**Unit 6 Outline**

**Brokerage Agreements**

**Learning Objectives**

When you have completed this unit, you will be able to accomplish the following.

* Identifythe different types of listing and buyer representation agreements and their terms.
* Explainthe listing process and the parts of the listing agreement.
* Distinguishamong the characteristics of the various types of listing and buyer representation agreements.
* Describethe ways in which a listing may be terminated.

**Why Learn About Brokerage Agreements?**

A listing agreement is an employment contract that creates a special agency relationship between the property owner and the managing 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 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 and your clients.

**Suggested Items to Bring To Class**

* Blank brokerage agreements, particularly a(n)
  + exclusive-right-to-sell listing;
  + exclusive-agency listing;
  + open listing;
  + listing sheet from the local multiple-listing service (MLS);
  + exclusive buyer agency agreement;
  + exclusive agency buyer agency agreement; and
  + open buyer agency agreement
* Completed broker employment contracts
* A sample comparative market analysis and a “listing presentation packet” (the self-marketing materials shown to prospective clients)

**Lecture Outline**

*IN ILLINOIS . . . A brokerage agreement is either a written or oral agreement between a sponsoring broker and a consumer for licensed [real estate] activities to be provided to a consumer in return for compensation.*

*IN ILLINOIS . . . All exclusive brokerage agreements must be in writing. Each broker agreement must clearly state that it is illegal for either the owner or the broker to refuse to display or sell to any person because of one’s membership in a protected class.*

1. Listing Agreements with Sellers

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

a. 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.

b. Exclusive-right-to-sell agreements offer 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.

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

3. Open listing—The 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.

a. 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 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.*

II. The Listing Process

A. Listing Appointment

1. Ongoing Communication

B. Pricing the Property—Comparative Market Analysis (CMA)

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

2. A CMA is a comparison of the prices of properties recently sold.

3. The seller’s CMA is based on

a. recently closed properties (solds),

b. properties currently on the market (competition for the subject property), and

c. properties that did not sell (expired listings in the area).

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

C. Information Needed for Listing Agreements

1. Once listing price is determined, broker must get detailed information about the property

2. Gathering accurate facts mean most contingencies can be anticipated

3. Measuring structures and room count

D. Calculating Sales Price, Commission, and Net to Seller

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.*

E. Disclosures

1. Agency relationships

2. Property condition

3. Disclosure of no agency

III. The Listing Agreement

A. MLS Clause

A *multiple listing clause* may be included in an exclusive listing. It is used by brokers who are members of a multiple listing service (MLS).

B. Disclosures

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

* Disclosure of material facts. *Licensees must not withhold material facts of which they have 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. *Licensees must disclose in writing to the parties to the transaction their status as licensees and any direct or indirect interest they have or may have in the subject property or in any third party provider of services offered to the client.*
* Disclosure of special compensation. *Licensees are 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 addition, a lead paint disclosure is required for any property built before 1978, and a radon disclosure also is required of the seller.*

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.*

C. 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 with a definite termination date,*
* *names of the broker and seller,*
* *signatures of both broker and seller,*
* *identification of the property involved (address or legal description of the property),*
* *statement of nondiscrimination,*
* *the duties of the listing broker*, and
* *statement regarding antitrust.*

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

1. Type of listing agreement

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

b. The type of listing agreement determines the extent of a broker’s authority to act on the principal’s behalf.

c. Most MLSs do not encourage open listings to be posted in the system.

2. Broker’s authority and responsibilities

a. 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:

(1) place a sign on the property and advertise and market the property,

(2) make the listing available to buyer’s brokers through an MLS and the internet,

(3) show the property at reasonable times and upon reasonable notice to the seller,

(4) use social networking, or

(5) accept earnest money deposits on behalf of the seller.

b. 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

a. 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

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

5. Listing price

a. The listing price is the proposed gross sales price.

6. Real property and personal property

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

7. Leased equipment

a. 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

a. The closing issues include the details and logistics of the closing.

11. Evidence of ownership

a. Evidence of ownership includes a title insurance policy or an abstract and legal opinion.

12. Encumbrances & Zoning

a. Identity of liens; responsibility for payment

13. Homeowner warranty program (if applicable)

14. Commission

a. The form and amount of commission are important to consider. When the commission is earned and when it is payable also must be determined. Be sure to discuss a policy regarding splits with cooperating 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. Antitrust wording

16. Termination

a. A listing contract must provide a termination date.

