



PROPOSED CRITERIA FOR EVALUATING HOME SELLER CONTRACT FORMS¹

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Form: Is the contract readable and understandable?

- **Length:** The contract should not include marginal provisions designed solely to protect the interest of the broker.² And the agency agreement should be in a separate document.*³
- **Type Size:** Most courts recommend 12-point. Any size smaller will be difficult for some people to read.*⁴
- **Organization:** The most important information, including compensation arrangements, should be at the beginning of the document and clearly labeled.*
- **Plain Language:** The contract should be written so that it can be understood by home sellers. It should not contain words and language that can be understood only by lawyers.*

Content: Is the content of the contract fair to home sellers?

- **Length of Contract:** The contract should clearly state when it will end.*⁵
- **Termination of Contract:** Brokers have the right to terminate contracts at any time; sellers should have the same right with no fees charged.*
- **Compensation, Continuing Obligation:** A seller can be obligated to compensate a broker who showed a home that was purchased after termination of the contract. But this obligation should last for a reasonable period of time, no more than 60 days.*

- **Compensation, Disclosure:** The contract should state prominently that the broker fee is not set by law and is fully negotiable.*
- **Compensation, Commission:** The listing agent’s commission should be completely separate from any concession to a buyer that may include funds used to compensate the buyer’s agent. This commission should always be stated as a dollar figure or hourly rate.⁶
- **Compensation, Fees:** In a home sale, any additional fees should be deducted from the commission.*⁷
- **Compensation, When Owed:** Only upon successful closing of the sale.*⁸
- **Seller Concessions:** Concessions should never include a dollar figure representing buyer agent compensation. Instead, the contract should simply indicate whether the seller is prepared to consider negotiating concessions.⁹
- **Unrepresented Buyers:** Unrepresented buyers must be shown the property. The contract can include a provision for a modest administrative fee (expressed in dollars) if a buyer is unrepresented and does not cover this cost. This provision should be initialed by the seller.¹⁰
- **Buyer Offers:** The contract should state that all written offers from buyers will be shown to and decided on by the seller.¹¹
- **Dual Agency:** Dual agency should not be pre-approved by the contract. If a dual agency situation arises—e.g., a buyer wants to purchase a listing of the seller’s broker—written seller approval should be secured at this point.*¹²
- **Seller Remedies:** There should be no limits on seller remedies. Sellers should not be required to submit first to mediation or arbitration to pursue a grievance.*¹³

*Criteria identical or similar to those in CFA’s Proposed Criteria for Evaluating Home Buyer Contract Forms (July 2024).

¹ The criteria focus on the forms, not always recommended broker practices. The latter are sometimes included in the notes. For example, one criterion is that the contract state an end date but does not specify what that date should be. However, in the note it is recommended that the contract not last longer than six months.

² The following clauses, which also increase the unreadability of the contract, are mainly intended to protect brokers and agents: limits on broker’s authority and responsibility, referral to third party vendors, due on sale, entire agreement, FIRPTA, force majeure, heirs and assigns, no imputed knowledge, statute of limitations, cyber-fraud warning. None of these clauses are included in the fairest contracts unless required by state law.

³ Agency agreements—which define the relationship between broker and customer or client—need special attention with some states having approved specific forms that define this relationship.

⁴ The author sees the irony related to these notes, which are intended not for consumers but for professionals.

⁵ The Consumer Federation of America (CFA) suggests that sellers request a three-month contract and recommends that they never sign an agreement for more than six months. Contracts can always be extended if warranted by circumstance.

⁶ Some consumers do not understand percentages well, and a large number fail to comprehend the actual dollar cost of broker compensation expressed as a small percentage of a sale price, as a new CFA report (to be published in August 2024) will reveal. If the contract includes a percentage commission, the equivalent dollar figure related to the list price should also be immediately stated.

⁷ CFA sees no role for additional administrative or processing fees, typically ranging between \$300 and \$900, often charged by brokers in some areas. If charged, additional fees should be deducted from (i.e., credited to) commissions.

⁸ Sellers need to be protected from aggressive agents that try to push clients into sales about which they have qualms so then seek to withdraw. Brokers can protect themselves by being sensitive to client needs and concerns. They could also reconfigure compensation agreements to ensure some payment for services actually rendered.

⁹ Seller contract forms should not include spaces for sellers to state specific monetary offers (in dollars or percentages) to buyers. These offers can be used by brokers to collude in sustaining 2.5-3.0 percent buyer agent commissions typically charged today. Instead, contracts can include a space for sellers, if they wish, to indicate to potential buyers that they are prepared to consider negotiating dollar concessions. There should be no space that permits sellers to make a specific offer of a buyer agent commission.

¹⁰ Because of mandatory buyer contracts, CFA anticipates that an increasing number of buyers will seek to work directly with listing agents as customers. Listing agents cannot refuse to show a property to these unrepresented customers. Yet, it is reasonable for these agents, who continue providing fiduciary services to their seller clients, to charge these customers a reasonable administrative fee for paperwork that would have been handled by the buyer broker. If the customer refuses to cover this cost, it is reasonable for the listing agent (and their broker) to give their seller client the option of paying it.

¹¹ This requirement is sometimes required by state law. Yet, there is sufficient anecdotal evidence of listing broker manipulation of this prohibition to require it in all seller contracts. Sellers, for example, should be informed of all higher-priced offers even when these offers are more tenuous and could lead sellers to delay a sale.

¹² Dual agency, an oxymoron, is prohibited by eight states and must be contractually approved in almost all others. Dual agency, which typically occurs when a listing broker finds a buyer or a buyer wants to purchase their broker's listing, requires the broker to then facilitate the purchase without advantaging either party. Both sellers and buyers are much more likely to understand dual agency if they do not pre-approve it but consider it as an option when a dual agency situation arises.

¹³ Mediation, which does not limit legal remedies, is far preferable to binding arbitration, which does. But if a mediation option is presented, it should be by an independent party and be discussed, approved, and initialed by buyers.