

Chapter 25

The Exclusive Right to Sell Listing Agreement (Brokerage Engagement)

INTRODUCTION

To put together an inventory of property to sell, brokers and affiliated licensees must acquire listings. A listing agreement, a type of brokerage engagement, is the contract of employment between the seller and the broker. The types of listing contracts are: Exclusive Right to Sell, Exclusive Agency, and Open Listing. The Exclusive Right to Sell agreement is the most frequently used. An earlier chapter discussed each of these listing agreements.

Every real estate listing involves at least two parties, the seller and the real estate broker. Under the provisions of Georgia licensing law, only a broker can act as an agent to list, rent, or sell another person's real estate. Although an affiliated licensee may negotiate the listing with the seller, the listing is always in the name of and the property of the broker, never the affiliated licensee.

In the Exclusive Right to Sell Listing, one broker is the sole agent of the seller and receives the exclusive right to sell his or her property. Under this form of listing agreement, the seller can sell the property personally, but he or she is obligated to pay the broker's commission if a buyer purchases the property from the seller during the term of the agreement. No matter who sells the property, the broker receives a commission from the seller. This chapter considers the components of the Exclusive Right to Sell Listing Agreement on a clause by clause basis and presents an in-depth analysis of each clause. The comments reflected in this chapter are a summary of a typical listing agreement. The listing agreement form used by a specific brokerage firm may have perfectly acceptable variations.

BEGINNING DATE AND THE LEGAL DESCRIPTION

The language in the agreement determines the day that the listing begins. If the listing period does not start on the day the agreement is signed, then it must clearly state on what other date it starts. The legal description section of the listing agreement requests information about the following items:

	Land Lot, District (or Georgia Militia District), and Section State and County Lot, Block, Unit, and Subdivision Street Address City, State and Zip Code The plat as recorded in Plat Book _____, Page _____, _____ County Records.	
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In the eastern portion of the state, counties do not have land lots or districts, and only the northwest portion of the state has sections. Although courts in some cases have accepted a street address as sufficient to locate and identify the property in a listing agreement, a complete legal description makes the agreement less open to challenge. The seller's warranty deed usually contains the most acceptable form of

the legal description and is therefore useful for writing listing agreements and sales contracts, unless some portion of the property identified in the deed has been sold or subdivided since the creation of that deed, or unless the seller is selling only a part of the parcel described in the deed.

THE EXCLUSIVE RIGHT TO SELL CLAUSE

The exclusive right to sell clause contains language such as the following:

	<i>In consideration of the undersigned Broker's agreement to act as a limited agent for and on behalf of the undersigned Seller or legal representative thereof (hereinafter "Seller") to use Broker's efforts to sell the Property within the terms of this Agreement, I, the undersigned Seller, do hereby authorize and grant to Broker the exclusive right and power . . . to sell the Property described below. . . ."</i>	
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This and other contract provisions included in this manual are examples only. Different transactions demand different language. Licensees must seek the approval of their brokers before using a stipulation from this manual in an actual contract.

THE LISTING PERIOD CLAUSE

All listings must specify a definite period of time during which the seller employs the broker. In order to avoid potential problems concerning the listing period and to meet the requirements of Georgia licensing law, each exclusive listing agreement must clearly set forth a definite date on which the listing will end. If the listing agreement does not specifically identify the date on which the listing expires but identifies the number of days over which the listing agreement will be in effect, such as 120 days, the day on which the listing begins counts as the first day. The listing period clause can take the following form:

	<i>In consideration of the undersigned Broker's agreement to act as a limited agent for and on behalf of the undersigned Seller or legal representative thereof (hereinafter "Seller") to use Broker's efforts to sell the Property within the terms of this Agreement, I, the undersigned Seller, do hereby authorize</i>	
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	<i>and grant to Broker the exclusive right and power from the ____ day of _____, 20____, until 12 o'clock midnight the _____ day of _____, 20____, to sell the Property described below. . . ."</i>	
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At the end of the listing period, the owner does not renew the agreement by simply initialing it. Listing renewals must appear in a new listing agreement or in an addendum to the existing listing agreement extending the listing period.

