13 General Brokerage Practices

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FUNCTION AND ORGANIZATION

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The core activity of brokerage

Effecting a transaction. The core activity of real estate brokerage is the business of procuring a buyer, seller, tenant, or property on behalf of a client for the purpose of completing a transaction. If successful, the broker receives a commission according to the provisions of a listing agreement. A broker's compensation for effecting a transaction is usually a negotiated percentage of the purchase price.

Broker cooperation. In most cases, transactions require the assistance of a cooperating broker from another brokerage company acting as a subagent. Most listing agreements provide for brokerage cooperation in the multiple listing clause. A transaction involving a cooperating subagent is called **co-brokerage**. In a co-brokered transaction, the listing broker splits the commission with the "co-broker," typically on a 50-50 basis. A broker may cooperate with other brokers on either side of a transaction, either assisting a listing agent to locate a buyer or tenant, or assisting a buyer or tenant representative in locating a seller or landlord.

In the most common form of broker cooperation, an outside broker locates a buyer for the listing broker's seller. In such cases, the listing broker shares the commission with the cooperating "selling" broker on a pre-determined basis.

Multiple listing service (MLS). The second prevalent form of broker cooperation is the multiple listing service, or MLS. A multiple listing service is an organization of brokers who have agreed to cooperate with member brokers in marketing listings. Members of the service also agree to enter all exclusive listings into the listing distribution network so that every member is promptly informed of new listings as they come on the market.

The listing agreement used by members of a multiple listing service discloses relevant procedures and policies so that all principal parties to the agreement are aware of the pooling of the listing. A broker who works on a transaction listed in the MLS has all the duties and responsibilities inherent in the laws of agency as the client's fiduciary agent. The listing agreement sets forth specific duties.

Critical brokerage skills. To generate business, as well as achieve the transactional objectives of clients, a broker must be proficient in four skill areas:

- obtaining a client listing
- marketing a listing
- facilitating the closing of a transaction
- managing market information

A client hires a broker by executing a listing agreement. Once hired, the broker or agent implements a marketing plan to procure the other principal party for the transaction. The broker then plays an important role in pre-closing activities to ensure successful closing of the transaction.

To serve clients and locate customers, a broker must become expert in local real estate market conditions. A fundamental part of maintaining market expertise is organizing and managing an information system.

Types of transactions and properties brokered. Brokers and salespeople are licensed to broker all types of real property for clients in any form of transaction. In practice, it is common for brokers and agents to specialize in a type of property, a type of transaction, or a geographical area.

Brokerage vs. trading. The distinction between brokerage and trading for one's own account is important for determining whether one must be licensed to perform the real estate activity in question. To be considered brokerage, an agent's activity must generally be conducted on behalf of a person or business entity other than the agent. Buying, selling, and leasing real estate for one's own account or for one's company are generally not considered brokerage.

Brokerage vs. advisory services. Technically, brokerage is distinct from the practice of rendering real estate advisory services. A licensed broker acting as a consultant for a fee usually is not working to effect a particular transaction. Since the objective is not purely transaction-oriented, the activity is not really brokerage. Examples of advisory services include:

- providing an estimate of value
- performing market analysis
- managing property

Even though fee consulting is not brokerage in the strict sense, real estate consultants who offer advisory services to the public must have a real estate license in most states.

Exhibit 13.1 Common Brokerage Specialties

Transaction type	
sales rentals assignments	exchanges subleases options
Property type	
Residential single family condominiums cooperatives mobile homes apartments	**Commercial** retail office industrial
Land undeveloped developed agricultural	**Special purpose** government religious recreational
Businesses	**Real estate securities**

Who may legally broker real estate?

Real estate license laws. All fifty states (and Canada) impose legal licensing requirements on any person or business entity desiring to broker real estate. To obtain a broker's license, an applicant must complete required education, meet experience requirements as a salesperson, and pass a state examination. There may be additional requirements concerning age, criminal record, and professional background. Practicing real estate brokerage without a valid license is illegal. Anyone who plans to obtain a real estate license should become familiar with the real estate license law of the relevant state.

Range of business entities. Some business entities may legally broker real estate, and others may not. The principal types of business organization and the legal restrictions on their ability to broker real estate are described below. Note that all the business entities may own, buy, and sell *their own* real estate in varying degrees without violating license laws.

Sole proprietorship. A sole proprietorship is a business owned by a single individual. When the proprietor dies, the business terminates. Sole proprietorships must follow state licensing and registration laws to conduct business, such as fictitious name laws. Other distinguishing characteristics of sole proprietorships are:

- liability: sole proprietors are personally liable for their own debts and actions and those of employees while performing business duties; proprietors may be sued personally

- taxation: business profits are taxed once as the proprietor's personal income

A sole proprietorship *may broker* real estate if properly licensed.

Corporation for profit. A corporation is a legal entity owned by stockholders. A corporation for profit consists of one or more persons authorized to conduct business for profit. A board of directors elected by stockholders oversees the business. Officers (president, vice president, secretary, treasurer) and managers conduct day-to-day affairs. Other distinguishing characteristics are:

- "perpetual" existence: the corporation survives the death of any of the stockholders, directors, or officers
- formation: to incorporate, principal parties must complete and file articles of incorporation in accordance with state law; a corporation is domestic if it is headquartered in the state where the articles of incorporation were filed. Otherwise, the corporation is a foreign corporation
- liability: shareholders of the corporation are only liable to the extent of the value of one's shares; officers and directors may be held personally liable for the corporation's actions under the Sarbanes-Oxley Act of 2002
- taxation: owners are double-taxed on business profits; corporate profits are taxed and after-tax dividends distributed to shareholders are taxed again as personal income

A corporation *may broker* real estate if it is legally authorized to do business in a state and licensed to broker there. State license laws may require one or more officers to hold active or inactive broker's licenses. Generally, shareholders may not broker real estate for the corporation.

Non-profit corporation. A non-profit corporation is a corporate entity which is not legally entitled to generate profit. A board of directors and officers manage operations. Non-profit organizations are not subject to taxation.

A non-profit organization *may not* broker real estate.

General partnership. A general partnership is a for-profit business consisting of two or more co-owners who have agreed to share business profits. Unlike a corporation, the general partnership is not a distinct, legal entity, although a corporation may be a partner in a general partnership. Additional distinguishing features are:

- formation: the partnership is formed by a written or oral partnership agreement with or without a financial investment by either partner
- dissolution: the partnership may be terminated through mutual agreement, withdrawal or death of a partner, or by legal action
- liability: all partners bear full liability for debts and obligations jointly and severally
- taxation: partners are taxed once on their respective partnership profits; partnerships do not have double-taxation

A general partnership *may* broker real estate if properly licensed. State law may require one or all partners to hold active or inactive broker's licenses.

Limited partnership. A limited partnership consists of general partners and limited partners. General partners are wholly responsible for business operations, while limited partners are investors who participate only in business profits. The general partners typically receive compensation for their management responsibilities. Other defining features are:

- limited partners: a limited partner must make an investment, which subsequently comprises the extent of the partner's liability. Limited partners are taxed once, on profits distributed by the partnership.
- general partners: bear sole liability for debts and obligations

A limited partnership *may* broker real estate. However, limited partners may not broker real estate for the partnership. State laws may require the general partners to have active or inactive broker's licenses. Limited partners need not be licensed for the partnership to broker real estate.

Joint venture. A joint venture is a partnership formed to complete a specific business endeavor, such as a real estate development. Individuals, general and limited partnerships, and corporations may participate. In forming the entity, the partners identify how they will conduct business and share profits. Principal parties in the joint venture share liability, but may not obligate the other co-venturers to agreements outside of the joint venture project.

A joint venture *may* broker real estate, provided the co-venturers are duly licensed.

Business trust and real estate investment trust. A business trust is a group of investors who invest in a pooled trust fund managed by their elected trustee. The trustee purchases investment assets and distributes profits and gains to the trustors. A business trust that invests primarily in real estate and meets certain other requirements is a real estate investment trust (REIT) and receives special tax treatment.

