

## **OREF SALE AGREEMENT COMMISSION ISSUES**

**By**

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The 2007 OREF Sale Agreement form has undergone several modifications, most of which do not significantly affect how Realtors<sup>®</sup> conduct their business. These changes are summarized on the OREF website at <http://www.orefonline.com/>. However, there is one change that has received enough Realtor<sup>®</sup> attention lately that it deserves a more complete explanation.

Section 41 of the Residential Real Estate Sale Agreement form - as well as the analogous sections in the other OREF sale agreements for new construction, farms, ranches and vacant land, which are only available online - has been changed. Previously, Section 41 contained a place for the listing or selling agent to fill in the actual dollar amount of the compensation, based upon the listing commission rate and the final sale price of the home. This section also contained express language that the seller agreed to pay that amount at the time of closing.

In the 2007 form, Section 41 was changed to eliminate this commission provision, including the blank line to insert the dollar amount. During 2006, this change was thoroughly discussed by the Forms Committee members, and there was virtually unanimous agreement that Realtor<sup>®</sup> practice had shifted throughout the state, such that the dollar amount was not being inserted. Usually, agents were simply inserting the language “per listing” on the blank line where the dollar amount was intended to be added. Since the contractual obligation for payment under the listing agreement, as well as the offer of compensation rules of the local MLS were not being affected, removal of the blank line did not seem unreasonable.

Moreover, Section 15 (Escrow) of the 2007 Residential Real Estate Sale Agreement was also changed to include language comparable to the old Section 41 text, confirming the legal obligation to pay the commission, but without the gross dollar amount disclosed. Section 15 now states that the real estate fees, commissions or other compensation for professional real estate services provided by the licensees is to be paid at closing in accordance with the listing agreement, buyer service agreement, or other written agreement for compensation.

Lastly, it was felt that with the introduction of new business models for real estate brokerages over the past few years, the Section 41 change was appropriate since (a) sellers do not always pay the entire commission today, and (b) when they do, those arrangements are better left confidential between principal and agent based upon the contractual terms of each party’s own compensation agreement, and where applicable, the MLS offer of compensation rules.

Thus, the Forms Committee members felt: (a) That the net effect of the change to Section 41 was negligible; (b) It dealt better with today’s real estate brokerage environment; (c) It eliminated putting agents in the position of disclosing compensation amounts to the other side; and, (d) It reflected the fact that today, most agents were already inserting “per listing” and similar phrases where the dollar amount was originally intended to be.

Although there have been some questions raised about Section 41 since the new 2007 forms have been released, the general consensus has been favorable. However, in light of the number of Realtor® questions recently, OREF felt that a more thorough explanation was in order – especially since it appears that there are some misconceptions today about the purpose and legal effect of the old language. Here are some observations intended to dispel those misconceptions:

1. ORS 696.582 currently gives to listing agents and buyer brokers the right to submit to escrow a demand for commission where there is a valid written and signed agreement for compensation. The demand will result either in those funds being disbursed to the brokerage at closing, or a withholding of that sum by escrow. A copy of the entire statute is attached below.<sup>1</sup>

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<sup>1</sup> The statute is in need of change because of a variety of shortfalls, but it unquestionably protects listing agents to the extent of their commission demand. Here is the text, *verbatim*:

**696.582 Escrow agent to hold certain commissions; conditions; notice of demand; disbursement of money; copy of notice to principal.** (1) An escrow agent shall hold, as provided in subsection (3) of this section, the amount of money or other property agreed to as a commission in a written real estate broker's or principal real estate broker's commission agreement, if the escrow agent has at the office at which the escrow is being closed, before the date of closing:

(a) A written notice of demand, signed by the real estate broker or principal real estate broker who is authorized under rules adopted by the Real Estate Commissioner to enter into the commission agreement and sign the written notice of demand, in substantially the form set out in subsection (2) of this section; and

(b) The written closing instructions of the principals which do not honor the amount and terms of payment in the notice of demand.

(2) The notice of demand required by subsection (1) of this section may not be incorporated into any document of agreement between the principals or between the broker and a principal, and shall be in substantially the following form:

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Notice of Demand for  
Real Estate Commission  
To: \_\_\_\_\_  
(Name of Escrow Company)  
Re: \_\_\_\_\_  
(Names of Principals to  
Transaction)  
Your Escrow Number: \_\_\_\_\_

The undersigned real estate broker or principal real estate broker states that such broker has a valid written commission agreement with \_\_\_\_\_ (Name of Principal), one of the principals to the transaction referred to above, and that such principal is obligated to pay the broker the commission on account of that transaction. The commission amount is \$\_\_\_\_\_ and is to be paid on the following terms:\_\_\_\_\_. Demand is hereby made that the commission be paid in that amount and on those terms, out of escrow and as a part of your closing of that transaction.

\_\_\_\_\_  
(Name and Signature of Real Estate Broker or Principal Real Estate Broker)

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(3) An escrow agent in a transaction described in subsection (1) of this section may only disburse the moneys or other property to:

(a) The broker and principal, based upon a written agreement between those parties and directed to the escrow agent as disbursement instructions;

(b) Any persons, as directed by order of a court of competent jurisdiction; or

(c) The court, upon filing by the escrow agent of an interpleader action for the moneys or property.