THE LIST PRICE

The clause identifying the listing price usually takes a form similar to the following:

	<i>"at a price of \$ _____ or any other price acceptable to Seller."</i>	
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While it is the responsibility of the broker or affiliated licensee to advise the seller in setting the listing price, it is ultimately the seller who must determine that price. Since the seller may not have enough information on which to make an informed decision about a fair market price, the broker or affiliated licensee may offer his or her knowledge, information, and expertise in this area by suggesting a list price and an estimated sales price from market and/or cost data. [See Part Nine "Pricing Property" for a discussion of establishing the list price and an estimated sales price for the property.] However, the owner may wish to have the property appraised by an independent appraiser to assist in establishing market value. The affiliated licensee and the broker cannot appraise the property. The law permits only a registered, licensed, or certified appraiser to do so. Once the appraiser estimates the market value of the property or the licensee estimates the anticipated sales price, then the licensee can estimate how much money the seller will net from the sale. This calculation involves the deduction of the outstanding balances of any loans or other liens on the property, the broker's commission, the closing costs, and any discount points paid by the seller from the estimated sales price. A discussion of

estimating the seller's net proceeds at closing appears in the section on the Closing in this guide.

THE BROKERAGE COMMISSION CLAUSE

The brokerage commission clause in the listing agreement can take the following form:

	<p><i>Seller agrees to pay to Broker a sales commission of _____ % of the sales price or \$ _____, at closing, in the event that during the term of this Agreement: (1) Broker procures a person ready, willing, and able to purchase the Property at the price described above; or (2) Seller enters into an enforceable contract for the sale or exchange of the Property with any Buyer, without exclusion as to any Buyer, whether by or through the efforts of Broker or any other person, including Seller.</i></p>	
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The amount of the brokerage commission is a matter of agreement between the broker and the seller. There is no such thing as minimum commission rate, maximum commission rate, regulated commission rate, nor fixed commission rate. The broker may set minimum commission rates that he or she will authorize its affiliated licensees to accept for the company, but those rates do not apply to other companies. If a prospective seller wants to negotiate a rate lower than the broker has authorized the affiliated licensee to accept, the affiliated licensee must convey the seller's wishes to the broker for negotiation and a final decision. Price fixing occurs when brokers conspire to set commission rates for their services rather than letting competition in the open market establish the commission rates. Price fixing is a violation of federal antitrust laws, and the penalties for such violations are severe. People who fix prices may face civil and criminal prosecution.

THE SAFETY CLAUSE

The safety clause in a listing agreement, such as the one that follows allows the broker to collect a commission even though the property sells after the listing ended if the buyer was exposed to the property during the term of the listing.

<i>Seller agrees to pay to Broker such commission, if within _____ (____) days after termination of this agreement, the Property is sold, exchanged, or conveyed to any person to whom the Property had been submitted during the term of this agreement, unless the Property is sold to such Buyer during such _____ day period by or through another licensed real estate Broker with whom Seller had made an exclusive listing contract.</i>

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THE TERMS AND CONDITIONS

The listing agreement may also contain special terms and conditions or special stipulations. While a preprinted listing agreement form usually contains most of the information necessary to create a listing agreement, there is often a need to include certain special stipulations and to explain clearly the terms and conditions under which the property is to be sold. When drafting special stipulations into the listing agreement, note that generally speaking, handwritten wording takes precedence over typewritten wording, which takes precedence over preprinted wording.

As part of the discussion of the listing agreement, the licensee advises the seller of his or her duty to disclose any defects in the home that are not readily apparent by an ordinary inspection of the property by a prospective buyer. It is common practice for the seller to complete and sign a property disclosure form at the time of the signing of the listing agreement. At the same time, the licensee obtains the seller's written permission for the lender to disclose detailed information on any outstanding loans against the property.