A business trust may *not* broker real estate, but it may buy and sell its own real estate assets.

Cooperative association. A cooperative association is a non-profit, tax-exempt alliance of individuals or companies formed to promote common goods or services.

A cooperative association *may not* broker real estate.

Exhibit 13.2 Who may broker real estate

May broker	May not broker
individual sole proprietor for-profit corporation general partnership limited partnership joint venture	non-profit corporation business trust co-operative association

Types of brokerage organization

In addition to being organized as a sole proprietorship, partnership, corporation or joint venture, a brokerage may be:

- independent or affiliated
- specialized in a type of property
- specialized in a type of transaction
- specialized in a type of client

These variations in brokerage organization are usually a response to competitive conditions in the local real estate market.

Independent brokerage. A brokerage that is not affiliated with a franchise is an independent agency. Many independent agencies participate in networks on a local, regional, or national basis. Such networks expose the independent broker to a larger market without compromising individual identity.

Franchise. A franchised brokerage is an independently-owned company that enters into a licensing arrangement with a franchisor to participate in various benefits offered in exchange for compensation. Franchisors generally offer local franchisees:

- the use of a recognized trade name
- national and regional advertising
- training programs
- standardized operating procedures
- a national referral system

In exchange, a franchisee pays the franchisor start-up fees and a portion of gross income.

Commercial and residential brokerages. Many brokerages deal primarily with limited types of property: residential, commercial, industrial, undeveloped land, etc. In practice, most residential companies conduct a small amount of commercial brokerage, while commercial brokerages tend to deal strictly with retail, office, industrial, or land properties. A large company may handle all types of properties but will probably have a separate organizational division for each property type.

Transaction-specialized brokerages. Brokerages often organize around a particular type of transaction. Thus, there are companies that specialize in apartment rentals, office rentals, exchanges, business brokerage, and, most commonly, residential sales.

Buyer- and seller-oriented brokerages. Companies sometimes specialize even further by choosing to represent only one side in a transaction. Thus a brokerage may represent only commercial tenants, or only residential buyers, or some other limited type of client.

Trade organizations

Numerous trade organizations serve the real estate brokerage industry and all of its areas of specialization. The largest is the National Association of Realtors® (NAR). NAR is comprised of a national headquarters, a state association in each state, and within each state, local Realtor® boards.

One should note that the term Realtor® is a protected trade name of NAR. *Only members of the organization may use the term to refer to themselves*. More specifically, there are two identities within NAR: Realtor, and Realtor-Associate. By definition, a Realtor® is a member broker and a Realtor-Associate® is a member sales agent. (In some states, Realtor applies to both broker and sales agent.) Membership in the local board automatically includes membership in the local MLS, the state association, and NAR.

THE BROKER-SALESPERSON RELATIONSHIP

Legal relationships
Salesperson's employment status
Obligations and responsibilities
Agent compensation

Legal relationships

Only a broker with an active broker's license can hire and employ a licensed salesperson. A licensed salesperson may work only for the employing broker and may not work for or receive direct compensation from any other broker.

Agent's scope of authority. State real estate license laws provide for two distinct licenses to conduct real estate brokerage: the broker license and the salesperson or sales agent license.

A licensed real estate broker is duly authorized to represent clients directly in brokering real estate. A sales agent, on the other hand, is only authorized to represent a broker and carry out such duties as the broker may legitimately delegate. In other words, a sales agent does not directly represent the client in a transaction but is rather the agent of the broker and subagent of the client. A sales agent is therefore a fiduciary of the employing broker.

As agent of a broker, a salesperson may offer properties for sale or lease, procure buyers, negotiate transaction terms, and otherwise conduct the business of brokerage. The agent, however, must act entirely on the broker's behalf.

A salesperson *may not*:

- bind a client to any contract
- receive compensation directly from a client
- accept a listing or deposit that is not in the name of the broker

Salesperson's employment status

A sales agent may be an independent contractor (IC) or an employee. In either case, the broker is responsible and liable for the sales agent's actions. Brokers are subject to guidelines of the U.S. Equal Employment Opportunity Commission (EEOC), a federal agency that enforces laws against workplace discrimination.

Independent contractor / broker relationship. Generally, a broker has limited control over the actions of a contractor. Specifically:

- a broker can require performance results, but is limited in demanding *how* a contractor performs the work. For example, a broker may not prescribe selling methods, meeting attendance, or office hours.
- an IC is responsible for income and social security taxes; the broker does not withhold taxes
- a broker cannot provide an IC with employee benefits such as health insurance or pension plans

Employee / broker relationship. A broker has greater control over the actions of an employee. Specifically:

- a broker can impose a sales methodology. In addition, a broker can enforce all office policies, including hours, meeting attendance, and telephone coverage.
- a broker must withhold income taxes and pay unemployment compensation tax on behalf of an employee
- an employee may receive the benefits enjoyed by the broker's non-selling employees

A written agreement between broker and employee or independent contractor should clearly state each party's duties and responsibilities to the other. In addition, the agreement should clarify the agent's compensation program as well as who is to pay for incidental business expenses.

Real estate assistant or personal assistant. Brokers and salespersons may hire licensed or unlicensed employees to assist them with a variety of tasks. Unlicensed assistants may perform clerical or ministerial acts, but nothing requiring a license. Licensed assistants may perform tasks requiring a license. Unlicensed assistants usually may be compensated directly by the sales associate they work for, but licensed assistants must be compensated by the employing broker and are subject to that broker’s supervision.

Obligations and responsibilities

Sales agent's duties and responsibilities. In accepting employment from a broker, a salesperson generally makes a commitment to:

- work diligently to sell the broker's listings
- work diligently to procure new listings
- promote the business reputation of the broker
- abide by the broker's established policies
- fulfill the fiduciary duties owed clients as their subagent
- maintain insurance policies as required by the broker
- have transportation for conducting business, as required by the broker
- conform to ethical standards imposed by broker and trade organization
- uphold all covenants and provisions of the employment agreement

Broker's obligations to the sales agent. In employing a salesperson, a broker generally makes a commitment to:

- make the brokerage's listings available
- make the brokerage's market and property data available
- provide whatever training was promised at the time of hiring
- provide whatever office support was promised at the time of hiring
- uphold the commission structure and expense reimbursement policy
- conform to ethical standards imposed by the broker's trade organization
- uphold all covenants and provisions of the employment agreement

Agent compensation

An agent employee of a broker may receive wages, salary, additional commissions, expense reimbursements, and benefit plans. An independent contractor's compensation is a normally a combination of commissions and free office support. Most sales agents work as independent contractors who earn a commission.

Commission splits. A sales agent earns compensation for procuring listings and for procuring buyers or tenants, whenever a transaction results. In the jargon of brokerage, these are the two "sides" to a commission: the listing side and the selling side. An agent who procures a listing receives a share of the broker's listing side commission, according to the agent's commission schedule. An agent who sells a listing, i.e., finds the customer, receives a share of the broker's selling side of the commission, according to the commission schedule. An agent who procures both listing and customer receives a share of the broker's listing side commission and selling side commission.

Commission schedules. An agent's commission schedule is a comprehensive summary of commission splits under various circumstances, including:

- listing and selling side
- salesperson's level of sales performance

- broker's level of expense reimbursement to agent
- the particular policies or organization of the agency
- prevailing commission splits in the market

In view of these circumstances, an agent's commission schedule can vary widely. For example, an agent who is the highest sales producer in the market may be able to secure a 70% or 80% commission split with the broker, regardless of side. If the broker is paying an inordinate amount of selling expenses, an agent's commission split may only be 40%. Some brokerages have a policy of not paying any expenses except the rent. In such cases, agents may receive an 80% or 90% commission split. In almost all cases, broker and agent negotiate the schedule of commissions in the environment of competitive market conditions.

Calculating commissions. The following exhibit illustrates how commissions might be split in a hypothetical transaction.

