

SLIDE 1 – Miscellaneous Real Estate Contract Considerations (Cover Page)

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Procuring Cause

Disputes often arise as to whether an agent is owed a commission. Many such disputes involve open listings where numerous agents are working to find customers for the principal, and none has a clear claim on a commission. In other cases, a client may claim to have found the customer alone and therefore to have no responsibility for paying a commission.

There are also situations where cooperating brokers and subagents working under an exclusive listing dispute about which one(s) deserve a share of the listing broker's commission.

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The concept that decides such disputes is that the party who was the "procuring cause" in finding the customer is entitled to the commission or commission share.

The two principal determinants of procuring cause are:

- Being first to find the customer
- Being the one who induces the customer to complete the transaction

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Compensation for Buyer Brokers

Buyer agency agreements stipulate how the agent will be compensated in the relationship. The compensation may be a client-paid retainer fee or a commission contingent upon a completed transaction or procured seller.

It is common practice for the agent to be paid by the customer to the transaction, the seller, as opposed to the fiduciary principal, the buyer or tenant. In addition, the agent may be paid by the buyer in the event that the seller or listing agent refuses to offer any compensation to the buyer broker.

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Advertisement Regulations

Advertising is an important tool in marketing properties and procuring buyers. It is, however, subject to regulation and restrictions. In general, state laws and regulations require that:

Advertising must not be misleading

The broker is responsible for the content of advertising done by agents

All advertising must reveal the identity of the broker; licensed brokers and agents may not use blind ads that conceal their identities

Brokers selling their own property through the brokerage must disclose the brokerage identity

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Telephone Consumer Protection Act

The TCPA (Telephone Consumer Protection Act) addresses the regulation of unsolicited telemarketing phone calls. Rules include the following:

Telephone solicitors must identify themselves, on whose behalf they are calling, and how they can be contacted

Telemarketers must comply with any do-not-call request made during the solicitation call

Consumers can place their home and wireless phone numbers on a national Do-Not-Call list which prohibits future solicitations from telemarketers.

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Multiple Listing

A multiple listing is not a distinct listing contract but rather a provision in an exclusive listing authorizing the broker to place the listing into a multiple listing service.

A multiple listing service is an organization of member brokers who agree to cooperate in the sale of properties listed by other brokers in exchange for a share of the broker's resulting commission.

The authorization enables and requires the broker to disseminate the listing information in a timely fashion so that members in the organization can participate in the sale of the property as subagents.

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Ethical Practices

Job performance – A professional real estate agent must understand the skills and knowledge the profession requires and make a commitment to maintain and improve expertise in these areas.

Market knowledge

Real estate laws

Evolving standards
of practice

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Job performance –

Other aspects of professional performance usually supported:

Promoting exclusive listings

Promoting professionalism
in the real estate industry

Promoting arbitration of
disagreements, not litigation

Obtaining written
transactional agreements

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Duties to clients –

Most codes of ethics uphold the commitment to fulfill fiduciary duties. Specific applications include:

Honestly representing market
value and property condition

Respecting rights and duties of
other client-agent relationships

Submitting all offers

Avoiding commingling
and conversion

Keeping transaction
documents current

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Duties to customers –

Some of the guidelines for working with customers are:

Honestly representing market
value and property condition

Avoiding calling a service "free"
that in fact is contingent on
receiving a commission

Advertising truthfully

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Disclosure –

In compliance with applicable laws and to promote respect for the real estate profession, licensees should be careful to disclose:

That the agent is going to receive compensation from more than one party in a transaction

Any profits made on a client's money

Property defects if they are reasonably apparent; however there is no duty to disclose a defect which it would require technical expertise to discover

Any interest the agent has in a listed property if the agent is representing a party concerning the property

The agent's identity in advertisements

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Non-discrimination –

Real estate professionals must comply with fair housing laws in spirit and letter.

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Professional relationships –

Professional conduct excludes disparagement of competitors. Real estate professionals also:

Forgo pursuit of unfair advantage

Arbitrate rather than litigate disputes

Respect the agency relationships of others

Conform to accepted standards of co-brokerage practices



Fraud

Intentional misrepresentation

Also known as fraud, this kind of misrepresentation occurs when a licensee knowingly conveys false information about a property, financing or service.

Fraud is a criminal act that may result in fines and incarceration, in addition to discipline from state regulators and professional organizations.

If it is determined that a salesperson should have known about material information they may be guilty of fraud through culpable negligence.