17. Broker protection clause

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

19. Idemnification (hold harmless) wording

IN ILLINOIS . . . *A client shall not be vicariously liable for the acts or omissions of a 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, disability, or familial status.*

20. The signatures of the parties

21. The date the contract is signed

IV. Minimum Services

A. All exclusive brokerage agreements must specify that the sponsoring broker, through the sponsored licensees, must provide at the very least the following required services

1. Accept delivery of and present to the client all offers and counteroffers to buy, sell, or lease the client’s property or the property the client seeks to purchase or lease.

2. Assist the client in developing, communicating, negotiating, and presenting offers, counteroffers, and notices that relate to the offers and counteroffers until a lease or purchase agreement is signed and all contingencies are satisfied or waived.

3. Answer the client’s questions relating to the offers, counteroffers, notices, and contingencies.

B. The signatures of parties

C. The date the contract is signed

D. Additional Information

E. Broker protection clause

V. Buyer Agency Agreements

A. A buyer agency agreement is an employment contract under which the

* broker is employed as the buyer’s agent,
* buyer is the principal, and
* 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. In this type of agreement, buyers are entitled to payment regardless of whether they locate the property.

2. Exclusive-agency buyer agency agreement

Brokers (as exclusive agents) are entitled to payment only if they locate 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.

VI. Qualifying Buyer Services

A. The buyer’s agent provides the following services throughout the real estate transaction:

1. Needs Assessment—The agent determines and evaluates the needs and wants of the buyer.

2. Property Selection—The agent locates the best property for the buyer by notifying buyers of new listings and for sale by owner properties. Remember, property selection need not be limited by price. In today’s market, list prices can often be negotiated down.

3. Viewing Properties—The agent provides an objective evaluation of the property and shows buyers how to compare properties. The agent discloses material facts that are pertinent to the property.

3. Negotiate—The agent should strategize with the buyer, suggesting techniques that strengthen the buyer’s position. Then the agent should implement them on the buyer’s behalf. The agent should also provide price counseling and prepare a comparative market analysis (CMA) on the property the buyer is considering.

4. Follow-Up—The agent resolves any issues that could prevent a closing from occurring. The agent should provide ongoing communications with the client, preferably by e-mail for maintaining records.

VII. The Buying Process

A. Preparing an offer

1. After the buyers have found the right property, the next step is to prepare and negotiate an offer. The buyer’s agent must prepare a CMA to establish a price for the buyer to offer. Factors to take into consideration include:

2. Property condition—Does the property need a lot of repairs?

3. Length of time on the market—This indicates whether there is a slow market, level of inventory, or potential problem with the property.

4. Supply and demand—When supply increases and demand remains stable, prices go down; when demand increases and supply remains stable, prices go up.

5. Seller’s motivation—Is the property in distress, pre-foreclosure, or requiring a short sale?

6. Terms and contingencies—The fewer the contingencies, the stronger the offer, making it more attractive to the seller or bank (if property is bank owned or requires bank approval for a short sale).

B. Contemporaneous (Simultaneous) Offers

IN ILLINOIS . . . *The buyer agent is obligated to keep confidential all confidential information received from the client.*

*The buyer agent does not breach a duty or obligation to the client by showing alternative properties to prospective buyers or tenants, by showing properties in which the client is interested to other prospective buyers or tenants, or by making or preparing contemporaneous offers or contracts to purchase or lease the same property.*

*Licensees must provide written disclosure to all clients for whom the licensee is preparing or making contemporaneous offers or contracts to purchase or lease the same property, and they shall refer to another designated agent any client that requests such referral.*

VIII. Termination of Broker Employment Agreements

A. An employment contract may be cancelled

1. when the agreement’s purpose is fulfilled

2. when the agreement’s term expires without a successful transfer

3. if the property is destroyed or its use is changed by some force outside the owner’s control, such as zoning change or condemnation by eminent domain

B. An employment contract may be cancelled

1. if either party dies or becomes incapacitated

2. if either the buyer’s broker or client breaches the contract, the agreement is terminated and the breaching or canceling party may be liable to the other for damages

IX. Expiration of a Brokerage Agreement

A. Amendments to Illinois Real Estate License Act of 2000 require written brokerage agreements to either provide for automatic expiration within a certain time period or allow client to terminate annually by providing 30 days written notice.

B. Listings and buyer agency agreements may be terminated for the same reasons as any other agency relationship.