Exhibit 13.3 Calculating Commissions

Sale price: $500,000	Co-brokerage splits: 50%
Commission: 6%, or $30,000	Agent splits: 50% on both sides

Situation A: a cooperating broker is involved

	Commission $	Commission %
Listing broker	7,500	1.5%
Listing agent	7,500	1.5%
Selling broker	7,500	1.5%
Selling agent	7,500	1.5%

Situation B: no cooperating broker; listing agent finds buyer

Listing broker	15,000	3.0%
Listing agent	15,000	3.0%

Situation C: no cooperating broker; another agent *in the same agency* finds buyer

Listing broker	15,000	3.0%
Listing agent	7,500	1.5%
Selling agent	7,500	1.5%

OPERATING A REAL ESTATE BROKERAGE

Obtaining listings
Marketing listings
Pre-closing activities
Handling trust funds
Managing information
Policy manual
Advertisement regulations
Anti-trust laws

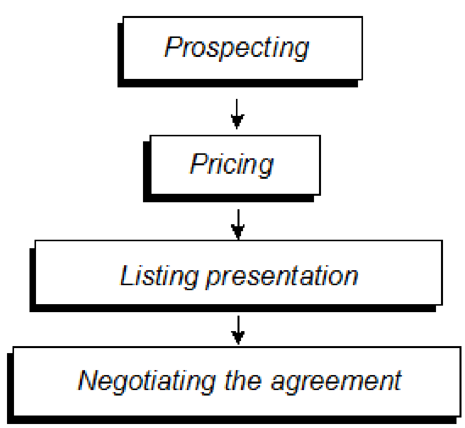
Obtaining listings

Listings are the traditional source of a broker's income. By obtaining a listing, a broker obtains a share of the commission generated whenever a cooperating broker finds a buyer. It is not so certain that working with a buyer will provide income. In the absence of an exclusive buyer representation agreement, a buyer may move from one agent to another without making any commitment. Agents can spend considerable time with a buyer and earn nothing. Hence the special value of a listing: it is likely to generate revenue.

Listing procedures. The marketing and self-promotional efforts of agents generate listings. New agents usually focus on becoming well known in a small geographical area and hope to encounter clients there who are willing to list with them. More experienced and better-known agents are able to rely to a greater extent on referrals in obtaining listings.

New or experienced, an agent needs certain skills at each step in the process of obtaining a listing.

Exhibit 13.4 Listing Steps



Prospecting. Prospecting is any activity designed to generate listing prospects: parties who intend to sell or lease property and who have not yet committed to a broker. Prospecting activities include mailing newsletters and flyers, selling directly and person-to-person, advertising, and selling indirectly via community involvement.

The goal of prospecting is to reach a potential seller or landlord, make that person aware of the agent's and brokerage's services, and obtain permission to discuss the benefits of listing, often in the form of a formal selling presentation.

Pricing. It is almost always necessary for an agent seeking a listing to suggest a listing price or price range for the property. It is important to make a careful estimate, because underpricing a property is not in the best interests of the seller, and overpricing it often prevents a transaction altogether.

The "Appraisal" chapter describes methods of estimating value. In brief, an agent usually relies on an analysis of comparable properties which have recently sold in the same neighborhood. By making adjustments for the differences between the subject property and the comparables, the agent arrives at a general price range.

Agents must be careful to caution sellers that they are not appraisers, and that the suggested price range is not an expert opinion of market value. If a more precise estimate of market value is desired, the seller should hire a licensed appraiser.

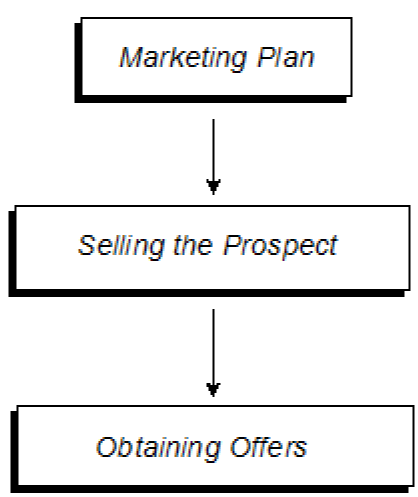
Listing presentation and negotiation of agreement. A listing presentation is an agent's opportunity to meet with a seller and present the merits of the agent's marketing plan, personal expertise, and company strengths. At the same time, an agent can explain the many phases and details of a real estate transaction and point out how the provisions of the listing agreement and the agent-principal relationship work to ensure a smooth transaction.

Ultimately, the agent's aim in a presentation meeting is to have the principal execute a listing agreement. The agent must then submit the listing to the broker for approval and signing. This result will set in motion the process of marketing the property. In practice, it may take an agent many meetings with a prospect before the prospect signs an agreement.

Marketing listings

The process of marketing a listed property occurs in three broad steps, leading to the desired end of a completed sale contract. At each of these steps, there are critical skills an agent must master.

Exhibit 13.5 Marketing Steps



Marketing plan. After the broker formalizes the listing agreement, the sales agent initiates a marketing plan for the property. An ideal marketing plan is a cohesive combination of promotional and selling activities directed at potential customers. The best combination is one that aims to have maximum impact on the marketplace in relation to the time and money expended.

Selling the prospect. When marketing activities produce prospects, the agent's marketing role becomes more interpersonal. An agent must now:

- qualify prospects' plans, preferences, and financial capabilities
- show properties that meet the customer's needs
- elicit the buyer's reactions to properties
- report material results to the seller or listing agent

At the earliest appropriate time, an agent must make certain disclosures to a prospective customer. Depending on state laws, an agent may have to disclose the relevant agency relationship, the property's physical condition, and the possible presence of hazardous materials.

Obtaining offers. If a buyer is interested in purchasing a property, an agent obtains the buyer's offer of transaction terms, including price, down payment, desired closing date, and financing requirements.
An agent must be extremely careful at this point to abide by fiduciary obligations to the client, whoever that party may be. Discussions of price are particularly delicate: whether the client is buyer or seller, the agent's duty is to uphold the client's best interests. Thus it is not acceptable to suggest to a customer what price the client will or will not accept. With pricing and other issues, it is always a good practice to understand what role the client wants the agent to assume in the offering phase of the transaction; in other words, exactly how far the agent may go in developing terms on the client's behalf.

When a buyer or tenant makes an offer, the agent *must* present it to the seller or landlord at the earliest possible moment. If the terms of the offer are unacceptable, the agent may assist the seller in developing a counteroffer, which the agent would subsequently submit to the customer or customer's agent. The offering and counteroffering process continues until a meeting of the minds results in a sale contract.

Pre-closing activities

Between the execution of the sale contract and the closing of the transaction, the property is "under contract" or "contract pending." During this period, buyer and seller have certain things to do to achieve a successful closing. The buyer often needs to arrange financing and dispose of other property; the seller may need to clear up title encumbrances and make certain property repairs. The sale contract should specify all such required tasks.

The time period between contracting and closing is referred to as the **contingency period**, or **pre-closing period**.

Agent's responsibilities. As dictated by custom and the circumstances of a transaction, an agent has a range of duties and responsibilities during the pre-closing period.

An agent's foremost duty following acceptance of an offer is to submit the contract and the earnest money to the employing broker without delay. Most states impose deadlines for this requirement, usually within twenty-four hours from the agent's receipt of the deposit.

Other possible responsibilities are:

- assisting the buyer in obtaining financing
- assisting the seller in clearing title
- assisting the seller in completing property repairs
- recommending inspectors, appraisers, attorneys, and title companies
- assisting in communications between principals
- assisting in the exchange of transaction documents

Broker's responsibilities. The listing broker has the primary responsibility for handling deposit monies and for overseeing the agent's pre-closing activities. State license laws require that earnest money deposits be placed in an account which is separate from the broker's operating accounts. They also require the broker to keep accurate records and follow accepted accounting procedures. These precautions protect the buyer and seller and safeguard the deposited funds. A broker must be careful to avoid two common violations of escrow regulations: commingling and conversion, described below.

