2 HR Contract Basics
The Listing Contract

Table of Contents:

Page 2: Welcome Letter

Page 3: Renew Your License in 3 Easy Steps

Page 4 – 17: Course
Dear Licensed Agent:

As a licensee, you owe it to yourself to keep abreast of the changes in the industry. Some practices that were common in the past are now illegal. Others have become outdated and obsolete as changes continue to come to our industry.

This 2 HR Contract Basics: The Listing Contract Course has information concerning changes in laws and practices of the real estate business in Tennessee. This course will give you new insight into this ever-changing Real Estate industry.

As part of your continuing education requirements, this course has been approved by the Tennessee Real Estate Commission. Simply follow the instructions enclosed to fulfill the necessary requirements for the state.

We at D&D School of Real Estate have spent numerous hours collecting the information and data assembled on these pages. It is our hope that you find this course informative and helpful in your career. Any questions or comments will be most appreciated. Thank you for using D&D School of Real Estate as your provider of continuing education.

Sincerely,

[Signature]

President
RENEW YOUR REAL ESTATE LICENSE IN
3 EASY STEPS

STEP ONE

Study the manual at your own pace and complete the progress quizzes and the end of each section.

STEP TWO

Transfer all your answers to the answer sheet at the front of the manual, complete the additional information on the answer sheet then snail mail, scan and email or fax the answer sheet in for grading before your license deadline.

STEP THREE

Send your renewal fee to the state before your license deadline and be sure your E&O Insurance is up to date. You can renew your license online at www.apps.tn.gov/cirens

A licensed instructor will be available during normal business hours if you have any questions regarding the course material. No assistance on the final exam questions and answers can be given. For assistance call: 423-232-1811 or email your questions to admin@ddschoolofrealestate.com.

Work at your own pace! Complete the course and send in your answers for grading. We do the rest. We will notify the state of your successful completion of the course. Thank you for using D&D School of Real Estate.
CONTRACTS BASICS:  
THE LISTING CONTRACT

Contract Law Basics

A contract is a voluntary agreement or promise between legally competent parties to perform or to refrain from performing some legal act, and it must be supported by legal consideration. Contracts are expressed in writing or orally, or they are implied. For our purposes, in real estate we will only discuss contracts expressed in writing since the Statute of Frauds requires all listing contracts to be in writing in order to be enforceable in court.


(a) No action shall be brought:

- (1) To charge any executor or administrator upon any special promise to answer any debt or damages out of such person's own estate;
- (2) To charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;
- (3) To charge any person upon any agreement made upon consideration of marriage;
- (4) Upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one (1) year; or
- (5) Upon any agreement or contract which is not to be performed within the space of one (1) year from the making of the agreement or contract; unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party. In a contract for the sale of lands, tenements, or hereditaments, the party to be charged is the party against whom enforcement of the contract is sought.
The above excerpt from Tennessee Code, particularly paragraph (4) supports the necessity for real estate contracts to be in writing to be enforceable in court.

Contracts are either **bilateral** or **unilateral**. In today’s real estate business, most contracts are **bilateral**, meaning that all parties to the contract have made promises to the other party in exchange for a return promise. In this course, we will only discuss bilateral contracts.

Contracts are either **executory** or **executed**. An agreement becomes a contract when the parties have agreed to all the tenets of the contract in writing. At the time of acceptance, which is when an offer to purchase becomes a contract, the contract is said to be **executory**. This means the parties have agreed to all the promises but they are not yet fulfilled. Performance by one or more of the parties is required to complete the promises in the contract. Once all the promises are accomplished the contract is ready to be completed. Once completed it becomes an **executed** contract, meaning it is fully performed. In the case of a sale of real estate the deed has been exchanged for the valuable consideration that was promised in the contract.

Four contractual elements are necessary to ensure that the contract is valid. Those elements are:

1. **OFFER AND ACCEPTANCE**

   An offer is made by one party (offeror) with a request for something in exchange for the promises made in the offer.

   Acceptance is a promise by the second party (offeree) to be bound by the exact terms proposed by the offeror.

2. **REJECTION**

   The offer may be rejected, revoked or not answered (failure to accept) within the time frame allowed by the contract. Remember, a
counter offer is a rejection of the original offer by the offeree and therefore relieves the offeror from any obligation that may have been promised in the offer.

