



Edward Smith - The Commercial Classroom: Getting paid - open listings

May 23, 2011 - Long Island

This column is offered to help educate agents new to commercial and investment brokerage and serve as a review of basics for existing practitioners.

Depending upon the market (and the agent's skills), open listings may have to be taken.

I would like to have a "handshake" agreement with every owner; I will sell or lease your property and you will pay me an agreed fee. Unfortunately in a small number of transactions commission disputes arise or an owner tries to renege on an agreed fee. Our "handshake" or oral agreement will not help us win if we have to go to court to collect our commission, a written listing agreement and other evidence will be required.

First we need to define listing agreements. The exclusive right agreements make the owner responsible to pay the broker a defined commission if the property is sold or leased by the broker, or in cooperation with another broker or by the owner themselves during the term of the agreement. Exclusive agency is basically the same except if the owner sells or leases the property themselves the broker does not get a fee. Then we have the "open listing." Basically this is a written agreement that states if the broker sells or leases the property the owner will pay them a specified fee; however the owner may also "hire" other brokers to market the property or sell it themselves, in which case the "open listing" broker does not get paid.

In the event of a commission dispute does the court care if the listing is exclusive or open? No, what the court cares about is: is the agreement in writing and if it contains the basic seven elements of a listing agreement:

- * Property address;
- * Owner information;
- * Broker information;
- * Offering price and terms;
- * Agreed commission fee and when payable;
- * The term (length) of this agreement; and
- * The legal jurisdiction.

In the eyes of the court the only thing that counts, is a written agreement; exclusives only affect the agents ability to market the listing. Most commercial listing services require exclusives for inclusion. When in a situation necessitating an "open" agreement, the easiest way to deal with it is to take your regular exclusive form and cross out the words "exclusive" and insert the word "open" and have both parties initial the document changes. This preserves all of the important clauses in the agreement.

If that does not satisfy the customer I recommend you have your firm develop a "listing authorization form." This document authorizes the agent to market the property on a non-exclusive basis and

should contain the seven key points indicated above. By requiring such an authorization we have a written document indicating our fee if we bring about a sale or lease.

Can we co-broke "open listings?" I get nervous when I ask another agent if they have an exclusive and they "dance around" the question. Probably they did have an exclusive, but it may have expired. Are our fees protected? No! If your exclusive runs out and the owner is not giving the listing to another broker, at least get a listing authorization signed. You must have a written fee agreement to protect your commission if you have to go to court to collect it.

Next month we will look at co-broking exclusive and open listings.

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