Handling trust funds

General account requirements. Brokers who receive and hold earnest money deposits or money belonging to others, particularly clients and customers, must maintain a trust account. Typically, trust accounts must

- designate the real estate broker as trustee
- provide for withdrawal of funds without prior notice

State or national depository institution. According to state law, brokers must maintain their escrow accounts in a state- or federally-chartered savings and loan association or credit union. A broker may maintain more than one trust account to meet business requirements.

Non-trust funds. Brokers may maintain nominal amounts of operating funds in their trust accounts sufficient to cover bank service charges and minimum balance requirements. Such non-trust funds must be identified as such in the trust account.

Commingling. Commingling is the act of mixing the broker's personal or business funds with escrow funds. To avoid committing a violation, a broker must not deposit any money belonging to others in the broker's business or personal account. Also, a broker must not deposit operating funds into any trust account. The definition of commingling includes the failure to deposit earnest money into escrow in a timely manner. In most states, commingling funds constitutes grounds for license suspension or revocation and is a serious violation of the law.

Conversion. Conversion is the act of misappropriating escrow funds for the broker's business or personal use. More serious than mere commingling, conversion is effectively an act of theft: using monies which do not belong to the broker. Conversion carries serious consequences, including license revocation.

Deposit deadlines. A real estate broker must deposit trust funds received within a required deadline after receiving notice that an offer to purchase is accepted by all parties. The deadline varies from state-to-state, so licensees must be familiar with local regulations to remain in compliance with escrow laws.

Holding funds. Brokers must retain the trust monies in the trust account until the transaction involved is consummated or terminated, at which time the broker must account for the full amount received and disbursed.

If a purchase agreement signed by a seller and purchaser provides for someone other than a real estate broker to hold a deposit, a licensee in possession of that deposit must deliver the deposit to that person within the required number of banking days after the licensee receives notice that an offer to purchase is accepted by all parties.

Return of earnest money deposit. Generally, escrow funds are disbursed to the respective parties at closing, or according to escrow instructions. However, if any trust fund disbursement is disputed, the broker must follow very specific procedures for handling the dispute. Depending on the jurisdiction, these can range from arbitration to court-ordered resolutions. In any case, the broker must rely on state regulations and legal solutions instituted by the courts.

Salesperson receiving trust funds. A real estate salesperson must deliver to the real estate broker, on receipt, a deposit or other money paid in connection with a transaction in which the real estate salesperson is engaged on behalf of the real estate broker.

Communications and technology

Multiple listing services and websites. The posting and sharing of property listings and data among broker websites, firm websites, and multiple listing services (MLS) is one of the most effective marketing tools available to today's licensees. Broker cooperation assures sellers of maximum exposure for their properties, just as it assures buyers of seeing the widest possible range of listed properties.

To ensure fair use of MLS facilities, the National Association of REALTORS® has developed an Internet Data Exchange (IDX) policy that enables MLS members to display and use MLS data while respecting the rights of property owners and brokers to market their properties however they want.

Basically, persons who want to make use of MLS data have to share their own data as well. They can opt out of the sharing policy so that competitors cannot post their properties on competing websites, but then they cannot post competitors' properties on their own sites.

There are a number of websites that provide consumers with the capability to search through listings all over the country and even the world. Of course, it is always wise to recognize that information posted on the internet is not necessarily reliable and that the source of the information should be considered carefully.

Email and texting. Frequent and virtually instantaneous contact between real estate practitioners and consumers is possible via email and texting. As both these forms of communication fall under the category of advertising, practitioners need to carefully observe their state's advertising regulations. In brief, be truthful, direct, and concise. Provide the information required by law, and do not violate prohibitions against unsolicited emails and messages.

Social media. Social media websites allow rapid exchange of information, documents, photos, messages and data with a select group of contacts. They also represent another form of advertising and so are subject to real estate commission advertising regulations in most states.

Smartphones. Smartphones facilitate the use, not only of email, texting, and social media, but also of immediate internet access, document review, photo and document sharing, data storage, and video conferencing. They offer, in fact, an almost complete mobile office.

Managing information

The ability to satisfy the needs of clients and customers is largely dependent on a broker's ability to obtain, organize, and manage information. Information is a cornerstone of the broker's perceived value in the marketplace and a major reason why buyers and sellers seek a broker out. Systematic collection and updating of relevant information is therefore a business priority.

Property data. Most brokerages maintain two categories of property data: available properties, and all properties in the market area. In residential brokerage, available property basically consists of the listings in the MLS and for-sale-by-owner properties. Records for all properties in an area are accessible in tax records. Commercial brokerages usually keep track of available and occupied commercial properties in a proprietary database.

Buyer data. Buyer information is usually compiled and maintained, often informally, by each agent in a brokerage. An agency's base of prospects who are looking for property at any given time is valuable for marketing new listings.

Tenant data. In residential and commercial leasing companies, information is compiled and maintained on all tenants in an area, by property type used. Such files contain a tenant's lease expiration, property size, and rent.

Client data. It is important to keep track of both current and former clients. Former clients are likely prospects to become clients again or customers. They are also a source of referrals. Current clients, of course, should be the broker's primary concern.

Market data. Today's clients and customers expect a broker to know the market intimately. It is often the broker or agent with the best market knowledge who dominates business in the market. Knowing a market includes keeping up to date on:

- pricing and appreciation trends
- financing rates and terms
- demographic patterns and trends
- construction trends
- general economic trends

Policy manual

A well-managed brokerage relies on a written policy manual to keep the business running smoothly and professionally. A policy manual sets forth company rules, regulations, and policies.

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
- salespersons must include the broker's business identity in any advertising; they may not advertise in their own name solely (unless selling their own property through channels other than the agency)

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.

CAN-SPAM Act. The CAN-SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003) supplements the Telephone Consumer Protection Act (TCPA). It

- bans sending unwanted email 'commercial messages' to wireless devices
- requires express prior authorization
- requires giving an 'opt out' choice to terminate the sender's messages

Anti-trust laws

Brokerage companies, like other businesses, are subject to anti-trust laws designed to prevent monopolies and unfair trade practices.

Sherman Antitrust Act. Enacted in 1890, the Sherman Antitrust Act prohibits restraint of interstate and foreign trade by conspiracy, monopolistic practice, and certain forms of business combinations, or mergers. The Sherman Act empowers the federal government to proceed against antitrust violators.

Clayton Antitrust Act. The Clayton Antitrust Act of 1914 reinforces and broadens the provisions of the Sherman Act. Among its prohibitions are certain exclusive contracts, predatory price cutting to eliminate competitors, and inter-related boards of directors and stock holdings between same-industry corporations. The Clayton Act also legalizes certain labor strikes, picketing, and boycotts.

Anti-competitive behavior. The effect of antitrust legislation is to prohibit trade practice and trade restraints that unfairly disadvantage open competition. Business practices and behaviors which violate antitrust laws include collusion, price fixing, market allocation, bid rigging, restricting market entry, exclusive dealing, group boycotts, and predatory pricing.

Collusion. Collusion is the illegal practice of two or more businesses joining forces or making joint decisions which have the effect of putting another business at a competitive disadvantage. Businesses may not collude to fix prices, allocate markets, create monopolies, or otherwise interfere with free market operations.

Price fixing. Price fixing is the practice of two or more brokers agreeing to charge certain commission rates or fees for their services, regardless of market conditions or competitors. In essence, such pricing avoids and disturbs the dynamics of a free, open market.

For instance, the two largest brokerages in a market jointly decide to cut commission rates by 50% in order to draw clients away from competitors. The cut-rate pricing could destroy smaller agencies that lack the staying power of the large companies.

Market allocation. Market allocation is the practice of colluding to restrict competitive activity in portions of a market in exchange for a reciprocal restriction from a competitor: "we won't compete against you here if you won't compete against us there."

For example, Broker A agrees to trade only in single family re-sales, provided that Broker B agrees to focus exclusively on apartment rentals and condominium sales. The net effect is an illegally restricted market where collusion and monopoly supplant market forces.

