16. LISTINGS AND OPTIONS

I. The Listing Contract

A. A listing is a bilateral agreement between the listing broker (the agent) and the seller (the principal).

B. The Seller agrees to:
   1. Allow the agent to place the property on the market and seek a buyer.
   2. Pay a commission if a ready, willing, and able buyer is found who offers the terms given in the listing agreement or agrees to other terms through an accepted Real Estate Purchase Contract.

C. The Broker agrees to:
   1. Place the property on the market.
   2. Make a reasonable effort to locate a ready, willing, and able buyer.

D. The seller, not the real estate agent, sells the property.
   1. A listing is not an offer; rather, it is an invitation for offers.
   2. Typically, the offer is initiated by the buyer in the form of a Real Estate Purchase Contract in response to the listing.
   3. By law, the agent must present all offers promptly. <u>See</u> Utah Code Annotated § 61-2f-308(2)(a)(i).
   4. The seller can refuse any offer, even if it meets the terms stated in the listing.
   5. The agent has *earned* a commission when a ready, willing, and able buyer is located and makes an offer that meets all the requirements specified in the listing agreement, regardless of whether the seller sells or not. The broker has also *earned* the commission when he produces a ready, willing, and able buyer at other terms the seller agrees to in the Real Estate Purchase Contract.

II. Types of Listings

A. **Open Listing**:
   1. Non-exclusive – meaning the seller can list with as many brokers as he wants to.
   2. Does not mean that *any broker* can find a buyer; only those who have signed listing agreements can do so.
   3. The broker who finds the buyer is paid the entire commission and is not required to share with other brokers.
   4. If the seller finds the buyer, no commission is owed to any of the listing brokers.
   5. Typically open listings are not allowed in the data base of the Multiple Listing Service.

B. **Net Listing**:
   1. The seller receives an agreed net amount from the sale. The broker receives everything over and above the net amount. For instance, if the seller wants $70,000 net from his home, and the agent sells the property for $95,000, then the seller would get the $70,000 and the agent would receive $25,000 as a commission.
   2. Because the opportunity exists for agents to receive unconscionable commissions, and the possibility of artificially inflating market values, net listings are illegal (or prohibited) in Utah, (R162-2f-401b(8)) and either illegal or discouraged in almost all states.

C. **Exclusive Agency Listing**:
   1. The commission is paid exclusively to the listing broker and there can be only one listing broker.
   2. The seller reserves the right to find a buyer himself, sell the property, and not pay a commission to the listing broker.

D. **Exclusive Right-to-Sell Listing**:
The listing broker has an exclusive right to the commission regardless of who locates a buyer, including the seller.

E. **Commissions**:
The listing broker can share the commission with other brokers through co-broker agreements. A co-broker agreement is when brokers from various brokerages agree that if a non-listing office, usually referred to as the selling office, finds the buyer, the listing broker will give a percentage of the total commission to the selling office. Principal brokers who join the national, state, and local Board of REALTORS® automatically enter into a co-broker agreement with all other principal brokers who are also members. Most boards require that all agents of a member principal broker also join the board. The cost is several hundred dollars, usually $400 - $500. Check your local board for exact costs. If a listed property doesn't get sold through the brokerage before a foreclosure sale is held, no commission will be earned by the brokerage.

III. Miscellaneous Items

A. **Single Party Exclusive Right-to-Sell Listing**:
This listing is exclusive to one broker for one specified buyer. It sometimes has a time-clause associated with it.

B. **Exclusive Right-to-Sell with Exclusions**:
The seller is allowed to exclude certain names from the listing. If one of the excluded parties purchases the property, the seller does not have to pay a commission. It sometimes has a time limitation placed on the exclusions. For instance, the listing may be for six months, but the exclusions are removed after 30 days.

C. Determination of who actually earns the commission. There is sometimes a dispute concerning which selling agent actually earned the commission. One of the following doctrines is used to settle such a dispute.
   1. **"To and Through":** The agent who first takes the buyer to and through the property has the right to the selling portion of the commission if the buyer purchases the property.
   2. **Procuring Cause**: The agent who initiates an uninterrupted chain of events that ultimately leads to closing has the right to the selling portion of the commission. The uninterrupted chain of events usually begins with the broker introducing the buyer to the property, and the courts will weigh that factor heavily. See *Frederick May & Company v. Dunn,* 368 P.2d 266, 269 (Utah 1962). While, the courts tend to favor procuring cause, the Professional Standards Committee of the Board of REALTORS® considers both.

D. **Protection Clause**: To protect the real estate agent from a seller who might try to induce a potential buyer to wait until the listing has expired, the safety clause in a listing indicates that a commission is owed the agent if any buyer who was shown the property during the term of the listing purchases the property after the listing's expiration. This safety clause usually has a limited time frame (such as 120 days). To make the safety clause valid, the real estate agent must provide the seller with a list of protected names when the listing expires.