3. CONSIDERATION

Contracts must have some sort of valuable consideration to be valid. Valuable consideration is something of value. In real estate contracts we normally receive an earnest money deposit from the original offeror in the form of a check or possibly cash. We must realize that anything of value can and must be accepted from the offeror to be valid. A watch, car title or even livestock would be considered ‘valuable consideration’ and could validate a contract under this necessary element. It would be wise to further explain how the consideration will be cared for during the executory period of the contract. Most real estate practitioners are not prepared to handle valuable consideration unless it can be deposited in an escrow account.

4. LEGALLY COMPETENT PARTIES

Parties to the contract must be of legal age and of sufficient mental capacity to understand the actions and consequences of said contract. Sufficient mental capacity includes, such consideration as the party is not under the influence of drugs or any chemical substances as well as any mental health condition that would prohibit them from making an informed decision. Reality of consent is a legal term meaning the party is able to make a prudent and knowledgeable decision and that they weren’t deprived by a mistake, misrepresentation, fraud, duress or undue influence. Any of these situations could render the contract as invalid or voidable by one of the parties.
Contracts are further affected by the following condition:

**DISCHARGE**
Contracts may be discharged or terminated by any of the following:

*Performance of the contract:* This is obviously the best scenario. It means the deal will be closing.

*Assignment:* Contracts may be assigned or the rights may be transferred to another party (assignee).

*Breach of a contract:* Default by either the buyer or the seller could mean a breach of the contract. If there is a breach the other party has three options:

- Rescind the contract and give the valuable consideration back to the party that deposited it.
- Sue the other party for specific performance, that is force them to complete the contract.
- Sue the other party for compensatory damages.
- In the case of a seller in a real estate transaction there is an additional option and that is to declare the contract forfeited and retain the earnest money.

*Statute of Limitations:* This is the time frame in which to enforce the terms of the contract. This will vary under state law from contract to contract.

**Listing Contracts**

The listing contract is the beginning of a transaction which we all hope leads to the consummation of a sale and the paying of a commission. We will use the enclosed listing contract as our example for discussion. There is no specific form contract required under Tennessee Real Estate law. The

*D&D School of Real Estate                Contract Basics: The Listing Contract*
enclosed contract is an example and is similar to most listing contracts in the market place. Since this contract is between the broker and the seller there is no need to have a standardized contract in a given area. However, having a standardized contract does limit the need for interpretations throughout the industry.

First we will look at the different types of listing contracts:

**Exclusive Right to Sell Listing Contract**

This is an exclusive contract, meaning that the seller has hired one broker to market the seller’s property. In the event of a sale, regardless where the buyer came from, the broker is entitled to a commission. The sale must be accepted during the time of the contract. Even if the closing doesn’t occur until after the contract time has expired, if the acceptance happened within the contractual time frame the commission was earned. Most listing contracts indicate the commission is earned by the broker for producing a ready, willing and able buyer at terms acceptable to the seller. Tradition is such that we wait until the closing to collect the commission even though it is actually earned at an earlier date. This is the best listing contract for both the seller and the broker as it commits both parties to work towards the closing of a sale. The broker should work hard since he/she knows that their hard work will be rewarded in the event of a sale no matter who produces the buyer. The seller can also have more confidence in their broker and expect the marketing effort to be a 100% effort since the commission is assured in the event of a sale.

**Exclusive Agency Listing Contract**

In this listing agreement one broker is hired to market the property and is entitled to a commission if the buyer is procured by the broker or any other broker. However, the seller reserves the right to procure the buyer themselves and not pay a commission. The use of this contract has grown in recent years even though it restricts the efforts of the broker. Sellers may feel they can out sell the professional but the odds are against them and the
broker’s marketing effort may be limited due to the competition the seller represents.

Open Listing

An open listing is not really a contract. The seller agrees to pay a commission to whoever produces a buyer. There is no marketing effort on the part of any broker, which is certainly a detriment to the seller. Our primary work in the real estate industry is to market properties. To not take advantage of a professional approach to marketing but still agree to pay a commission is not a reasonable position for a seller to put himself in. In the event an agent does work in this area it would be wise to get a commission payment agreement from a seller prior to presenting their property to a prospective purchaser.

Contract Terms

A few more basics from contract law are listed in order here.

