

*Modern Real Estate Practice in Illinois, 6<sup>th</sup> Edition*  
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**Chapter 6: Brokerage Agreements**

**Learning Objectives**

*After reading this chapter, students should be able to:*

- Identify the different types of listing and buyer representation agreements and their terms.
- Describe the ways in which a listing may be terminated.
- Explain the listing process and the parts of the listing agreement.
- Distinguish among the characteristics of the various types of listing and buyer representation agreements.
- Define the following key terms: buyer agency agreement; comparative market analysis; exclusive-agency listing; exclusive-right-to-sell listing; market value; minimum services; multiple listing service; net listing; open listing; option listing; statute of frauds.

**Why Learn About Brokerage Agreements?**

A listing agreement is an employment contract that creates a special agency relationship between the property owner and the broker. The various types of listing agreements establish the basic relationship between the parties and provide different levels of rights and responsibilities for the listing broker. Perhaps most importantly, listings determine important questions like how a property is marketed and how the agent will be compensated.

A buyer agency agreement is an employment contract, too. It establishes the rights and responsibilities of the broker as agent for the buyer. Various kinds of buyer agency agreements establish different levels of relationships between the agent and the buyer/principal.

In short, listing and buyer representation agreements are the fundamental, bedrock documents of the real estate sales profession. To understand who you are as a real estate professional, you must understand how these documents work, what they say, and what they mean to you.

### **Suggested Items to Bring To Class**

1. Blank brokerage agreements, particularly a(n)
  - a. exclusive-right-to-sell listing;
  - b. exclusive-agency listing;
  - c. open listing;
  - d. listing sheet from the local multiple-listing service (MLS);
  - e. exclusive buyer agency agreement;
  - f. exclusive agency buyer agency agreement; and
  - g. open buyer agency agreement.
2. Completed broker employment contracts.
3. A sample competitive market analysis and a "listing presentation packet" (the self-marketing materials shown to prospective clients).

### **Lecture Outline**

#### **I. Listing Agreements with Sellers**

A listing agreement is an employment contract, not a real estate sales contract.

- Creates a special agency relationship between the principal (the owner of the property) and the broker (the agent). As agent, the broker is authorized to represent the principal to third parties.

**IN ILLINOIS . . .** *An exclusive listing agreement must be in writing to be enforceable. Other types of brokerage agreements may be in oral form but effective brokerage practice should require them to be in writing as well.*

#### **A. Common Types of Listing Agreements**

##### **1. Exclusive-right-to-sell**

One broker is given the exclusive right, or authorization, to market the seller's property.

- If the property is sold while the listing is in effect, the seller must pay the broker a commission regardless of who sells the property.
- Offers the greatest opportunity for brokers to earn a commission.

##### **2. Exclusive-agency listing**

One broker is authorized to act as the exclusive agent of the principal, but the seller retains the right to sell the property without obligation to the broker.

- Broker receives a commission only if the broker was the procuring cause of the sale.

**3. Open listing**

Seller may employ any number of brokers as agents, and is obligated to pay a commission to only the broker who successfully produces a ready, willing and able buyer.

- If the seller personally sells the property without the aid of any of the brokers; the seller is not obligated to pay a commission.

**4. Net listing**

The seller and broker agree on a net amount that the seller will receive from any sale, with the excess going to the listing broker as commission. The broker is free to offer the property at any price greater than that net amount.

**IN ILLINOIS . . .** *while net listings are not illegal, they are considered undesirable and potentially unethical: the risk of fraud involved makes them incompatible with the service-based nature of the brokerage business. Most REALTOR® groups will not accept them.*

**5. Option listing**

The broker has the right to purchase the listed property at any time during or at the expiration of the listing.

There is a possibility of conflict of interest with an option listing so they should usually be avoided.

**IN ILLINOIS . . .** *brokers and sellers may sometimes enter into guaranteed sale agreements, in which the broker agrees to buy the listed property if it fails to sell before the end of the listing period. Typically, these guarantees are made to the seller as an inducement to list the property with the broker. In Illinois, any such agreement must be in writing and is subject to other legal requirements. A guaranteed sales agreement differs from an option listing because it binds the broker to purchase the listing at the end of the listing period at a previously agreed upon price.*

**B. Special listing provisions**

**1. Multiple listing**

A multiple-listing clause in a listing agreement is required by members of a multiple-listing service (MLS), a marketing organization whose broker members make their exclusive listings available to other brokers and gain access to other members' listed properties. The contractual obligations of MLS organizations vary.

**IN ILLINOIS . . .** *An offer of sub agency may not be made through an MLS in Illinois. Cooperating brokers function as buyer brokers.*

**C. Expiration of Listing Period**

**IN ILLINOIS . . .** *the failure to specify a definite termination date in a listing agreement is grounds for suspension or revocation of a real estate license. Illinois law forbids automatic extension clauses.*

**D. Broker Protection Clause**

1. Provides that the property owner will pay the listing broker a commission if, within a specified number of days after the listing expires, the owner transfers the property to someone the broker originally introduced to the owner.
2. Protects a broker who was the procuring cause from losing a commission because the transaction was completed by the seller and buyer after the listing expired.
3. The protection clause is void if after expiration of the agreement the seller lists the property with another broker.