(4) At the time of filing a notice of demand with an escrow agent under subsection (1) of this section, the real estate broker or principal real estate broker filing the notice shall deliver a copy of the notice to the principal identified in the notice. [1985 c.449 §2; 2001 c.300 §41]

2. The old language in Section 41 of the Sale Agreement, standing alone, is not sufficient to protect the listing or selling agent's commission entitlement at the time of closing. Moreover, Section 15 (Escrow) of the 2007 Sale Agreement form still obligates the principal to pay any compensation previously agreed upon. In the event of a commission dispute, following ORS 696.582 is the only way for Realtors<sup>®</sup> to protect against escrow's disbursement to the seller (or, where there is a written buyer broker agreement, to the buyer).
3. The old Section 41 of the Sale Agreement did not supersede the listing agreement on the issue of commission entitlement. These are two entirely separate documents. The listing contract is an employment agreement between the listing brokerage/agent and the seller. It sets forth the basis upon which the listing brokerage/agent will be compensated and authorizes them to place the property in the local MLS and offer a certain amount (or percentage) of compensation to any selling agent who brings in a ready, willing and able buyer. The Sale Agreement is primarily an agreement setting forth a blueprint for the sale and purchase of the property. With very limited exceptions, the listing and selling agents are not "parties" to the Sale Agreement or the escrow. Only a party to escrow may give a written "instruction" to escrow.<sup>2</sup>
4. There is nothing in current Oregon law that prevents listing or selling brokers from informing escrow, in writing or otherwise, of the amount of commission that they would like paid at the time of closing. However, without a written instruction from the seller or buyer obligated to pay that amount, escrow is not legally empowered to do so.
5. Oregon law provides no right to "lien" the proceeds of sale to secure payment of a commission. There never has been such a right. The closest the industry has come to having such right is ORS 696.582, and this is not a "lien" in any sense of the word, i.e. nonpayment does not result in a "foreclosure" of anything. By submitting a proper demand for commission under ORS 696.582, escrow is only empowered to withhold disbursement of that amount back to the principal (usually the seller), leaving it to the principal and agent to battle out the commission issue in another forum, e.g. court or arbitration.
6. Escrow's payment of a portion of the commission to the selling brokerage is done as a courtesy to them, but they are not "required" to do so as a part of the closing process. In most cases there is no written contractual obligation by either seller or buyer to pay the selling agent. The selling agent's entitlement to a commission is usually based solely upon the offer of compensation rules in the local MLS, and is primarily a claim by the selling brokerage against the listing brokerage in the event of nonpayment. The old

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<sup>2</sup> A careful reading of ORS 696.581, which immediately precedes the commission demand statute, ORS 696.582, clarifies that escrow is legally required to follow only written instructions of the "principals" who are the "parties" to the transaction. Sellers and buyers are parties, but their real estate agents are not. That is why ORS 696.582 was created, in order to protect real estate licensees when they had a commission dispute with their principals. Under ORS 696.582, escrow now has legal authority to honor a properly prepared commission demand submitted by the broker. *It must be emphasized, however, that under the current text of ORS 696.582, the commission demand must also be copied to the principal and be based upon a written agreement to pay a commission.*

language of Section 41 never addressed the obligation of the listing agent to pay the selling agent's compensation in a co-op transaction, and the disappearance of the language does nothing to change that situation.<sup>3</sup>

7. Is it easier to enforce an agreement to pay a certain commission when it was expressly stated in terms of dollars, as in the old Section 41? Psychologically this may be so. Legally, this really isn't the case, since the duty to pay the compensation is still based upon the underlying listing agreement. In any event, based upon anecdotal reports, the OREF Forms Committee believed that most agents did not insert a dollar amount anyway, electing instead to add the words "per listing agreement."<sup>4</sup>
8. Some have complained that without the full commission amount being inserted into the blank line in the old Section 41, the buyer's agent does not know the gross amount of the commission being paid since they do not have a copy of the listing agreement. This is because the listing agreement is confidential between the listing agent and his or her principal. With increased scrutiny by the public and the U.S. Department of Justice on commission issues, there is even *more* reason to allow the basis for Realtor<sup>®</sup> compensation - be it a percentage, fixed amount, or some other arrangement - to remain confidential between the parties to the contract. The selling agent's entitlement to compensation is based solely upon the percentage or dollar amount published in the offer of compensation portion of the local MLS. Anything beyond that should not be a matter of concern to third parties. By inviting its disclosure in Section 41, which exposes the entire commission arrangement to everyone in the transaction, including escrow, the Realtor<sup>®</sup> industry potentially increases its antitrust liability.
9. The idea that elimination of the dollar amount of the commission in Section 41 will result in agents inserting it in separate addenda is doubtful. Good practice, company policy, and NAR ethics suggest otherwise.
10. If individual companies wish to develop a separate fee request form for delivery to escrow they may do so - however, it should *only* be done with competent legal advice.

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<sup>3</sup> It should be noted that the current text of ORS 696.582 does not give selling agents a right to submit a commission demand to escrow against sellers. This is a problem where sellers instruct escrow to pay only their listing agent but not the selling agent. I believe a change to this law is in order and submitted draft legislation in early 2006 to the Oregon Association of Realtors<sup>®</sup> (OAR) to accomplish this.

<sup>4</sup> In evolutionary terms, the blank line had become *vestigial*, serving no useful function today. The real estate industry is also evolving, and OREF's modification of Section 41 attempts to acknowledge these changing times.