Contract law and Tennessee law require all listing contracts to have a beginning and ending date with no automatic renewal clauses.

62-312-(9)
(9) Using or promoting the use of any real estate listing agreement form, real estate sales contract form, or offer to purchase real estate form which fails to specify a definite termination date;

Contract law further requires that in order for a contract to be valid all the parties to the contract must sign it. This requires the principal broker of the office and the sellers to sign the contract before it is valid. This is not a standard practice in Tennessee but it should be for the protection of the broker and the broker’s agent.

Statute of Frauds requires the contract to be in writing.
State and Federal law requires certain disclosures such as lead-based paint, property condition report, synthetic stucco, septic tank, exterior injection well and others.

State law further requires agents to disclose any adverse conditions that may be present.

62-13-403(2)
(2) Disclose to each party to the transaction any adverse facts of which licensee has actual notice or knowledge

Working with the Listing Contract

Using the Exclusive Right to Sell Listing Agreement (p. 14), the following discussion will go line by line through the contract. At this point in the course you need to take the time to review each area of the contract and ensure that you understand it.

• Lines 1 through 4
  o Here we list the broker (listing company) and address, and the seller/owner and address.

• Lines 5 through 10
  o A seller grants the broker the exclusive right to sell the described property; the property address (sufficient legal description in Tennessee); and the deed book, and page the property is recorded in. County.

• Line 11
  o The listing price.

• Line 12
  o Term or length of the contract. Contracts must have a beginning and ending date to be valid.
• **Lines 13 through 19**
  o This is commonly referred to as the “broker protection clause”. This paragraph insures the broker’s commission if the property is sold to any party directly or indirectly introduced to the property during the listing period. There are no standards as to how the proof of introduction is to be obtained or if there is a need for any records to prove introduction. To prove the introduction it would be wise for an agent to keep a list of all parties the property was shown to during the listing period. This may be the proof needed to enforce this paragraph in a court of law. Further, there is a cancellation fee the broker may charge to release the seller from this agreement. The last sentence negates the entire clause should the property be listed with another licensed broker.

• **Line 20**
  o Predetermined delivery date of the property by the seller.

• **Line 21**
  o Financial terms acceptable to the seller i.e. type of financing seller would accept. Any financing not pre-printed, such as owner financing, must be added on line 22 such as owner financing.

• **Lines 23 through 41**
  o This clause covers fixtures and personal property included in the sale of the property. The pre-printed list in this clause is fairly extensive and inclusive of those articles normally included in the sale of property.
  o Additional items may be added on lines 33 and 34 and items that will not be included should be listed on lines 36 and 37.
  o To ensure no ambiguity any items listed in lines 23 through 31 should be stricken as well as listed on lines 36 and 37.
  o Lines 38 through 41 cover any leased items that may be on the property. It is important the agent be sure this list of leased
items is accurate for the benefit of both the seller and the buyer.

- Line 41 clearly makes it the responsibility of the seller to pay the balance on any items where the lease is not assumable. This also then assumes that if assumable the seller will have no additional responsibility to the leasing company for any item. It would be a wise agent who directs sellers to ensure themselves against any responsibility of transferred leases that may become assumable.

- **Lines 42 through 59**
  - Compensation is covered in this clause making it a very important clause for most agents. There are fill-in-the-blanks for the amount of commission and whether it will be a percentage of the sales price or a flat fee. Both types of payment are legally accepted. The reason the blanks are there is to show that the commission was negotiated between the parties to the contract, assuring compliance with antitrust laws. There can also be an additional fee paid at closing to the broker. The next sentence explains that the seller consents to compensation from both parties in an exchange based on the value of both properties.
  - Lines 46 though 48 are agreement from the seller to convey the property with a warranty deed.
  - Lines 48, 49, 50 and 51 state that the compensation is not set in any manner other than agreement between the parties, further antitrust language, clearly state fair housing practices and no discrimination will occur and that a request from the seller to observe discriminatory practices will not be granted since it is a violation of the law.
  - Lines 52 through 55 state that in the event the seller unlawfully fails to close due to a breach that the commission is still due and payable equal to what would be due if the sale had closed. Additionally, it states that the commission will be payable without demand, minimizing the need for a lawsuit.
  - Lines 55 through 59 obligate the seller to pay all costs incurred in the marketing process should the seller want to terminate
before the natural closing of the contract, plus reasonable attorney fees and court costs.