Group boycott. Group boycotting is the illegal activity of a number of competitors in a given market "ganging up" on a competitor in that market to limit the boycotted party's access to customers and patrons of the competitor's business. For instance, a group of brokers might collectively refuse to show a boycotted broker's listings to potential buyers. Over time, the boycotted company is essentially "starved" out of the market.

Tie-in agreements. In a tie-in agreement, the sale of one product or performance of a service is tied to the sale of another, less desirable product or service. For instance, "I will sell you this car, but you have to hire my brother-in-law to drive it." Or, more likely, "I will list and sell your old home if you hire me to find you a new home to purchase." Tie-ins restrict competition and limit the freedom of the consumer.

Violations of fair trade and anti-trust laws may be treated as felonies, and penalties can be substantial. Loss of one's license is also at stake. Brokers are well-advised to understand and recognize these laws.

BUSINESS BROKERAGE

Business brokerage vs. real property brokerage
Transaction knowledge
Accounting
Determining a price
Business brokerage regulation

Business brokerage is *effecting a sale or exchange of an existing business*. In most cases, the sale of a business entails the simultaneous transfer of an estate in land, whether a leasehold or a fee. Thus to sell businesses, a broker must generally hold a real estate license.

In some states, business brokerage is classified into *opportunity brokerage* and *enterprise brokerage* in accordance with the size of the business being sold. **Opportunity brokerage** concerns a small business, usually a proprietorship or partnership, where the transaction consists of a sale of assets and an assignment of a lease. **Enterprise brokerage** concerns a larger company, usually a corporation, where the transaction involves the sale of stock and multiple real estate parcels leased or owned by the seller.

The process of business brokerage is similar to real estate brokerage: a broker secures a listing, procures a purchaser, and facilitates the closing. Once a ready, willing, and able buyer is found, the broker earns a commission.

Business brokerage vs real property brokerage

The critical difference between selling a business and selling real estate is that selling a business includes the transfer of *business income, personal property assets*, and, possibly, *liabilities*, in addition to real property. To be competent in this brokerage specialty, a business broker must have specialized skills concerning transactions, accounting, and pricing. A business broker must also rely on a professional team to complete the transaction. Members of this team would include the client's legal counsel, accountant, and, preferably, a professional appraiser.

Transaction knowledge

Types of sale. There are generally two types of business sale transaction for a business broker to be aware of: the *asset sale* and the *stock sale*. In an **asset sale**, the purchaser takes possession of some or all of the assets of the business, as well as the real estate, in exchange for the sale price. The purchase usually does not include acquiring the existing business entity or its liabilities. An asset sale is preferred by buyers who want to buy only portions of a business, or to avoid liabilities inherent in a stock purchase.

In a **stock sale**, a purchaser acquires complete ownership of a business, including the legal corporate entity, all assets, all financial liabilities, and any current or future legal liabilities arising from incidents that have occurred prior to the sale. A purchaser may prefer a stock sale to avoid creating a new business entity or to benefit from a possible tax advantage. In addition, a stock sale keeps a business identity intact, which can be very valuable.

Transaction documents. The most common transaction documents in business brokerage are a *sale contract,* an *assignment* or *real estate sale contract,* a *no-compete agreement,* and a *consulting agreement*.

A **sale contract** sets forth all terms and conditions of the agreement, including exactly what is being sold. An **assignment** or **real estate sale agreement** is an agreement for transferring any and all real property involved in the transaction. A **no-compete agreement** is a seller's covenant, for compensation, not to compete with the buyer under prescribed conditions and time periods. A **consulting agreement** is an employment agreement that hires the seller to assist the buyer in taking over business operations.

For the most part, transaction documents in business brokerage are not fully standardized. For that reason, a business broker must exercise caution in dealing with document language so as to avoid the unauthorized practice of law.

Accounting

A broker or agent who wants to undertake business brokerage needs basic proficiency in accounting. In particular, one must know how to read and interpret:

- income, expenses, and profit on an income statement
- assets, liabilities, and net worth on a balance sheet

Income, expenses, and profit. A business's profit is the revenue remaining from gross income after all expenses have been paid. A business broker must evaluate an owner's income and expenses in order to determine what the business may be worth to a buyer. This often involves interpreting which income and expense items will change after the business is sold. For example, a seller owns a grocery store and uses family members to perform clerical work without pay. If a buyer is a bachelor without children, much of the clerical work will have to be hired out. The additional payroll suddenly changes the store's profitability significantly. Neglecting to consider how income and expenses might change is likely to lead to serious problems in working with buyers.

Business assets. The assets of a business include **tangible** assets and **intangible** assets. Tangible assets include:

- cash and marketable securities
- inventory
- trade fixtures and equipment

- real property
- accounts receivable

Intangible assets include:

- the company name
- trademarks
- copyrights
- licenses
- contracts for future sales of goods or services
- goodwill

In valuing a business, both tangible and intangible assets must be taken into account, even though intangible assets may be very difficult to appraise.

Business liabilities. Business liabilities acquired in a corporate stock sale include short-term debt, such as accounts payable, and long-term liabilities, such as mortgages and leases.

Goodwill. Goodwill is a business brokerage term with two meanings. In one sense, goodwill is an intangible asset consisting of any factor that an owner values in the business, apart from any other specific asset. For example, goodwill might include reputation, a long history of success in a market, name recognition, a dominant market share, and an excellent business location. In the second sense, which is more familiar to accountants, goodwill is the difference in value between an owner's price and the value of all other business assets. For example, if an owner wants $400,000 for a business, and the totality of tangible and intangible assets is valued at $320,000, the goodwill is an $80,000 asset.

Determining a price

The most difficult task for a business broker is often finding the proper price range for a business. An owner of a smaller business has probably built the business from scratch and tends to overvalue it. Moreover, such an owner may have incomplete and disorganized accounting records, making the valuation of assets quite difficult. Finally, a business's true income may be different for one owner than it would be for another because of variations in management style and ability.

In any case, the value of the business is a function of the following:

- past, present, and future net profits, and capitalized value of these
- amount of risk and certainty associated with realizing future profits
- value of all assets as reflected in the books of account
- impact of goodwill on the value of the business
- prices paid for similar businesses
- all other risks associated with the business

Business brokerage regulation

Licensing. A business broker generally must have an active real estate license. In addition, the broker may need to have a valid securities license since a transaction may entail the sale of securities.

Uniform Commercial Code (UCC). The Uniform Commercial Code regulates the sale of personal property on a state-by-state basis, and forms the basis for standardized sale documents. Standard documents include promissory notes, security agreements, and bills of sale.

Bulk Sales Act. The Bulk Sales Act protects creditors against loss of collateral in an indebted business through the undisclosed sale of the business's inventory. If a business sells over half of its inventory to a buyer, the act declares that the sale is a bulk sale, and, as such, is potentially an asset sale. Since a creditor could lose security in such a sale, the seller must disclose the names of creditors to the buyer in a Bulk Sales Affidavit. The buyer must notify the creditors of the sale, who may then take appropriate action to secure their loans.

13 General Brokerage Practices Snapshot Review

FUNCTION AND ORGANIZATION

The core activity of brokerage

- procuring buyer, seller, tenant, or leased property for a client, often with the help of other brokers and a multiple listing service
- skills: listing, marketing, facilitating, managing information
- Multiple Listing Service: network of brokers who share listings

Who may legally broker real estate?

