

Plain English in Residential Real-Estate Listing Contracts

By George H. Hathaway

A residential real-estate listing contract is a contract between the owners of a house, who promise to pay a real-estate agent a commission for selling the house, and a real-estate agent, who promises to use his or her best efforts to sell the house. All of the listing contracts now used in Michigan are written in legalese. This is unnecessary because these contracts are not "too complicated for plain English," nor is the legalese required because of "case precedent," or "statute," or "precision." All of these contracts should be and can be written in plain English.

Pieces of the Puzzle

More than 99 percent of the listing contracts now written in Michigan are written on printed forms in which the parties fill in the blanks. Each real-estate formbook contains one or more of these forms. But many different listing contract forms are used in Michigan. And each different form is simply one piece of a gigantic jigsaw puzzle. Therefore, to get a good overall view of listing contracts, it's helpful to find out how many total listing contracts are normally written in Michigan each year,

and how many different forms are used for these contracts.

Number of Listing Contracts Written

Michigan currently has about 9.1 million people and about 2.1 million owner-occupied single-housing units (homes).¹ An estimated 100,000 of these homes are sold each year. Some of these homes are listed but not sold. And other homes are sold by the owner without a listing contract. For simplicity we will assume that these two items cancel each other out, and therefore estimate that about 100,000 listing contracts are written in Michigan each year.

Number of Different Listing-Contract Forms

All real-estate agents in Michigan must be licensed with the Michigan Department of Licensing and Regulation under the Licensing Act, MCL 339.2501 *et seq.*; MSA 18.425(2501) *et seq.* The term real-estate "agent," a broad general term usually meaning anyone who buys and sells real estate for a fee, is not used in the Act. Instead, the Act uses the following three terms: "Broker"—an individual or corporation that buys and sells real estate for a fee; "associate broker"—the principal officers of a broker corporation; and "salesperson"—a person employed by a broker. The Department presently licenses 10,000 active brokers, 7,000 active associate brokers, and 31,000 active salespersons. If we assume that half the 10,000 brokers are individuals, there are 43,000 licensed, active real-estate agents in Michigan. About 22,000 of these agents belong to the Michigan Association of Realtors (MAR). Only

members of MAR can refer to themselves by the registered trademark term "REALTOR" (pronounced realtor, not real-a-tor). They represent about 3,000 real-estate companies² and are geographically grouped into 51 local boards (12 large boards with from 500 to 2,000 members each, 17 medium size boards with from 200 to 500 members each, and 22 small boards with from 30 to 200 members each). Little is known about the 21,000 licensed, active real-estate agents who are not members of MAR. They are licensed but are probably not working full-time in the residential home-sales field. Therefore, it will be assumed that non-MAR realtors account for less than 1 percent of the home sales in Michigan.³

Within most of the 51 local MAR boards, there is an entity known as a Multiple Listing Service (MLS), which lists all the homes for sale within the board. Each MLS is organized and operated (either directly or indirectly) by the local board. Each MLS has its own listing-contract form. All the real-estate agents in each local board use the listing-contract form of the MLS in their local area. But the MLSs in some of the small-board areas do not have a listing-contract form. In these boards each real-estate company has its own different listing-contract form. Therefore, in actual practice, there are about 100 different listing-contract forms now used in Michigan.

Analysis of Listing-Contract Forms

Each of these 100 listing-contract forms is different from all the others. They have many titles, such as Listing Contract, Listing Agreement, Sales Agency Contract, Exclusive Sales

"Plain Language" is a regular feature of the **Michigan Bar Journal**, edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

Agency Contract, Exclusive Right To Sell Contract, and so on.⁴ Each of these contract forms are on one page. They usually cover many of the same topics. But the words used in each of the forms are different. See Figure 1 for an example comparison of the commission clauses in the listing contracts of the 12 large boards in Michigan.

Case Precedents for Listing Contracts

Many case precedents for listing contracts are referenced and discussed in the Michigan legal literature.⁵ In all this literature, one thing stands out—the literature discusses substantive items that should be covered in a listing contract (e.g., a statement of the amount of commission, when it will be considered as having been earned, and when it will be paid) but does not discuss specific words that should be used.⁶ The reason for this is that there is case precedent for substantive items that should be covered in a listing contract, but there is no case precedent for specific words that must be used for certainty in interpreting a listing contract.