- **Lines 60 through 79**
The responsibilities of each party to the contract are listed here:

  Broker agrees to:

  - File listing in MLS
  - Timely notice to MLS of status changes
  - Use best efforts to produce a buyer
  - Divide compensation with other brokers in the sale if applicable
  - Place a For Sale sign and a lock box on property (written agreement as required by TN Code)
  - Remove all other real estate signs
  - Disseminate information from Residential Property Condition Disclosure or exemption form and the MLS profile sheet
  - Disseminate lead based paint disclosure, exterior injection well percolation test and soil absorption rate disclosure
  - Exhibit property to any prospective buyer
  - Have interior and exterior photographs, videos or audio recordings created for advertising, as broker deems appropriate

  Seller agrees to:

  - Assist broker in any reasonable way to sell property
  - Refer all inquiries to broker
  - Authorize broker to provide final sales information to MLS
  - Allow property to be shown at all reasonable hours
  - Authorize broker to receive on seller’s behalf any notices, offers, or other documents incidental to the offering and sale
  - Keep broker informed as to their whereabouts in order for broker to promptly forward all notices mentioned above
• **Lines 80 through 96**
  o The “hold harmless” clause is important for the agent, broker and the real estate office. Starting in line 88 the seller agrees to be solely responsible for any misrepresentations or mistakes in information supplied by the seller. The seller further agrees to hold the agent, firm and broker harmless and indemnify them from any claim, demand, action, liability, or proceedings resulting from any omission or alleged omission by the seller on the forms mentioned in this clause or any material fact that is known or should have been known by the seller concerning the property and that is not disclosed to agents and to provide defense costs for agents and firm.

• **Lines 97 through 99**
  o These lines reiterate permission given to broker and agents from sellers that are mentioned in lines 74 and 75 above.

• **Lines 100 through 102**
  o Seller represents that adequate insurance will be kept in force for any claims of damage, loss or liability arising from the showing of the property.

• **Lines 103 through 124**
  o Agency definitions are explained for broker, agent for the seller, facilitator or transaction broker.

• **Lines 125 through 148**
  o The rights owed to all parties to a transaction are explained as outlined in the Tennessee Code.

• **Lines 149 through 166**
  o Duties owed to a client under a written agency agreement as outlined in the Tennessee Code.
• **Lines 167 through 178**
  o Seller authorizes broker to appoint a designated agent if the broker deems it necessary and further explains the necessity to default to a facilitator as explained under Tennessee Code 62-13-102(9)(B).

• **Lines 179 through 181**
  o Seller authorizes broker to accept earnest money (valuable consideration) to be applied to the purchase price. The broker is further authorized to hold the money in an escrow account until disbursed at closing as determined by the purchase offer.

• **Line 181 and 182**
  o Seller warrants that he/she has marketable title with full authority to execute this agreement and shall convey property with a general warranty deed.

• **Lines 184 through 189**
  o Seller may or may not agree to provide a home protection plan. One or the other of the boxes must be checked.

• **Lines 190 through 195**
  o Disclaimer as to the fact that this is a legal document, the agent is not qualified or authorized to give legal advice, and the seller is certifying that they have read the contract, accept the terms and received a copy of said contract.

• **Lines 195 through 204**
  o List any and all information the seller authorizes the broker to disclose that may be deemed to be confidential.

• **Lines 205 through 217**
  o List all exhibits and addenda attached to the contract.
• Line 218 through 257
  o List any special provisions if conflicting with any paragraph above. The provisions listed will take precedence over the printed paragraph.

• Lines 260 through 266
  o Signature line for the broker should always be signed by the principal broker of the firm, dated and the name of the broker printed. There is no place on the contract for the listing agent to sign since said agent is not a party to the contract. If the agent signs for a broker there should be a properly executed power of attorney recorded in the county records to support the authorization. There is no provision in the Tennessee Code to allow this duty of the principal broker to be passed on to agents under their licensure.

• Lines 267 through 277
  o Signature line for the sellers. All parties listed on the deed must sign this listing contract for it to be a valid contract. If it is not signed by all parties (in most cases both husband and wife) there is a question as to the validity of the contract and therefore a question as to the ability of the broker to enforce the payment of the commission.

