship between the parties.

Another way to approach drafting such an agreement is to ask some of the following questions:

1. What if this relationship terminates? 2. What expectations does each party to the agreement have in that event? 3. What issues or concerns does each party have that could be addressed at the outset rather than through litigation?

Taking the time to discuss, agree, and memorialize these issues and potential concerns will help eliminate potential disputes and avoid incurring attorney's fees which the prevailing party will not be able to recover because of the oral nature of the agreement and the absence of any written agreement providing for the recovery of attorney's fees.