**II. The Listing Process**

**A. Pricing the Property**

While it is the responsibility of the broker or salesperson to provide professional guidance, advice and assistance, it is the seller who must determine the listing price for the property.

**1. Comparative market analysis (CMA)**

A CMA is a comparison of the prices of properties recently sold, properties currently on the market and properties that did not sell and is made with properties similar in location, size, age, style and amenities.

- a. Although a CMA is not a formal appraisal, the salesperson uses many of the same methods and techniques an appraiser uses.

**B. Calculating Sales Price, Commission and Net to Seller**

(Show student how to do the calculations, see Math Concepts in textbook)

**C. Information Needed for Listing Agreements**

The information needed for a listing agreement generally includes

- the names and relationship of the owners.
- the street address and legal description of the property.
- the size, type, age and construction of improvements.

- the number of rooms and their sizes.
- the dimensions of the lot.
- details about any existing loans and the possibility of seller financing.
- the amount of any outstanding special assessments and whether they will be paid by the seller or assumed by the buyer.
- the zoning classification of the property.
- the current (or most recent year's) property taxes.
- neighborhood amenities.
- any real property to be removed from the premises.
- any personal property to be included in the sale for the buyer.
- any additional information that would make the property more appealing and marketable.
- any required disclosures concerning agency representation and property conditions.

**IN ILLINOIS . . .** *as in most other states, agents must disclose the identification of their clients whose interests they legally represent. Brokers are required to inform the seller of the brokerage's policies about cooperating with other brokers including the manner in which any commission split will be made. Illinois law also requires seller disclosure of property conditions.*

### **III. The Listing Contract Form**

**IN ILLINOIS . . .** *the following disclosures must be included in listing contracts:*

- **Disclosure of material facts.** *A licensee must not withhold material facts of which he or she has knowledge concerning a property. "Material facts" are any facts on which a reasonable person would base a contractual decision. Licensees are not required to violate any duty imposed by the laws of agency.*
- **Disclosure of interest.** *A licensee must disclose in writing to the parties to the transaction his or her status as a licensee and any direct or indirect interest he or she has or may have in the subject property or in any third party provider of services offered to the client.*
- **Disclosure of special compensation.** *A licensee is prohibited from accepting finder fees, commissions, discounts, kickbacks, or other compensation from any source other than another licensee without full disclosure in writing to all parties.*

- **Earnest money and purchaser default.** *If a written listing includes a provision that the seller will not receive the earnest money deposit if the purchaser defaults, it must be emphasized in letters larger than those otherwise used in the listing agreement.*
- **Disclosure of property condition.** *The law in Illinois requires seller disclosure of property conditions. It is the licensee's responsibility to see that the seller complies with these disclosures. The disclosure form must be given to the buyer before an offer is made. If a negative disclosure is made after contract formation, the buyer has three days in which to rescind the contract.*

**IN ILLINOIS...***Illinois law prohibits the licensee from making any addition to, deletion from, or alteration of a signed, written listing without the written consent of the principal. The licensee must give a true copy of this signed listing agreement to the principal within 24 hours of execution.*

**A. Listing Agreement Issues**

Regardless of which standard form of listing agreement is used, the same considerations arise in most real estate transactions.

**IN ILLINOIS . . .** *there is no required state form for any real estate contract. However, all written exclusive listing agreements must include:*

- *list price of the property.*
- *agreed upon basis of or amount of commission and the time of payment.*
- *time duration of the agreement.*
- *names of the broker and seller.*
- *address or legal description of the property.*
- *minimum services.*
- *statement of nondiscrimination.*
- *statement regarding antitrust.*

*Licensees may not obtain written listings that contain blank spaces to be filled in later.*

**1. Type of listing agreement**

The contract may be an exclusive-right-to-sell listing (the most common type), an exclusive-agency listing, or an open listing.

- The type of listing agreement determines the extent of a broker's authority to act on the principal's behalf.
- Most MLSs do not encourage open listings to be posted in the system.

**2. Broker's authority and responsibilities**

The contract should specify the broker's responsibilities about handling client funds, state the broker's responsibility toward the maintenance of the property, as well as clearly state whether the broker may:

- place a sign on the property and advertise and market the property.
- make the listing available to buyer's brokers through an MLS and the Internet.
- show the property at reasonable times and upon reasonable notice to the seller.
- accept earnest money deposits on behalf of the seller.

Without the written consent of the seller, the broker cannot undertake any of these or other important activities.

**3. Names of all parties to the contract**

Anyone who has an ownership interest in the property must be identified and should sign the listing to validate it.

**IN ILLINOIS . . .** *if a married couple is living in the listed property, both spouses must sign the listing even if only one owns the property due to existence of homestead rights. If the property is in the possession of a tenant, that should be disclosed and instructions given on how the property is to be shown to a prospective buyer.*

**4. Brokerage firm**

The brokerage company name, the employing broker and the designated agent of the sponsoring broker are all identified.

