

Entering Tenant-Occupied Property

Q: Do I need the permission of the tenant to place a MLS authorized lock box on the property?

A: Yes. California Model MLS rule 13.6 (or as adopted by the local MLS) states that to place a lock box on a property, written authority must be obtained from the occupant. C.A.R. Form “Key-safe/Lockbox Addendum and Tenant Permission to Access Property” (form KLA) may be used for this purpose.

Specific rules govern the right of an owner or agent to enter a tenant-occupied residential property. Typically, an agent can simply call up the tenant and arrange to enter. But every now and then, the tenant demands strict adherence to the legal requirements before he or she lets you in. Or it may be that you are simply unable to contact the tenant to arrange entry. In these circumstances how should an agent proceed?

Entering Without Notice

➤ There is nothing wrong for an agent to arrange entry by simply calling up the tenant. If the tenant is at home when you arrive and the tenant voluntarily lets you in, you are in full compliance with the law. But if the tenant doesn't let you in, then you must provide legal notice. There are two types of notices.

Form “Notice of Entry”

First, there is the form “Notice of Entry” (C.A.R. form NOE) which must be in writing. This form can be used to show the property, to make repairs, to supply services, to allow workers or contractors to inspect, and for other reasons.

It should be delivered at least 24 hours in advance to enter during “normal business hours” (see next paragraph). Delivery is typically accomplished by personally giving the notice to the tenant, leaving it with someone of suitable age and discretion at the premises, or just leaving it near or under the main entry door. What about email? You can use email to deliver the notice only if there is clear evidence that the tenant actually received it. Email is ineffective without proof of actual receipt. Mailing the notice is not a very practical option, since it must be done six days in advance.

“Normal business hours” is a fuzzy notion. It always includes the traditional Monday through Friday from nine-to-five. But it can also include weekend afternoons when

the purpose is to show the property. Because the law tries to balance the right of the owner to sell their property with the right of the tenant to quiet enjoyment, notice to show the property to prospective buyers on weekend afternoons should be given, if at all possible, more than 24 hours in advance. As for entry of other individuals such as inspectors or workmen, conservative legal advice would caution you to restrict entry to Monday through Friday from nine-to-five.

Once you've delivered the notice, you may then enter the property at the designated time. But what if the tenant is not home? There is no law that requires the tenant to be home when entering the property. As long as the reasonable notice requirements were met, there is a legal right for the landlord, or landlord's agent, to enter the property. Now, admittedly, there are reasons why you might not want to enter a property without the tenant being home. For example, the tenant may harbor an aggressive dog or you suspect the tenant will take such exception that it may make getting further tenant cooperation difficult. But those are not legal reasons. They are practical reasons of how to most effectively interact with the tenant to promote the sale of the property.

Form “Notice of Sale and Entry”

The second type of notice is the “Notice of Sale and Entry” (C.A.R. form NSE). This form can only be used to show the property

to prospective or actual buyers (or other tenants). The big advantage of this form is that it allows for entry upon 24 hour oral notice. Many tenants believe that the notice must be delivered 120 days in advance. But that's not how the form works.

When a property is for sale, the form NSE can be delivered to the tenant. For the next 120 days thereafter, oral notice of entry may be given to show the property to prospective or actual buyers. The oral notice should be given at least 24 hours in advance for entry during normal business hours, and include the date, approximate time, and purpose of entry. This oral notice may be given in person or over the phone. Prudent agents will document a file with a note or memorandum indicating when the call was made to the tenant. At the time of entry, the agent should leave written evidence indicating that entry was made. A business card with time and date of entry will suffice for this purpose.

Weekend Open Houses

»» The law permits the landlord to hold open houses on weekends with reasonable notice. This was the ruling in the case of *Dromy v. Lukovsky* in 2013 which set down the guidelines for holding open houses.

What kind of notice should an agent give to hold a weekend open house? First, the notice should be given at least 10 days in advance for a proposed afternoon open house. The *Dromy* case allowed that the open house could be either Saturday or Sunday, but should be limited to two a month. The tenant also had the right to propose alternative days for open houses. Second, after giving the notice, if the tenant objects, you should be amenable to the tenant's proposal of alternative open house days. Finally, the judge approved an open house in the afternoon from 1:00 to 4:30. When planning a weekend open house, you should stick generally to these guidelines.

Difficult Tenants

»» What if you've followed the law to the letter and the tenant still won't let you in? First, the owner can try to persuade the tenant to allow entry by writing a strong letter explaining the possible consequence of not allowing the landlord or the agent in. The "Access to Premises" letter (form AP) in the C.A.R. zipForm® sample letter library explains the right of entry; affirms that the notice requirements have been met; explains that the tenant may be evicted, and that such eviction may result in costs, attorney fees and a negative mark on the tenant's credit report.

Another more formal way to get the tenant to comply is to deliver a "Notice to Perform Covenant (Cure) or Quit" (C.A.R. form PCQ). This notice tells the tenant that they are in breach of the lease (assuming the lease has an entry provision) and that if the tenant does not allow entry within three days, then the landlord may file an action to evict, and recover attorney fees and penalties.

Ultimately, if nothing is effective, then it will be up to the owner to decide whether they want to evict the tenant before sale, or to sell the property despite the difficulty in showing it. If the owner decides to evict, then you should discuss with the seller the need to temporarily change the MLS status to "withdrawn" until the tenant is out. On the other hand, if the owner would like to sell despite the tenant's lack of cooperation, then the purchase agreement should indicate that the buyer's investigation rights are subject to the cooperation of the tenant. Finally, if you suspect that the tenant will not vacate at all prior to close, then you should consider changing the purchase agreement to state that the tenant will remain in possession at close (paragraph 9D of the RPA-CA). ♦

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