

Exclusive Listing Agreements – The Essential Elements

Real Estate In-Depth April, 2008

By Edward I. Sumber, Board Counsel

The Westchester-Putnam Multiple Listing Service, Inc. has, without attempting to do so, become a regional MLS. Over the past decade, brokerage firms from outside of Westchester and Putnam Counties have chosen to become Participants of the MLS. When the National Association of REALTORS® created Board of Choice, it also indicated that a Multiple Listing Service's primary market area can be determined by the MLS based upon natural market factors. As a result, WPMLS now requires that all Participants submit to WPMLS listings taken in Bronx, Westchester, Putnam and Dutchess Counties.

As listings are now submitted electronically to WPMLS it has become apparent that there are a wide variety of listing agreements in use. Some do not conform to the requirements of New York Law. The essential elements, therefore, of an Exclusive Right to Sell or an Exclusive Agency Agreement should be reviewed by every firm.

No Standard Form

WPMLS offers forms of Exclusive Right to Sell, Exclusive Agency, Exclusive Right to Represent, etc. for optional use by its Participants. The Multiple Listing Service cannot mandate that a particular form of contract be used because the right of a listing agent to contract with a principal to create an agency relationship remains paramount.

Agency is a consensual relationship between a principal and an agent, with many aspects open to negotiation. "One size" does not fit all. There are nuances which must be negotiated and most importantly, the contract between the agent and the principal must comply with New York Law.

New York's Plain English Law

The Plain English Law in New York State (General Obligations Law §5-702) requires that written agreements regarding residential property involving commission amounts of Fifty Thousand (\$50,000) Dollars or less be written in a "clear and coherent manner using words with common and everyday meanings" and be "appropriately divided and captioned by its various sections". Many listing agreements currently being submitted to WPMLS are not in conformity with the Plain English Law.

The consequences of non-compliance are a nominal Fifty (\$50) Dollar fine and the potential of a charge of incompetency by the Division of Licensing Services of the New York State Department of State ("D.O.S.").

Contract Law and Agency Law

An Exclusive Right to Sell or Exclusive Agency Agreement is a contract between a licensed Real Estate Broker and a property owner in which the agent is contractually retained to perform services as an agent pursuant to the terms of the agreement. An open listing does not create an exclusive relationship and open listings are not acceptable to WPMLS nor most multiple listing services.

The creation of the exclusive relationship permits the listing agent to make an offer of cooperation to other Participants of the Multiple Listing Service. The listing agent has the ability with the consent of the owner, to appoint sub-agents, broker's agents or invite the cooperation of buyer's agents. Moreover, the owner is given the opportunity in the Exclusive Agreement to determine whether to compensate certain types of cooperating brokers and not others. The Department of State has indicated that an agent (broker or salesperson) must have an informed consent dialogue with the owner before taking a listing in order that the owner be made aware of the factors which should be considered before an owner decides whether to offer compensation to sub-agents, broker's agents or buyer's agents.

A Relationship of Trust and Confidence

Licensees, lawyers and even judges are not aware that while an agency agreement in the form of an Exclusive Right to Sell Agreement or an Exclusive Agency Agreement is a "contract", Agency Law often governs the contractual obligations of the agent and the principal rather than Contract Law. Contract Law and Agency Law may differ significantly and Agency Law is controlling when there is a conflict. Agency relationship is a unique relationship in the law creating fiduciary obligations on the part of the agent to act in the best interest of the principal. Because the agency relationship is one of trust and confidence it is considered to be a "fiduciary" relationship that goes beyond the obligations of good faith and fair dealing which are applicable to all contracts in New York.

Fiduciary Obligations

When an agent acts on behalf of a principal, fiduciary obligations of undivided loyalty, confidentiality, obedience, the duty to account and the duty of full disclosure expand the contractual obligations of the agent to exercise care, skill and integrity in carrying out and fulfilling the terms of the contract. The fiduciary duties place the agent in a unique roll and the failure of the agent to abide by his or her fiduciary duties can result in the loss of commission, the loss of the agent's license, disciplinary action by the Department of State, an adverse judgment in a civil suit and the ability of the principal to rescind the contract arising from a breach of fiduciary duty on the part of the agent. (See New York Real Property Law Section 443 regarding agency relationships.)