- yes: sole proprietorship, for-profit corp., general or limited partnership, joint venture. no: non-profit corp., business trust, cooperative association

Types of brokerage organization

- independents; franchises; agencies by property type, by transaction type, and by client type; limited and full service agencies

THE BROKER-SALESPERSON RELATIONSHIP

Legal relationships

- salesperson is agent, fiduciary of broker; acts in broker's name; subagent of client
- **may not:** have two employers; be paid by other parties; bind clients contractually

Salesperson's employment status

- may be employee or contractor; relationship defined by agreement; assistant may be licensed or unlicensed; if licensed, supervised and paid by employing broker

Obligations and responsibilities

- agent to broker: obtain & sell listings; follow policies and employment provisions; promote ethics and broker's reputation
- broker to agent: provide data, office support, compensation, training; uphold ethics, policies, and employment agreement

Agent compensation

- commissions per schedule after splits with cooperating brokers

OPERATING A REAL ESTATE BROKERAGE

Obtaining listings

- generate prospects; develop price range; complete listing presentation; negotiate execute and agreement

Marketing listings

- develop marketing plan; sell and qualify prospective buyers; complete necessary disclosures; obtain offers

Pre-closing activities

- facilitate fulfillment of contract contingencies and provisions
- no commingling or conversion of escrow funds

Handling trust funds

- trust funds to be held in trust account in state- or federally-chartered institution; no commingling or conversion; timely deposit and withdrawal; full accounting

Communications and technology

- marketing techniques using technology: broker cooperation via MLS and competitors' websites; email and texting; social media websites; smartphone communication capabilities; all must be used carefully and in conformity with advertising rules and other laws

Managing information — property data; buyer and tenant files; market data files

Policy manual — written procedures **and** policies on all aspects of the business to ensure smooth, consistent operations

Advertisement regulations — no misleading ads; must contain broker's ID; broker responsible for content; no blind ads

Anti-trust laws
- Sherman Act and Clayton Act pioneered antitrust laws to prohibit unfair trade practices, trade restraints, and monopolies
- illegal to collude, disadvantage competitors; fix prices; allocate markets; force tie-ins

BUSINESS BROKERAGE — sale of existing business and its real estate; opportunity and enterprise brokerage

Business brokerage vs. real estate brokerage — special skills: transaction knowledge; accounting; determining the price

Transaction knowledge
- types of sale: asset sale and stock sale
- documents: sale contract; real estate sale contract or assignment; no-compete agreement; consulting agreement

Accounting
- income, expenses, and profit
- balance sheet: assets, liabilities, net worth
- assets: tangible and intangible
- goodwill: intangible asset--difference between price & other assets

Determining a price — reconciliation of income, cost, and market data approaches; influenced by risk and stability of future income

Business brokerage regulation — may need securities license; must comply with Bulk Sales law

14 Overview of Conveyance Contracts

Contract for Sale
Sale Contract Provisions
Option-To-Buy Contract
Contract for Deed

CONTRACT FOR SALE

Legal characteristics
Contract creation
Earnest money escrow
Contract contingencies
Default

A real estate sale contract is a binding and enforceable agreement wherein a buyer, the **vendee**, agrees to buy an identified parcel of real estate, and a seller, the **vendor**, agrees to sell it under certain terms and conditions. It is the document that is at the center of the transaction.

The conventional transfer of real estate ownership takes place in three stages. First, there is the negotiating period where buyers and sellers exchange offers in an effort to agree to all transfer terms that will appear in the sale contract. Second, when both parties have accepted all terms, the offer becomes a binding sale contract and the transaction enters the pre-closing stage, during which each party makes arrangements to complete the sale according to the sale contract's terms. Third is the closing of the transaction, when the seller deeds title to the buyer, the buyer pays the purchase price, and all necessary documents are completed. At this stage, the sale contract has served its purpose and terminates.

Other names for the sale contract are *agreement of sale, contract for purchase, contract of purchase and sale*, and *earnest money contract*.

Legal characteristics

Executory contract. A sale contract is *executory:* the signatories have yet to perform their respective obligations and promises. Upon closing, the sale contract is fully performed and no longer exists as a binding agreement.

Signatures. All owners of the property should sign the sale contract. If the sellers are married, both spouses should sign to ensure that both spouses release homestead, dower, and curtesy rights to the buyer at closing. Failure to do so does not invalidate the contract but can lead to encumbered title and legal disputes.

Enforceability criteria. To be enforceable, a sale contract must:

- be validly created (mutual consent, consideration, legal purpose, competent parties, voluntary act)
- be in writing
- identify the principal parties
- clearly identify the property, preferably by legal description
- contain a purchase price
- be signed by the principal parties

Written vs. oral form. A contract for the sale of real estate is enforceable only if it is in writing. A buyer or seller cannot sue to force the other to comply with an oral contract for sale, even if the contract is valid.

Assignment. Either party to a sale transaction can assign the sale contract to another party, subject to the provisions and conditions contained in the agreement.

Who may complete. A broker or agent may assist buyer and seller in completing an offer to purchase, provided the broker represents the client faithfully and does not charge a separate fee for the assistance. It is advisable, and legally required in most states, for a broker to use a standard contract form promulgated by state agencies or real estate boards, as such forms contain generally accepted language. This relieves the broker of the dangers of creating new contract language, which can be construed as a practice of law for which the broker is not licensed.

Contract creation

Offer and acceptance. A contract of sale is created by full and unequivocal acceptance of an offer. Offer and acceptance may come from either buyer or seller. The offeree must accept the offer without making any changes whatsoever. A change terminates the offer and creates a new offer, or counteroffer. An offeror may revoke an offer for any reason prior to communication of acceptance by the offeree.

Equitable title. A sale contract gives the buyer an interest in the property that is called equitable title, or *ownership in equity*. If the seller defaults and the buyer can show good faith performance, the buyer can sue for specific performance, that is, to compel the seller to transfer legal title upon payment of the contract price.

Earnest money escrow

The buyer's earnest money deposit fulfills the consideration requirements for a valid sale contract. In addition, it provides potential compensation for damages to the seller if the buyer fails to perform. The amount of the deposit varies according to local custom. It should be noted that the earnest money deposit is not the only form of consideration that satisfies the requirement.

The sale contract provides the *escrow instructions* for handling and disbursing escrow funds. The earnest money is placed in a third party trust account or escrow. A licensed escrow agent employed by a title company, financial institution, or brokerage company usually manages the escrow. An individual broker may also serve as the escrow agent.

The escrow holder acts as an impartial fiduciary for buyer and seller. If the buyer performs under the sale contract, the deposit is applied to the purchase price.

Strict rules govern the handling of earnest money deposits, particularly if a broker is the escrow agent. For example, state laws direct the broker when to deposit the funds, how to account for them, and how to keep them separate from the broker's own funds.

Contract contingencies

A sale contract often contains contingencies. A contingency is a condition that must be met before the contract is enforceable.

The most common contingency concerns financing. A buyer makes an offer contingent upon securing financing for the property under certain terms on or before a certain date. If unable to secure the specified loan commitment by the deadline, the buyer may cancel the contract and recover the deposit. An appropriate and timely loan commitment eliminates the contingency, and the buyer must proceed with the purchase.

It is possible for both buyers and sellers to abuse contingencies in order to leave themselves a convenient way to cancel without defaulting. To avoid problems, the statement of a contingency should:

- be explicit and clear
- have an expiration date
- expressly require diligence in the effort to fulfill the requirement

A contingency that is too broad, vague, or excessive in duration may invalidate the entire contract on the grounds of insufficiency of mutual agreement.

Default

A sale contract is bilateral, since both parties promise to perform. As a result, either party may default by failing to perform. Note that a party's failure to meet a contingency does not constitute default, but rather entitles the parties to cancel the contract.

Buyer default. If a buyer fails to perform under the terms of a sale contract, the breach entitles the seller to legal recourse for damages. In most cases, the contract itself stipulates the seller's remedies. The usual remedy is forfeiture of the buyer's deposit as **liquidated damages**, provided the deposit is not grossly in excess of the seller's actual damages. It is also customary to provide for the seller and broker to share the liquidated damages. The broker may not, however, receive liquidated damages in excess of what the commission would have been on the full listing price.

If the contract does not provide for liquidated damages, the seller may sue for damages, cancellation, or specific performance.

Seller default. If a seller defaults, the buyer may sue for specific performance, damages, or cancellation.