**5. Listing price**

Proposed gross sales price

**6. Real property and personal property**

Any personal property that will be left with the real estate or removed when it is sold must be explicitly identified.

**7. Leased equipment**

If any leased equipment will be left with the property, the seller must notify the equipment's lessor of the change of ownership.

**8. Specific identification of the property**

**9. Proposed dates for closing and buyer's possession**

**10. Closing issues**

Details and logistics of the closing

**11. Evidence of ownership**

Title insurance policy or an abstract and legal opinion

**12. Encumbrances**

Identity of liens; responsibility for payment

**13. Homeowner warranty program (if applicable)**

**14. Commission**

Form, amount, when earned and when payable and policy regarding splits with coop brokers.

**IN ILLINOIS . . .** *written listing agreements must state that no change in the amount of the commission or time of payment will be valid or binding unless the change is made in writing and signed by the parties.*

**15. Termination**

A listing contract must provide a termination date.

**16. Broker protection clause**

**17. Warranties by the owner with reference to type of deed that will be used**

**18. Idemnification (hold harmless) wording**

**IN ILLINOIS . . .** *a client shall not be vicariously liable for the acts or omissions of a salesperson or broker in providing brokerage services for or on behalf of the client.*

**19. Nondiscrimination (equal opportunity) wording (required by federal law)**

**IN ILLINOIS . . .** *all written listing agreements must clearly state that it is illegal for either the owner or the broker to refuse to sell or show property to any person because of race, color, religion, national origin, sex, handicap, or familial status.*

**20. The signatures of the parties**

**21. The date the contract is signed**

**IV. Buyer Agency Agreements**

**A.** A buyer agency agreement is an employment contract under which:

- the broker is employed as the buyer's agent.
- the buyer is the principal.
- the purpose is to find a suitable property for the buyer.

**1.** An agency agreement gives the buyer a degree of representation possible only in a fiduciary relationship.

**2.** A buyer's broker must protect the buyers' interests.

**B. Types of Buyer Agency Agreements**

**1. Exclusive buyer agency agreement**

The buyer is legally bound to compensate the agent whenever the buyer purchases a property of the type described in the contract. The broker is entitled to payment regardless of whether he or she locates the property.

**2. Exclusive-agency buyer agency agreement**

The broker (as exclusive agent) is entitled to payment only if he or she locates the property the buyer ultimately purchases. The buyer is free to find a suitable property without obligation to pay the agent.

**3. Open buyer agency agreement**

A nonexclusive agency contract under which the buyer is obligated to compensate only the broker who locates the property the buyer ultimately purchases.

**C. Buyer Representation Issues**

1. The licensee should make the same disclosures to the buyer that the license would make in a listing agreement.
2. The licensee should explain the forms of agency available and the parties' rights and responsibilities and services provided under each type.
3. Compensation issues need to be addressed. Buyer's agents may be compensated in the form of a flat fee for services, an hourly rate or a percentage of the purchase price.
  - a. The source of compensation is not the factor that determines the relationship. Either the buyer or the seller may compensate a buyer's agent.

**V. Termination of Broker Employment Agreements**

An employment agreement may be canceled:

- when the agreement's purpose is fulfilled.
- when the agreement's term expires without a successful transfer.
- if the property is destroyed or its use is changed by some force outside the owner's control, such as a zoning change or condemnation by eminent domain.
- if title to the property is transferred by operation of law, as in the case of the owner's bankruptcy.

- if the broker and client mutually agree to end the agreement or if one party ends it unilaterally (in which case he or she may be liable to the other party for damages).
- if either party dies or becomes incapacitated.
- if either the broker or client breaches the contract, the agreement is terminated and the breaching or canceling party may be liable to the other for damages.

### **Discussion Questions**

1. Why is the exclusive-right-to-sell listing the most advantageous for the seller?
2. How does an exclusive-agency listing affect the listing broker? When might you consider taking this type listing?
3. What protection does an open listing give a broker?
4. How are net listings unethical or possibly fraudulent?
5. How does the multiple listing system work in your area?
6. Discuss the buyer's brokerage agreement as it compares with a traditional seller's listing. How is the information required similar? How is the relationship between a buyer's broker and a buyer/client similar to and different from that between a seller's broker and a seller?

### **Classroom Exercises**

1. Have the students discuss the advantages and disadvantages of each of the three major listing agreements. Have someone write these items on the board.
2. Obtain copies of listing forms in use in your area for discussion of the information needed for a listing. Have the students mark their copies of the forms in class as they discover the items listed in the text.
3. Have each member of the class attempt to fill out a blank listing form for his or her place of residence. This would include not only the terms on which the student would "sell" the property, but also require the completion of the appropriate data for the property (for example, the size of the improvements, the number and sizes of the rooms, information about the property's neighborhood, amenities). Have them report back to the class on the relative ease or difficulty with which all of this information can be obtained.