“Brokerage listing contracts are not prepared with an eye opened wide enough to precedent and authority, as the areas of dispute in the brokerage contract are areas of continued litigation, with similar fact situations and similar contracts yielding antagonistic holdings—indicating a sufficient lack of specificity and enough ambiguity to render contemporary agreements open to a variety of interpretations.”⁷ Therefore, case precedent is not a valid rationale for writing a listing contract in legalese.

Furthermore, the topics that are covered in a listing contract are not complicated. Therefore, “too complicated for plain English” is also not a valid rationale for writing a listing contract in legalese.

Finally, the true terms of art such as “marketable title” and “ready, willing and able” buyer are precise and useful in writing these contracts, but legalese such as “herein,” “therein,” “hereby,” and “hereof” is unnecessary.

Statutory Requirements

The Licensing Act, MCL 339.2515; MSA 18.425(2515), requires that “[a] listing agreement entered into between the broker and seller or lessor of property shall contain language that discrimination because of religion, race, color, national origin, age, sex, or marital status on the part of the real-estate broker, real-estate salesperson, seller, or lessor is prohibited.” Note that the statute requires only that the listing contract “shall contain language.” The statute does not require that the language be stated in an exact way, in an exact order, in an exact sentence. Furthermore, the language itself—discrimination because of religion, race, etc.—is in plain English. Therefore, the statute does not require legalese.

MAR Real-Estate Forms

The 12 large- and 17 medium-size local boards of REALTORS within MAR

(and the respective MLS within each of these boards) are all big enough to develop and print their own forms. However, the 22 small boards are not. Therefore, MAR develops and prints real-estate forms for voluntary use by the small boards. But it is important to realize that the 22 small boards make up only 14 percent of the MAR membership. Therefore, any MAR form has a maximum use of only 14 percent of the total membership. Furthermore, since this use is voluntary, the total use of any MAR form is usually less than 10 percent.

MAR Listing-Contract Forms

One of the forms that MAR provides for the small boards is a listing-contract form (Exclusive Sales Agency Contract, Form B, revised 1986), which is used by about 5 percent of the MAR membership. This form, like all the other board MLS and REALTOR forms, is

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written in legalese. However, in 1989 the MAR Standard Forms Committee, assisted by the Plain English Committee of the State Bar of Michigan, developed a plain-English listing-contract form (Exclusive Right To Sell Contract,

Form G). See Figure 2 for a comparison of the commission clauses in the 1986 MAR Form B and the 1989 MAR Plain English Form G. None of the small-board MLSs or real-estate companies use this new plain-English form.

But the form proves that a listing contract can be written in plain English. And whether anyone uses this particular listing contract or not, there is now no practical reason (too complex, case precedent, statute, precision, or can't be done) why each of the 100 different legalese versions of listing contracts now used in Michigan cannot be written in plain English.

If the rationale is that it takes a lot of time to develop a plain-English form—use the plain-English form already developed by MAR. If the rationale is that there are substantive objections to the MAR form—modify the MAR form and then use that printed modified form. And if the rationale is that there are objections to modifying the MAR form—eliminate the legalese in the listing-contract form that you are presently using.

Conclusion

The State Bar of Michigan has always supported the passage of a proposed state plain-English bill. However, MAR opposes a bill “on the grounds that the delicacy and precision of certain terms expressed in a certain order spell out definitely what is required of both parties to a contract.”⁸ Yet nothing could be further from the truth in a listing contract. Not only is there no case precedent for “certain terms in a certain order” in a listing contract, but no two listing contracts in Michigan are expressed in the same “certain terms” in the same “certain order.”

The sample language used in the commission clauses of the seven different listing contracts used by the 12 large boards in Michigan (which represent 65 percent of MAR members) illustrate this point. It may be true that the words used in these seven contracts are all about the same. But “about the

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Figure 1. Comparison of sample language used in the commission clauses of the listing contracts of the 12 large-size boards of realtors in Michigan.