SALE CONTRACT PROVISIONS

Primary provisions
Secondary provisions

Sale contracts can vary significantly in length and thoroughness. They also vary according to the type of sale transaction they describe. Some of the varieties are:

- Residential Contract of Sale
- Commercial Contract of Sale
- Foreclosure Contract of Sale
- Contract of Sale for New Construction
- Contract of Sale for Land
- Exchange Agreement

As the most common sale transaction is a residential sale, a Residential Contract of Sale is the type with which a licensee should first become familiar.

Primary provisions

A typical residential sale contract contains provisions of the following kind.

Parties, consideration, and property. One or more clauses will identify the parties, the property, and the basic consideration, which is the sale of the property in return for a purchase price.

There must be at least two parties to a sale contract: one cannot convey property to oneself. All parties must be identified, be of legal age, and have the capacity to contract.

The property clause also identifies fixtures and personal property included in the sale. Unless expressly excluded, items commonly construed as fixtures are *included* in the sale. Similarly, items commonly considered personal property are *not included* unless expressly included.

Legal description. A legal description must be sufficient for a competent surveyor to identify the property.

Price and terms. A clause states the final price and details how the purchase will occur. Of particular interest to the seller is the buyer's down payment, since the greater the buyer's equity, the more likely the buyer will be able to secure financing. In addition, a large deposit represents a buyer's commitment to complete the sale.

If seller financing is involved, the sale contract sets forth the terms of the arrangement: the amount and type of loan, the rate and term, and how the loan will be paid off.

It is important for all parties to verify that the buyer's earnest money deposit, down payment, loan proceeds, and other promised funds together equal the purchase price stated in the contract.

Loan approval. A financing contingency clause states under what conditions the buyer can cancel the contract without default and receive a refund of the earnest money. If the buyer cannot secure the stated financing by the deadline, the parties may agree to extend the contingency by signing next to the changed dates.

Earnest money deposit. A clause specifies how the buyer will pay the earnest money. It may allow the buyer to pay it in installments. Such an option enables a buyer to hold on to the property briefly while obtaining the additional deposit funds. For example, a buyer who wants to buy a house makes an initial deposit of $200, to be followed in twenty-four hours with an additional $2,000. The sale contract includes the seller's acknowledgment of receipt of the deposit.

Escrow. An escrow clause provides for the custody and disbursement of the earnest money deposit, and releases the escrow agent from certain liabilities in the performance of escrow duties.

Closing and possession dates. The contract states when title will transfer, as well as when the buyer will take physical possession. Customarily, possession occurs on the date when the deed is recorded, unless the buyer has agreed to other arrangements.

The closing clause generally describes what must take place at closing to avoid default. A seller must provide clear and marketable title. A buyer must produce purchase funds. Failure to complete any pre-closing requirements stated in the sale contract is default and grounds for the aggrieved party to seek recourse.

Conveyed interest; type of deed. One or more provisions will state what type of deed the seller will use to convey the property, and what conditions the deed will be subject to. Among common "subject to" conditions are easements, association memberships, encumbrances, mortgages, liens, and special assessments. Typically, the seller conveys a fee simple interest by means of a general warranty deed.

Title evidence. The seller covenants to produce the best possible evidence of property ownership. This is commonly in the form of title insurance.

Closing costs. The contract identifies which closing costs each party will pay. Customarily, the seller pays title and property-related costs, and the buyer pays financing-related costs. Annual costs such as taxes and insurance are prorated between the parties. Note that who pays any particular closing cost is an item for negotiation.

Damage and destruction. A clause stipulates the obligations of the parties in case the property is damaged or destroyed. The parties may negotiate alternatives, including seller's obligation to repair, buyer's obligation to buy if repairs are made, and the option for either party to cancel.

Default. A default clause identifies remedies for default. Generally, a buyer may sue for damages, specific performance, or cancellation. A seller may do likewise or claim the earnest money as liquidated damages.

Broker's representation and commission. The broker discloses the applicable agency relationships in the transaction and names the party who must pay the brokerage commission.

Seller's representations. The seller warrants that there will be no liens on the property that cannot be settled and extinguished at closing. In addition, the seller warrants that all representations are true, and if found otherwise, the buyer may cancel the contract and reclaim the deposit.

Secondary provisions

A sale contract may contain numerous additional clauses, depending on the complexity of the transaction. The following are some of the common provisions.

Inspections. The parties agree to inspections and remedial action based on findings.

Owner's association disclosure. The seller discloses existence of an association and the obligations it imposes.

Survey. The parties agree to a survey to satisfy financing requirements.

Environmental hazards. The seller notifies the buyer that there may be hazards that could affect the use and value of the property.

Compliance with laws. The seller warrants that there are no undisclosed building code or zoning violations.

Due-on-sale clause. The parties state their understanding that loans that survive the closing may be called due by the lender. Both parties agree to hold the other party harmless for the consequences of an acceleration.

Seller financing disclosure. The parties agree to comply with applicable state and local disclosure laws concerning seller financing.

Rental property; tenants rights. The buyer acknowledges the rights of tenants following closing.

FHA or VA financing condition. A contingency allows the buyer to cancel the contract if the price exceeds FHA or VA estimates of the property's value.

Flood plain; flood insurance. Seller discloses that the property is in a flood plain and that it must carry flood insurance if the buyer uses certain lenders for financing.

Condominium assessments. Seller discloses assessments the owner must pay.

Foreign seller withholding. The seller acknowledges that the buyer must withhold 15% of the purchase price at closing if the seller is a foreign person or entity and forward the withheld amount to the Internal Revenue Service. Certain limitations and exemptions apply.

Tax deferred exchange. For income properties only, buyer and seller disclose their intentions to participate in an exchange and agree to cooperate in completing necessary procedures.

Merger of agreements. Buyer and seller state that there are no other agreements between the parties that are not expressed in the contract.

Notices. The parties agree on how they will give notice to each other and what they will consider to be delivery of notice.

Time is of the essence. The parties agree that they can amend dates and deadlines only if they both give written approval.

Fax transmission. The parties agree to accept facsimile transmission of the offer, provided receipt is acknowledged and original copies of the contract are subsequently delivered.

Survival. The parties continue to be liable for the truthfulness of representations and warranties after the closing.

Dispute resolution. The parties agree to resolve disputes through arbitration as opposed to court proceedings.

C.L.U.E. Report. CLUE (Comprehensive Loss Underwriting Exchange) is a claims history database used by insurance companies in underwriting or rating insurance policies. A CLUE Home Seller's Disclosure Report shows a five-year insurance loss history for a specific property. Among other things, it describes the types of any losses and the amounts paid. Many home buyers now require sellers to provide a CLUE Report (which only the property owner or an insurer can order) as a contingency appended to the purchase offer. A report showing no insurance loss within the previous five years is an indication that the availability and pricing of homeowner's insurance will not present an obstacle to the purchase transaction.

Addenda. Addenda to the sale contract become binding components of the overall agreement. The most common addendum is the seller's property condition disclosure. Examples of other addenda are:

agency disclosure	asbestos / hazardous materials
liquidated damages	radon disclosure
flood plain disclosure	tenant's lease

OPTION-TO-BUY CONTRACT

Contract requirements
Common provisions
Legal aspects

An option-to-buy is an enforceable contract in which a potential seller, the **optionor**, grants a potential buyer, the **optionee**, the right to purchase a property before a stated time for a stated price and terms. In exchange for the right of option, the optionee pays the optionor valuable consideration.

For example, a buyer wants to purchase a property for $150,000, but needs to sell a boat to raise the down payment. The boat will take two or three months to sell. To accommodate the buyer, the seller offers the buyer an option to purchase the property at any time before midnight on the day that is ninety days from the date of signing the option. The buyer pays the seller $1,000 for the option. If buyer exercises the option, the seller will apply the $1,000 toward the earnest money deposit and subsequent down payment. If the optionee lets the option expire, the seller keeps the $1,000. Both parties agree to the arrangement by completing a sale contract as an addendum to the option, then executing the option agreement itself.

An option-to-buy places the optionee *under no obligation* to purchase the property. However, the seller must perform under the terms of the contract if the buyer exercises the option. An option is thus a *unilateral* agreement. Exercise of the option creates a bilateral sale contract where both parties are bound to perform. An unused option terminates at the expiration date.