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Contract Creation

Offer and acceptance	Valid offer and valid acceptance creates contract Offer becomes contract on communication of acceptance by offeree to offeror
Counteroffer	Any offer in response to an offer or any altered original offer; nullifies original offer
Revocation of an offer	Offeror may revoke offer prior to communication of acceptance by offeree

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Termination of an offer	Acceptance; rejection; revocation; expiration; counteroffer; death or insanity
Assignment of a contract	Assignable unless expressly prohibited or a personal service
Contract preparation	Restricted unless licensed as attorney or a party to the contract

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Contract Termination

Forms of contract termination	Performance; infeasibility; mutual agreement; cooling-period rescission; revocation; abandonment; lapse of time; invalidity of contract; breach of contract
Breach of contract	Default without cause Legal remedies: rescission; forfeiture; suit for damages; specific performance

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Assignment	A contract benefit transferred to a third-party. This doesn't transfer the contract obligations.
Novation	The third party picks up both the assignment and the burden of the contract obligations.
Breach of Contract	A cause of action where a contractual binding agreement is not honored by one or more parties to the contract. A contract breach is a civil wrong and can be minor, material or fundamental.
Material breach of contract	A substantial breach of contract usually excusing the harmed party from further performance and giving him the right to sue for damages.
Minor breach of contract	Less severe than a material breach and only gives the harmed party the right to sue for damages and usually does not excuse him from further performance.

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Fundamental breach of contract	A breach so fundamental that it permits the aggrieved party to terminate performance of the contract. Also known as a repudiatory breach.
Legal remedy	Where a court of law, exercising civil law jurisdiction, can enforce a right, impose a penalty, or makes a court order imposing the will of civil law.

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Contract law	Listings are unilateral contracts; listing must be valid to be enforceable; legal form: oral listings are valid and enforceable except, in many states, exclusive right-to-sell listings which must be written to be enforceable Listings are not assignable since they are personal service contracts
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Listing agreement	<p>A written document signed by all owners of real estate or their authorized attorney in fact authorizing a broker to offer or advertise real estate described in such document for sale or lease on specified terms for a defined period of time and is only valid if signed by all owners or their authorized attorney. A valid listing agreement includes:</p> <ol style="list-style-type: none"> 1. Start and end date of property listing. 2. The price the home should be listed. 3. How the broker is to be compensated. 4. Terms regarding how the fees are paid. 5. The broker's scope of authority regarding co-agreements with other brokers. 6. The broker's scope of authority regarding the existence of previous offers.
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Types of Listing Agreements	Owner listing: authorization to sell or lease; buyer or tenant listing: authorization to represent buyer or tenant
Exclusive right-to-sell (or lease)	Most prevalent; given to one broker; must usually be written; must expire; broker gets commission if property transfers during period
Exclusive agency	Exclusive excepting owner; oral or written; must expire; broker gets commission unless owner sells
Open listing	Non-exclusive; oral or written; no stated expiration; procuring cause gets commission; no commission if client procures customer
Net listing	All sale proceeds above a seller's minimum price go to the broker; discouraged, if not illegal

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Buyer/Broker agreement	In this common buyer-broker agreement the broker is not paid any commission. Other common contract terms include verbiage that allows the buyer to retain multiple brokers and the contract to be revoked by either party at any time for any reason.
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Contract for Sale

Contract creation	Created by unqualified acceptance of an offer; gives buyer equitable title, power to force specific performance
Earnest money escrow	secures contract validity and buyer's equitable interest; varies in amount; deposit controlled by disinterested party who must act according to escrow instructions

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Sale Contract Provisions

Primary provisions	Parties, consideration, legal description, price and terms, loan approval, earnest money, escrow, closing and possession dates, conveyed interest, type of deed, title evidence, property condition warranty, closing costs, damage and destruction, default, broker's representation, commission, seller's representations
Residential property condition disclosure	In states where required, re-sellers of residential property must complete and deliver form to buyer on or before offering; failure to do so gives buyer right to rescind prior to closing or occupancy; agents must disclose material facts regardless of seller's disclosures; buyers must acknowledge receipt.

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Disclosures	Inspections, owner's association disclosure, survey, environmental hazards, compliance with laws, due-on-sale, seller financing disclosure, rental property tenant's rights, FHA or VA financing condition, flood plain and flood insurance, condominium assessments, foreign seller withholding, tax-deferred exchange, merger of agreements, notices, time of the essence, fax transmission, survival, dispute resolution, addenda
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