Essential Elements

The Granting of an Exclusive Right to Sell or an Exclusive Agency Relationship

When entering into an Exclusive Right to Sell or an Exclusive Agency Relationship the owner of the property grants to the agent the exclusive right to sell or exclusive agency to act on the principal's behalf and the agent agrees to use the agent's best efforts to sell the property. The creation of this agency exclusivity then becomes subject to Department of State Regulation §175.24 which requires that listing agreements set forth in the exact verbiage of the Regulation, the definitions of "Exclusive Right to Sell" and "Exclusive Agency" "in type size of not less than six (6) point" stating:

1. "An "exclusive right to sell" listing means that if you, the owner of the property, find a buyer for your house, or if another broker finds a buyer, you must pay the agreed commission to the present broker."

2. An "exclusive agency" listing means that if you, the owner of the property find a buyer, you will not have to pay a commission to the broker. However, if another broker finds a buyer, you will owe a commission to both the selling broker and your present broker."

Who May Negotiate

Regulation §175.24 also requires that Exclusive Right to Sell and Exclusive Agency Listings involving one to three family dwellings include a provision permitting the seller to choose whether all negotiated offers to purchase will be submitted through the listing agent or the selling agent.

Who is Responsible When a Listing Agent Submits a Listing Which Does Not Conform to the Law?

The Rules and Regulations of WPMLS place upon the listing agent, the duty to submit a listing which is in conformity with the law. The MLS is a dissemination vehicle and when a Participant submits a listing which fails to comply with the Plain English Law or the Regulations of the Department of State, the Listing Agent is placed in jeopardy on multiple levels:

1. Violation of the Rules and Regulations of the Multiple Listing Service and therefore, the potential to be fined.
2. The potential to be charged with incompetency and untrustworthiness for failure to comply with DOS Regulations and New York State Law.
3. The possible loss of a commission in a civil lawsuit if a property owner refuses to pay a commission to an agent who has provided an agreement

which is not in conformity with New York State Law or with the Department of State's Regulations.

No Listing Agreement should be entered into between a licensed Real Estate Broker and an owner of property which does not conform to the following:

1. The Listing Agreement must be dated and have a specified expiration date (D.O.S. Regulation §175.15).
2. It must grant an Exclusive Right to Sell or Exclusive Agency to the Listing Agent in order to be submitted to the Multiple Listing Service (WPMLS Rule 7:0).
3. It should specify the date on which it will terminate. (D.O.S. Regulation §175.15 does not permit self-renewing exclusive listing agreements.)
4. The price at which the property will be offered must be set forth. Net listings are not permitted in New York. (D.O.S. Regulation §175.19). (A net listing is one in which the Seller indicates she will accept \$500,000 and the Broker can keep anything over and above that amount. This has been prohibited in New York because of the potential for abuse of unsuspecting property owners who may lack knowledge about market conditions).
5. All persons who are owners of the property should sign the Listing Agreement. While the person purporting to be in title may become liable for a commission even if not the sole owner of the property, the listing agent who takes a listing from one of several co-owners of a property, does so at his peril and places all cooperating brokers at risk.

Client Names. When taking a listing, the Listing Agent should always make clear that the name of the client will be revealed in the listing agreement and in the listing data form to be submitted to the MLS. Clients should be discouraged from the requesting that their names be withheld from the listing data form because of the liability which accrues to the Listing Agent when the Listing Agent fails to reveal the name of his or her client. Some licensees encourage their clients to not reveal their names, not realizing their exposure to liability. The Restatement of the Law of Agency Third, at Sections 6.02 and 6.03, indicate:

“6.02 Agent for Unidentified Principal

When an agent acting with actual or apparent authority makes a contract on behalf of an unidentified to principal,

(1) the principal and the third party are parties to the contract; and

(2) the agent is a party to the contract unless the agent and the third party agree otherwise.”