E. **Seller's Property Condition Disclosure**: This should be filled out by the seller at listing time. It should be reviewed and modified, if necessary, when an offer is accepted.
F. Be sure the listing information and Section 1.1-2 of the REPC are in agreement as to what's included in the sale.
G. When a seller and buyer are brought together, the one who sells or offers to sell is referred to as the "Vendor" and the one who buys or offers to buy is called the "Vendee."
H. **Estoppel certificate**: A legal instrument from the mortgagee setting forth the exact unpaid balance and other terms of a mortgage, such as its assumability. This document can be ordered by the court, but should be arranged for at the time a listing is taken. This is done by the mortgagor (borrower) signing a release form that allows the mortgagee (lender) to release loan information to the listing agent.
I. Listings are not assignable. A sales agent or associate broker cannot take his/her listings to the new office without the written rescission of the existing listing agreement which requires the signature of the listing broker and the seller.

IV. Options

An option is the purchased right of a buyer to purchase or not purchase a specified property during a stated period of time and for predetermined price and terms.

A. The seller is the "Optionor."
B. The potential buyer is the "Optionee."
C. The seller agrees to take the property off the market for the period of time stated in the option.
D. The buyer agrees to pay non-refundable consideration for the option.
E. An option is a unilateral contract until it is exercised, and it creates a contractual right. Once the option is exercised it becomes a bilateral contract.
F. The seller must sell if the buyer exercises his right during the term of the option.
G. The buyer does not have to purchase, but loses his consideration if he doesn't.
H. An option must contain the:
   1. Term (time period) of the option.
   2. Proposed purchase price - the price can be expressed as:
      a. A dollar amount.
      b. An amount based on an appraisal at the time the option is exercised, etc.
   3. Essential terms of the purchase, such as agreement by the seller to carry a contract, limitations on interest rate, number of years of the contract, etc.
   4. Amount of non-refundable consideration for the option.
I. **Uses for an option**:
   1. It may be used to secure the right to purchase a rental property that has not yet been completely built but is located next to a similar property that is presently being purchased. The buyer purchases the completed property with an option to buy the incomplete property when it is built.
   2. An option is used to lock-up a property while securing financing, zoning changes, other buyers, etc. If the optionee is unable to arrange things to his satisfaction, he simply lets the option period expire and forfeits the option money.
J. **Lease with an Option to Purchase**: An option sometimes contains a clause that prohibits the owner from selling the property during the term of the lease. The lessee, on the other hand, can exercise the option to purchase the property during or at the conclusion of the lease, as agreed upon in the option portion of the contract.

K. **Right of First Refusal**: A contractual stipulation that the owner must present all legitimate offers which the holder of the right of first refusal can then match or refuse until the property sells. This is an alternative for the same situations in which an option would be used.

LISTINGS AND OPTIONS TERMS TO KNOW

[ ] Estoppel Certificate
[ ] Exclusive Agency Listing
[ ] Exclusive Right-To-Sell
[ ] Lease with an Option to Purchase
[ ] Listing
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[ ] Open Listing
[ ] Option Contract
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[ ] Optionor
[ ] Procuring Cause Doctrine
[ ] Right of First Refusal
[ ] Safety Clause
[ ] To and Through Doctrine
[ ] Vendee
[ ] Vendor

LISTINGS AND OPTIONS QUIZ

1. Broker Bell entered into an agreement with Seller Samuels to market Samuels home and seek a buyer for him. The agreement stated that regardless of who found the buyer, Samuels would owe Bell a commission. What kind of a listing agreement is this?
   A. Exclusive agency listing
   B. Open listing
   C. Net listing
   D. Exclusive right-to-sell listing

2. Under an exclusive right-to-sell listing, a broker has earned a commission when:
   A. the property is listed
   B. the purchaser hands the broker an earnest money deposit
   C. a purchaser is found who is ready, willing and able to buy the property on the seller's terms
   D. title to the property is transferred at closing

3. Which of the following listings are considered illegal or prohibited?
   A. Net listing
   B. Exclusive right-to-sell listing
   C. Exclusive agency listing
   D. Open listing

4. The main difference between an exclusive right-to-sell listing and an exclusive agency listing is that with an exclusive agency listing:
   A. The listing broker cannot enter into a co-brokering agreement with another broker.
   B. The seller can find a buyer himself and sell the home without paying a commission.
   C. The listing broker cannot allow any of his sales persons to work on the listing.
   D. It is exactly the same as an exclusive right-to-sell; they are just two names for the same kind of listing.

5. Jeff paid Mike $750 for the right to buy or not buy his property. They each signed a contract to confirm their intentions. This is an example of a(n):
   A. Right of first refusal
   B. Exclusive agency
   C. Listing agreement
   D. Option

6. An agent is protected from the seller and buyer waiting until the listing expires to reach an agreement by which clause:
   A. Exclusivity clause
   B. Protection clause
   C. Option clause
   D. Procuring clause

7. Which of the following types of listings gives the greatest protection to the agent:
   A. Exclusive agency
   B. Open listing
   C. Exclusive right-to-sell
   D. Net listing

8. If the seller will not agree to an option, it might be a good time to use a(n):
   A. Lease/option
   B. Exclusive right-to-sell
   C. First right of refusal
   D. Net sale agreement

9. In an option, the optionee is:
   A. Buyer
   B. Seller
   C. Agent arranging the option
   D. Broker of the agent

10. The seller would like to list his home, but there are two parties he knows who might buy it. He doesn't want to pay a commission if either of these parties buy the home. This would be a good time for the agent to take a(n):
   A. Exclusive agency with exceptions
   B. Exclusive right-to-sell listing
   C. Net listing
   D. Exclusive right-to-sell with exclusions