Following is the example listing contract we have discussed; there are additional contracts available for agents and brokers to use. A licensed attorney should write all contracts. Although a seller has the right to use any contract they so choose, we, as agents, may not prepare the contract for
them. We are authorized under the law to assist the seller in the filling in of the blanks on a pre-printed form such as the one provided in this course.
QUIZ

Answer all of the questions and transfer your answers to the answer sheet included in this course.

1. Which of the following requires a contract to be in writing and to be enforceable by a court?
   a. Parole Evidence rule
   b. Statute of Limitations
   d. Statute of Frauds

2. Which of the following is correct concerning a listing contract?
   a. Listing contracts are unilateral employment contracts.
   b. Listing contracts are executory, bilateral contracts.
   c. Listing contracts are bilateral, executed employment contracts.
   d. Listing contracts are bilateral option contracts.

3. A contract may be discharged by which of the following actions?
   a. Performance of the contract
   b. Breach of the contract
   c. Both a. and b.
   d. Parole Evidence rules

4. Which of the following is correct concerning an Exclusive Right To Sell listing contract?
   a. The listing broker is entitled to a commission regardless of who procures the buyer.
   b. The Seller retains the right to sell the property himself without paying a commission.
   c. The party that sells the property is the only one entitled to a commission.
   d. The contract may have an automatic extension date inserted with the seller’s permission.
5. Who are the parties to a listing contract?
   a. The sellers and the listing agent.
   b. Any of the owners named on the deed may sign on behalf of the other parties on the deed and the real estate company.
   c. The designated agent and the sellers.
   d. The parties on the deed to the property and the listing broker.

6. Lines 23 through 41 of the example listing contract describe personal property and fixtures. Which of the following statements is true?
   a. The list of personal property and fixtures as printed must remain a part of the contract.
   b. No item may be stricken from the contract, however, if the seller desires to change them they may use a different contract.
   c. If the seller’s desire is to change any of the printed items listed in lines 23 through 31, they should list the items they desire not be included on lines 36 and 37 and strike them out on lines 23 through 31.
   d. Contract law does not address a proper way to strike pre-printed words in a contract so the sellers would need to get advice from their attorney.

7. Which of the following is not a responsibility of the listing broker?
   a. To know the whereabouts of the seller at all reasonable times.
   b. Notify all county offices of the potential sale of the property if their jurisdiction covers the sale of real and personal property.
   c. Disseminate information for any injection wells that are or may have been on the property.
   d. Have interior and exterior photographs created for advertising purposes.
8. Agent Phyllis lists a property for sale. The seller fills out the Property Disclosure Report for Phyllis and she adds it to her marketing information. The property is sold within the original listing period and the buyer finds that there was previous termite damage that was not disclosed. The buyer sues the listing broker, agent Phyllis and the seller. Under the terms of our example listing contract, who is responsible for the legal expenses and any judgments that may be handed down?
   a. All the parties mentioned are equally responsible.
   b. It is the agent’s responsibility to assure the buyer that the seller has properly reported any previous damage.
   c. The principal broker is responsible.
   d. The seller, since he/she agreed to hold the agent, broker and the company harmless for any misrepresentations they may make.

9. Does the seller warrant the type of title it will pass onto the buyer in the listing contract? If so, which line indicates such, and if not, which line so indicates?
   a. On line 181 the seller warrants they will provide a general warranty deed.
   b. The seller does indicate the type of deed they will provide. It is left to the buyer to request it in the sales contract.
   c. The “as is” paragraph language in lines 12 through 148 cover the deed condition as well as the property condition.
   d. The deed relayed is determined by the closing agent depending on the type of buyers purchasing the property.

10. When establishing the compensation for the eventual sale of a listing, which of the following statements is true?
    a. Fees in addition to the standard commission paid at closing, are acceptable, and do not have to be negotiated and expressed in the listing contract.
    b. Commissions are established by negotiation between the parties to the contract and then displayed as either a percentage of the sale price or a flat fee.
    c. Both a. and b. are correct.
    d. Commissions must always be expressed as a percentage of the sale.
Please fax or email your answer sheet back to us for grading and processing. We will send your results back to you as well as a course completion report upon passing. Passing is a score of 70 or higher. We will notify TREC.

Thank you again, for choosing D and D School of Real Estate for your education needs!