Macomb County Board Downriver Board	<i>Exclusive Right-To-Sell Listing Agreement (Rev 3/89)</i>
If a purchaser, ready, willing and able, is obtained for said property by anyone.....	
Western Wayne-Oakland County Board South Oakland County Board Birmingham-Bloomfield Board North Oakland County Board Detroit Board	<i>Exclusive Right To Sell Contract (1984)</i>
If a purchaser/tenant is obtained for the aforementioned property by anyone, including the undersigned.....	
Grand Rapids Board	<i>Sales Agency Contract</i>
If... you, or any member of the MLS, produce a purchaser ready willing and able to purchase the property....	
Lansing Board	<i>Uniform Sales Agency Contract (Rev 12/88)</i>
If... I/we, you, or anyone else... produce a Purchaser ready, willing, and able to purchase the property or make exchange therefor....	
Flint Board	<i>Exclusive Right To Sell Contract (Rev 12/84)</i>
If anyone produces a purchaser ready, willing and able to purchase or exchange said property.....	
Ann Arbor Board of Realtors	<i>Listing Contract (Rev 9/86)</i>
If... a willing and able Purchaser for said property is obtained by anyone, including the undersigned.....	
Kalamazoo Board of Realtors	<i>Uniform Listing Contract (Rev 6/88)</i>
If Seller or if you or any member of the Kalamazoo Board of Realtors produces a purchaser ready, willing and able to purchase the property....	

Figure 2. Comparison of the commission clauses in the 1986 MAR Form B contract and the 1989 MAR Plain English Form G contracts

MAR Exclusive Sales Agency Contract (Form B revised 1986)

Seller agrees to pay said REALTOR/Broker a commission of \$_____ or _____% of the listed or exchange price or any other terms accepted by the Seller if anyone produces a purchaser ready, willing and able to purchase or exchange the Property.....

MAR Plain English Exclusive Right To Sell Contract (Form G 1989)

Seller will pay Broker a commission of \$_____ or _____% of the sales price if... anyone produces a buyer who is ready, willing, and able to buy or trade for the property.

same" is as close to "delicacy and precision of certain terms expressed in a certain order" as Rochester's own Madonna is to The Madonna.

Sooner or later a state plain-English bill will be passed. When that happens, any real-estate agent who still uses a residential real-estate listing-contract form written in legalese may risk paying a fine or losing a commission because of the legalese in the form. Therefore, the smart, sensible plan is to start to use plain-English listing contracts now. ■

Footnotes

1. 1980 U.S. Census estimate.
2. MAR does not keep records concerning the number of real-estate companies that are members of MAR. The 3,000 number is MAR's estimate.
3. This is a guess because nobody seems to know anything about non-MAR real-estate agents or companies.
4. The words "contract" and "agreement" are legally equivalent. Therefore, some people call the document a listing "contract." Others call it a listing "agreement." But "contract" is a better choice for three reasons. First, the general public recognizes the word contract as a legally binding document. Therefore, whenever a person signs something called a "contract," they usually take more time to consider it than they normally would. And if a dispute arises, they should normally be held accountable for knowing that the document was meant to be legally binding. However, the word "agreement," although just as legally binding as the word "contract," sounds more informal and less binding than the word "contract." Thus, a person is more apt to sign such a document and, if a dispute arises, more apt to argue that they were misled into believing that the document was something less binding than a contract. Second, the word "contract" is one letter, and one syllable, shorter than the word "agreement." Finally, for uniformity and simplicity, the one term "contract" is better than the interchangeable use of two terms.

Theoretically, there are three possible types of listing contracts. 1) *Open* listing contract, in which any broker, or the sellers themselves, may find a buyer for the house. The broker who finds the buyer gets the commission. If the owners find the buyer themselves, no broker gets the commission. 2) *Exclusive agency* listing contract, in which only one broker, or the owners, may find a buyer. The broker gets the commission if he

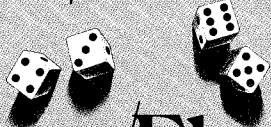
or she or any other broker finds the buyer. The broker doesn't get a commission if the owners find the buyer. 3) *Exclusive right to sell* listing contract, in which the one broker gets the commission if the house is sold regardless of whether any other broker or even the owners themselves find the buyer. As in any legal document, it is the words in the document and not the title of the document that determines the type, or legal effect, of the document. And about 99 percent of the residential real-estate listing contracts in Michigan are the exclusive-right-to-sell type of listing contracts.

5. Cameron, Michigan Real Estate Forms (Aspen, 1988); Cameron, Michigan Real Property Law (ICLE, 1985); Deems and Tervo, Michigan Real Estate Sales Transactions (ICLE, 1983); Jossman, Michigan Real Estate Formbook (ICLE, 1982); Comment, *The Real Estate Listing Contract in Michigan: An Attempt at Contract Certainty*, 47 J Urban L 523 (1969).
6. Cameron, Michigan Real Property Law, *supra* note 5, p 432.
7. Comment, *supra* note 5, pp 565-566.
8. Detroit Free Press editorial, February 27, 1987, p 8A.

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