

“Should a Seller Negotiate Changes to the Standard Listing Contract with Its Broker?”

Yes. It is important for sellers to negotiate the terms of a standard listing contract because the standard WB forms contain certain vague and unfavorable provisions for sellers.

For example, the standard WB form provides that if the listing broker "procures" a ready, willing and able buyer who submits an offer to purchase meeting the terms defined in the listing contract, the seller must pay a brokerage commission to the listing broker whether or not the sale actually closes. Closings can fail to occur for various reasons. The buyer may default. There may be a dispute where the buyer and the seller each blames the other for not closing. In such cases, the listing broker may still be able to prove that it has "procured" the buyer, and may assert a claim for the commission even though no closing has occurred. A seller could also be responsible for paying multiple brokerage commissions if the listing broker "procures" more than one prospective buyer. For this reason, it may be advisable to revise the listing contract to provide that the seller's duty to pay the commission is contingent upon the actual closing of a sale.

The seller may also want to modify the terms of the listing contract to exclude parties with whom the seller, or another broker, has already introduced to the property. If a neighbor has recently expressed an interest in purchasing the property, the seller may wish to reduce the commission or exclude the neighbor from the listing contract. If the seller has recently changed brokers, the former broker may still be entitled to a commission if the ultimate buyer had been introduced to the property by that broker. Therefore, the seller in such a case might wish to exclude the former broker's contacts from the listing contract. The risk of excluding potential purchasers from a listing, however, is that the broker will not have the incentive to heavily market a property for which the broker ultimately might not receive a commission.

The seller should specify material terms of the listing arrangement in the listing contract. The listing contract should expressly state the seller's intentions with respect to the following: (a) price, (b) term of the listing contract, (c) marketing efforts such as listing the property on the Multiple Listing Service, (d) confidentiality of information provided by the seller, and (e) excluded property. The seller should also review the terms of the co-brokerage arrangement to verify

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that such terms do not disadvantage the cooperating broker, making the property less marketable.

Finally, the listing contract should properly address the seller's intentions regarding multiple representation. By consenting to multiple representation with designated agency, the seller agrees that agents of the same broker may represent different parties in the transaction. Each designated agent has a duty of loyalty and the obligation to disclose material information to that agent's client. If the parties agree to multiple representation but do not consent to designated agency, then the broker and the broker's salespersons may provide brokerage services to different parties but may not represent any individual party.

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