“6.03 Agent for Undisclosed Principal

When an agent acting with actual authority makes a contract on behalf of an undisclosed principal,

(1) unless excluded by the contract, the principal is a party to the contract;

(2) the agent and the third party are parties to the contract; and

(3) the principal, if a party to the contract, and the third party have the same rights, liabilities, and defenses against each other as if the principal made the contract personally, subject to §§ 6.05-6.09.”

Owners may have legitimate reasons to want their names withheld. If a client requests that his or her name be withheld, it should be reflected in the listing agreement or in a separate supplement to the listing agreement. The listing agent should request indemnification from the owner for any liability which accrues to the agent as a result of the owner’s request.

6. The commission payable to the listing agent should be set forth as either a percentage of the sale or a fixed dollar amount (WPMLS Rule 7:4). In order to avoid a claim by a property owner that the property owner was told that listing commissions were “standard” and knowing that this is not the case under the Anti-Trust Laws, a provision should be included that indicates that the commission set forth in the Listing Agreement “was not suggested nor influenced by anyone other than the parties to this Agreement.”
7. The owner should be required in the Agreement to authorize the Agent to make offers of cooperation to other licensed Real Estate Brokers and should have the choice of authorizing (a) sub-agency and/or (b) broker agency and/or (c) buyer brokerage. The Department of State has often stated that it is the duty of the agent to explain agency options to the consumer and to guide the consumer as to what is best and what is in the consumer’s best interest. Included in such a dialogue would be the manner in which the listing agent will compensate cooperating brokers. While listing agents may want to reserve the right to negotiate cooperating broker commissions, it has been the position of the Department of State that the failure to communicate percentages to be

offered to cooperating brokers, would be a failure on the part of the listing agent to have an “informed consent dialogue.” For this reason it is recommended that the amount of compensation to be paid to sub-agents, broker’s agents and buyer’s agents should be set forth in the agreement.

8. Owner’s obligations after the expiration of the agreement: Many listing agents are rightfully concerned that owners will allow a listing agreement to expire and then complete a transaction with someone who was introduced to the property during the listing term. To avoid this, the use of a commission protection provision specifying that if a transaction takes place within a certain number of months (to be negotiated) results in a completed transaction with someone introduced to the property during the listing term, the listing agent will be paid.

The Department of State has indicated that the Multiple Listing Service form may not include a protection-period clause which does not release the owner in the event that the owner elects to re-list with another New York State licensed Real Estate Broker after the expiration of the exclusive listing. This is to avoid the exposure to a consumer of having to pay two commissions. Even when using one’s own Exclusive Agency or Exclusive Right to Sell forms, agents should include this provision in order to avoid a charge of having sought an “unearned commission.” Prosecution by the Department of State for seeking unearned commissions usually is accompanied by charges of incompetence, untrustworthiness and overreaching and may result in the loss of a listing agent’s license.

9. Negotiations: In order to comply with Regulation 175.24, it is recommended that the language in the WPMLS model form be used:

**“Owner agrees to direct all inquiries to the agent.
Owner elects to have all offers submitted through
agent or cooperating agent .**”

10. Submission of listing to the MLS: In the internet era the failure of a Listing Agent to obtain authorization from the owner to submit the listing to the MLS and to display same on the internet exposes the listing agent to liability if the owner does not anticipate and does not believe that the agent is authorized to display this information. It is recommended that the right to market the property through the Multiple Listing Service or on the internet, as well as standard advertising formats, is an essential element of the listing agreement and should not be omitted.
11. Fair Housing: Many homeowners remain ignorant of the duty of an agent to abide strictly by the Fair Housing Laws. Inclusion of a provision affirming the owner’s commitment to comply with all Fair Housing Laws,

along with the broker's duty to do so under the Fair Housing Act and the Realtor Code of Ethics should be made an essential component of a listing agreement.

