



Commercial Classroom: Open real estate listings - by Edward Smith

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

Should a broker/agent take an open listing? Let's begin by understanding the three different types of listings. There are three basic forms of commercial real estate listing agreements: Exclusive right, exclusive agency or open. These may apply to sales, leases or exchanges or all possibilities in one form.

An exclusive right to sell, lease or exchange agreement typically gives the listing broker authority to promote the property, based upon the agreed price and terms, in any manor including listing on marketing databases, the Internet (social media), networking and cooperating with other brokers. Permission is also granted to place signs on the property. Owner agrees to pay a specific commission to the broker, which the broker may share with cooperating brokers if the property is sold, leased or exchanged.

The exclusive agency agreement is similar with two major changes. The property owner retains the right to sell, lease, or exchange the property directly to a buyer or tenant themselves. In such case no commission would be owed to the listing broker. However, the broker could negotiate to be paid a fee for services (signage, advertising costs, etc.) if this occurred. In this type of agreement, the owner also agrees to refer any broker inquires to the listing broker.

In commercial real estate about 70% of the listing are exclusives; the other 30% are open listings. Basically, for two reasons: The property owner owns many properties and provides all the area brokers with their list of available space on a regular basis, or the property owner is a prominent individual in the area who "knows everyone" and does not want to slight other brokers they know by only giving the listing to one firm.

Open listing agreements may take different forms; they may or may not be representation agreements.

Open listings agreements are non-exclusive and may be given to multiple brokers to sell, lease or exchange a property. To be enforceable they must be in writing. A commission rate is negotiated (which could vary by broker) and is paid only to the broker the produces a buyer or tenant who actually buys or leases the property. In the open listing agreement, the seller or landlord also has the right to sell, lease or exchange the property directly to a buyer or tenant, and owe no one a commission.

In some cases, owners will give an open Listing to just one Broker at a full commission, with permission to share the commission with other brokerages. This non-exclusive agency agreement, like the exclusive agreements would contain all the agreed upon terms and conditions. It is then possible for the listing broker to co-broke with another broker who has the buyer or tenant. In these circumstances the open listing is a contract between the seller or landlord and the listing broker; with the broker representing their client the seller or landlord. If the listing broker finds a buyer or tenant themselves their firm would then be acting as a “dual agent.”

Other “open listing agreements” may not be formal contracts. Typically, referred to as “for sale by owner.” In commercial real estate an owner may place their sign on the property and add “brokers protected.”

The seller or landlord is soliciting local agents representing buyers or tenants to market the property. The listing agreement would say that the owner does not want representation but simply wants the broker to find a purchaser or tenant.

Since the seller or landlord are representing themselves, without agent representation, they may offer these agents representing the buyer or Tenants only half of the traditional commission rate. Only the broker who closes the transaction get paid. The owner retains the right to sell or lease the property directly themselves and then no commissions are paid.

The “brokers protected” term may be applied another way. Sometimes an owner of a property that they know will be hard to sell or lease, will offer the listing broker an “override”, effectively 1 ½ times the commission, so they may offer a full commission to cooperating brokers. In this case the listing broker would be representing the owner and if they found the buyer or tenant themselves “dual agency” would apply. Other owners may say you can sell or lease the property, but you must get your commission from the buyer or tenant.

As you can see open listings can be complicated: Be sure to discuss who you represent and negotiate your commission rate before signing any open listing agreement. If not sure check with an attorney.

The downside of open listings is if you advertise them, a buyer, tenant or another broker may contact the owner directly. So advertising is limited and if you do, the property should be initially described without the address.

With inquiries to these ads from buyers or tenants seek to get representation agreements signed, before identifying the property location. Including clauses in the agreement that state: "the client (your buyer or tenant) will pay your commission of __%. However, if such fee, or any portion thereof is paid by the seller or landlord, or the seller's or landlord's agent, then client will be credited by Broker for the amount so paid." Inquiries from other brokers require a co-broke agreement to be signed before going further.

No matter what type of listing agreement you have, register all potential buyers or tenants in writing with the property owners before you show the property, even if they are represented by another broker. This helps prevent clients from going around the broker(s) directly to the owner.

Create a paper trail, especially with open listings, starting with a written agreement and creating showing records. Paperwork first!

Open listings can be helpful if you find the "perfect" building for an existing buyer or tenant you represent. They also provide you with additional market knowledge as to pricing. They may, after a few showing by you, lead to upgrading to an exclusive listing.

Unfortunately many agents forget this last step, when you show the owner activity, they may now be willing to give you the exclusive.

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