THE PERMISSION TO ADVERTISE THE PROPERTY CLAUSE

Georgia licensing law requires that a broker have the seller's written permission to advertise his or her property for sale. Below is a sample clause that identifies the broker's right to advertise the property and to place a "for sale" sign on the property.

<i>Seller hereby grants permission for Broker to advertise the property for sale and for the Property to be photographed and for such photograph to be used promoting the sale. Broker is also hereby authorized to place Broker's "For Sale" sign on the property.</i>

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If the broker takes an oral listing, he or she must get the seller's written consent before posting a "For Sale" sign. After a listing ends, the licensee must promptly remove the "For Sale" sign. Local ordinances control the size and placement of signs and usually prohibit licensees from placing a real estate sign on street or highway rights-of-way.

THE SELLER COOPERATION CLAUSE

While the wording may vary in form listing agreements, the seller usually makes the following legally binding promise:

	<i>Seller agrees to refer all inquiries concerning the sale of the Property to Broker during the term of this agreement.</i>	
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WARRANTY OF TITLE

In a clause such as the one following, the seller warrants that he or she owns the property and has title to it:

	<i>Seller warrants that Seller has title to the Property described herein and/or has full authority to enter into this agreement.</i>	
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The Seller's warranty deed (by which he received title) should provide the ownership information. (The grantee named in the deed is the owner.) If the seller is unable to furnish a copy of the warranty deed, or if names have changed because of divorce, marriage, or legal name changes, the affiliated licensee should seek the advice of the broker.

ACKNOWLEDGMENT OF RECEIPT OF A COPY OF THE LISTING AGREEMENT

The seller of the property must receive and must acknowledge the receipt of a copy of the listing agreement. As with any contract, a listing agreement requires an offer

and acceptance, and communication of that acceptance to the party making the offer. For this reason, all parties signing a listing agreement must receive a copy of the agreement at the time they sign. Failure to furnish a copy of a signed listing agreement to each person signing the agreement can invalidate the broker's right to collect a commission and is also in violation of Georgia licensing law.

THE SIGNATURE SECTION

The signature section of the listing agreement contains lines for the signatures of the two parties to the agreement, the owner(s) and the broker. All parties who own the property must sign the listing agreement. The names of the owners appear on the warranty deed. "Owners" may include:

	(a)	HUSBAND AND WIFE - When husband and wife hold title, each one must sign the listing agreement. This practice avoids later complications when one party refuses to perform and uses as the basis of their refusal the fact that they did not know the property was being sold because he or she did not sign a listing agreement.
	(b)	SOMEONE SIGNING FOR THE SELLER - When the seller authorizes someone to sign the listing by a power of attorney, the licensee must get a copy of the power of attorney, attach it to the listing agreement, and make it a part of the agreement by reference.
	(c)	CORPORATION - When a corporation owns property, the listing agreement must have the corporate seal affixed or the signature of two authorized officers in the absence of the corporate seal.
	(d)	SOLE PROPRIETOR OF A FIRM - If a sole proprietor owns the property, he or she must sign the listing agreement as an individual.
	(e)	PARTNERSHIP - In a partnership, one general partner's signature may bind all other partners to the listing agreement. However, good practice is to get the signatures of all partners (or in a limited partnership, at least all of the general partners).

The signature line for the broker requires either the signature of the broker or of the broker's agent. An affiliated licensee can sign the listing only if the broker gives written authority to its sales associates to sign listing agreements. The symbol (L.S.) printed next to the signature lines is a Latin abbreviation which translates as Line Seal and has the same effect as a seal. The law considers a contract under seal as a contract entered into with more solemnity, and consequently of higher dignity, than ordinary contracts. Sealed contracts do not have the same degree of "higher dignity" they once had under Georgia law, but the statute of limitations (the time allowed to bring a lawsuit) is longer with a sealed contract than with an unsealed contract.