An optionee can use an option to prevent the sale of a property to another party while seeking to raise funds for the purchase. A renter with a **lease option-to-buy** can accumulate down payment funds while paying rent to the landlord. For example, an owner may lease a condominium to a tenant with an option to buy. If the tenant takes the option, the landlord agrees to apply $100 of the monthly rent paid prior to the option date toward the purchase price. The tenant pays the landlord the nominal sum of $200 for the option.

Options can also facilitate commercial property acquisition. The option period gives a buyer time to investigate zoning, space planning, building permits, environmental impacts, and other feasibility issues prior to the purchase without losing the property to another party in the meantime.

Contract requirements

To be valid and enforceable, an option-to-buy must:

- include actual, non-refundable consideration

  The option must require the optionee to pay a specific consideration *that is separate from the purchase price*. The consideration cannot be refunded if the option is not exercised. If the option is exercised, the consideration may be applied to the purchase price. If the option is a lease option, portions of the rent may qualify as separate consideration.

- include price and terms of the sale

  The price and terms of the potential transaction must be clearly expressed and cannot change over the option period. It is customary practice for the parties to complete and attach a sale contract to the option as satisfaction of this requirement.

- have an expiration date

  The option must automatically expire at the end of a specific period.

- be in writing

  Since a potential transfer of real estate is involved, most state statutes of fraud require an option to be in writing.

- include a legal description

- meet general contract validity requirements

  The basics include competent parties, the optionor's promise to perform, and the optionor's signature. Note that it is not necessary for the optionee to sign the option.

Common provisions Beyond the required elements, it is common for an option to include provisions covering:

- how to deliver notice of election

  A clause clarifies how to make the option election, exactly when the election must be completed, and any additional terms required such as an earnest money deposit.

- forfeiture terms

  A clause provides that the optionor is entitled to the consideration if the option term expires.

- property and title condition warranties

  The optionor warrants that the property will be maintained in a certain condition, and that title will be marketable and insurable.

- how option consideration will be credited

  A clause states how the optionor will apply the option consideration toward the purchase price.

Legal aspects

Equitable interest. The optionee enjoys an equitable interest in the property because the option creates the right to obtain legal title. However, the option does not in itself convey an interest in real property, only a right to do something governed by contract law.

Recording. An option should be recorded, because the equitable interest it creates can affect the marketability of title.

Assignment. An option-to-buy is assignable unless the contract expressly prohibits assignment.

CONTRACT FOR DEED

Interests and rights
Legal form
Default and recourse
Usage guidelines

A contract for deed is also called a *land contract*, an *installment sale*, a *conditional sales contract,* and an *agreement for deed*. It is a bilateral agreement between a seller, the **vendor,** and a buyer, the **vendee**, in which the vendor defers receipt of some or all of the purchase price of a property over a specified period of time. During the period, the *vendor retains legal title* and the vendee acquires equitable title. The vendee takes possession of the property, makes stipulated payments of principal and interest to the vendor, and otherwise fulfills obligations as the contract requires. At the end of the period, the buyer pays the vendor the full purchase price and the vendor deeds legal title to the vendee.

Like an option, a contract for deed offers a means for a marginally qualified buyer to acquire property. In essence, the seller acts as lender, allowing the buyer to take possession and pay off the purchase price over time. A buyer may thus avoid conventional down payment and income requirements imposed by institutional lenders. During the contract period, the buyer can work to raise the necessary cash to complete the purchase or to qualify for a conventional mortgage.

A contract for deed serves two primary purposes for a seller. First, it facilitates a sale that might otherwise be impossible. Second, it may give the seller certain tax benefits. Since the seller is not liable for capital gains tax until the purchase price is received, the installment sale lowers the seller's tax liability in the year of the sale.

Interests and rights

Vendor's rights and obligations. During the contract period, the seller may:

- mortgage the property
- sell or assign whatever interests he or she owns in the property to another party
- incur judgment liens against the property

The vendor, however, is bound to the obligations imposed by the contract for deed. In particular, the vendor may not breach the obligation to convey legal title to the vendee upon receipt of the total purchase price. In addition, the vendor remains liable for underlying mortgage loans.

Vendee's rights and obligations. During the contract period, the buyer may occupy, use, enjoy, and profit from the property, subject to the provisions of the written agreement. The vendee must make periodic payments of principal and interest and maintain the property. In addition, a vendee may have to pay property taxes and hazard insurance.

Legal form

Like other conveyance contracts, a contract for deed instrument identifies:

- the principal parties
- the property's legal description
- consideration: specifically what the parties promise to do
- the terms of the sale
- obligations for property maintenance
- default and remedies
- signatures and acknowledgment

The contract specifies the vendee's payments, payment deadlines, when the balance of the purchase price is due, and how the property may be used.

Default and recourse

Seller default. If the seller defaults, such as by failing to deliver the deed, the buyer may sue for specific performance, or for cancellation of the agreement and damages.

Buyer default. States differ in the remedies they prescribe for the seller in case of buyer default. Some states consider the default a breach of contract that may be remedied by cancellation, retention of monies received, and eviction. Others provide foreclosure proceedings as a remedy.

Usage guidelines

Many areas have no standardized contract for deed or any form sanctioned by associations and agencies. Therefore, this kind of conveyance presents certain pitfalls for buyer and seller.

In some states, a breach of the contract for deed is remedied under *local contract law* rather than foreclosure law. The buyer may not have the protections of a redemption period or other buyer-protection laws which accompany formal foreclosure proceedings. The vendor might sue the vendee for breach of contract for the slightest infraction of the contract terms.

A second danger for the vendee is that the vendor has the power and the right to encumber the property in ways that may not be desirable for the buyer. For example, the seller could place a home equity loan on the property, then fail to make periodic payments. The bank could then foreclose on the vendor, thus jeopardizing the vendee's eventual purchase.

For the seller, the principal danger is that the buyer acquires possession in exchange for a minimal down payment. A buyer might damage or even vacate the property, leaving the seller to make repairs and retake possession. Further, since the contract is recorded, the seller must also bear the time and expense of clearing the title.

To minimize risk, principal parties in a contract for deed should observe the following guidelines:

- use an attorney to draft the agreement
- adopt the standard forms, if available
- become familiar with how the contract will be enforced
- utilize professional escrow and title services
- record the transaction properly
- be prepared for the possible effect on existing financing

14 Overview Of Conveyance Contracts Snapshot Review

CONTRACT FOR SALE

Legal characteristics
- binding, bilateral contract for purchase and sale; enforceable; executory, or to be fulfilled; expires upon closing; must be in writing; contain valuable consideration; identify property; be signed by all; be a valid contract

Contract creation
- 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

Contract contingencies
- conditions that must be met for the contract to be enforceable

Default
- buyer may sue for cancellation and damages or for specific performance; seller may claim deposit as liquidated damages, or may sue for cancellation, other damages, or for specific performance

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

Secondary provisions
- 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

THE OPTION-TO-BUY CONTRACT
- optionor gives option to optionee; unilateral contract: seller must perform; buyer need not; if option exercised, option becomes bilateral sale contract

Contract requirements
- must include: non-refundable consideration for the option right; price and terms of the sale; option period expiration date; legal description; must be in writing and meet contract validity requirements

Common clause provisions
- special provisions: how to exercise option; terms of option money forfeiture; how option money will be applied to purchase price

Legal aspects
- creates equitable interest; is assignable; should be recorded

CONTRACT FOR DEED
- purchase price is paid over time in installments; seller retains title; buyer takes possession; at end of period, buyer pays balance of price, gets legal title

Interests and rights
- seller may encumber or assign interest; remains liable for underlying mortgage
- buyer may use, possess, profit; must make periodic payments, maintain the property, and purchase at end of term

Default and recourse
- if seller defaults, buyer may sue for cancellation and damages or specific performance; seller's default remedies vary by area; may sue for specific performance or damages, or may need to foreclose