12. The Department of State's Regulations do not permit an agent to place a "for sale" sign on the property without the specific authorization of the owner. Accordingly, if the agent intends to post a sign, authorization should be set forth in the listing agreement. (See D.O.S. Regulation §175.11 Sign on Property).
13. If the agent intends to place a lockbox on the property, the listing agreement must specifically authorize the agent to do so. Such a provision should also address who will be responsible for loss or theft arising from the use of a lockbox.
14. Rentals: In a volatile market, or one which has slowed significantly, the expectations of the owner may not be fulfilled. When granting an Exclusive Right to Sell or an Exclusive Agency the owner is not necessarily granting to the agent the exclusive right to rent the property on the owner's behalf. Since there are "inalienable" rights of an owner to take the property off the market, cancel a listing or decide to rent, the listing agent should consider carefully the inclusion of a provision which grants to the listing agent the right to rent the property if the owner so directs and to act as the owner's exclusive agent for such purpose.
15. Owner's Inalienable Right to Terminate an Agency: This column has addressed on many occasions, the inalienable right of an owner under New York Law to terminate the agency of an agent. Whether or not there is due cause for same, the right to terminate the agency is paramount. Inclusion of a provision that the owner will be responsible for the agent's advertising expenses or other damages is an appropriate protection for the agent and an alert to the seller that an arbitrary decision by the seller may result in liability.
16. In 2007 the Home Equity Theft Prevention Act (Section 265A of the Real Property Law) became effective in New York State. Agents should be certain to require that the owner represent that the owner is not delinquent in making mortgage payments for two (2) or more months and that the property is not the subject of a pending foreclosure.
17. Additional points: There are often unique circumstances applicable to individual owners. Owners may wish to exclude from the commission obligation to the agent a transaction with a neighbor's family member who previously expressed an interest in acquiring the property. Including

an exclusion from the compensation provisions of the contract for such circumstances is entirely appropriate.

18. **Signature:** Because a listing agreement is in fact a contract between the owner and the agent, the owner and the agent should execute the agreement and date the agreement at the end. Strict compliance should also occur with respect to the definitions of “Exclusive Right to Sell” and “Exclusive Agency” as required by Regulation §175.24. The explanations must be “attached to the listing or printed on the listing and signed or initialed by the homeowner...”.

Agency Relationship Disclosure Form (Section 443 of the Real Property Law)

While the listing agreement does not incorporate the provisions of Section 443 of the Real Property Law, every listing agent must be aware that the Law requires that the Agency Relationship Disclosure Form be submitted to the owner at the time of first substantive contact and in no event signed before an Exclusive Right to Sell or Exclusive Agency Listing is entered into between the owner and the agent.

It is at the time of distribution of the Section 443 Disclosure Form that the agent should discuss the agent’s office policies regarding cooperating brokers, buyer’s agents, dual agency and the other agency options which may arise in the course of the transaction. The WPMLS forms include optional “in-house sales” provisions which set forth some of the agency options that would be available when a dual agency situation comes about. While these are not mandatory, they are often helpful in clarifying to the owner the nature of the options available.

Copies Must Be Provided To the Consumer

Regulation §175.12 of the Department of State requires that whenever a consumer signs any document relating to any transaction with a licensed agent, the consumer be given a “duplicate original” of the signed document. The use of standard forms which acknowledge receipt of a duplicate original along with the definitions required to be given to the consumer under Regulation §175.24, is the best assurance that the agent will be able to prove to an investigator that the agent fully complied with Article 12-A of the Real Property Law.

It Is Not Simple!

Being a Real Estate licensee in the 21st Century is not simple. The knowledge base required of licensees has expanded exponentially over the last thirty years. Every licensed broker is encouraged to review carefully, their Exclusive Right to Sell and Exclusive Agency agreements to be certain that they are in conformity with all applicable laws and regulations.