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# REAL ESTATE CONTRACTS

1 **LEARNING OBJECTIVES**

2 *When you have completed this unit, you will be able to accomplish the following.*

- 3 ■ List and describe the essentials of a contract, list the four types of contracts with which licensees may
- 4 assist buyers and sellers, and describe the effect of the statute of frauds and the statute of limitations.
- 5 ■ Distinguish among formal, informal, bilateral, unilateral, implied, expressed, executory, and executed
- 6 contracts.
- 7 ■ Describe the various ways an offer is terminated.
- 8 ■ Describe the various methods of terminating a contract and explain the remedies for breach of contract.
- 9 ■ Differentiate among the various types of listings.
- 10 ■ Describe the elements of an option contract.
- 11 ■ List and describe the information contained in a sale contract.
- 12 ■ Explain and describe the various disclosures required in a real estate sale contract.
- 13 ■ Recognize what constitutes fraud, misrepresentation, and culpable negligence.

14 **KEY TERMS**

assignment  
attorney-in-fact  
bilateral contract  
competent  
contract  
enforceable contract  
exclusive-agency listing  
exclusive-right-of-sale  
listing

fraud  
homeowners association  
(HOA)  
liquidated damages  
meeting of the minds  
misrepresentation  
net listing  
novation  
open listing

option contract  
procuring cause  
statute of frauds  
statute of limitations  
unenforceable contract  
unilateral contract  
valid contract  
void contract  
voidable contract

## 1 INTRODUCTION

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2 Nearly every business transaction is based on an agreement.

### 3 11.1 CONTRACTS IN GENERAL

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4 A **contract** defines the parties' legal relationship and spells out each party's rights and  
5 duties. It is a voluntary agreement or promise between legally competent parties, sup-  
6 ported by legal consideration, to perform (or refrain from performing) some legal act.

7 Underlying every contract is the *promise*. In a real estate contract, the seller promises  
8 to convey title to the real estate, and the buyer promises to pay the purchase price. Con-  
9 tract promises are *enforceable* by law, provided the contract meets certain requirements.

## 10 PREPARATION OF CONTRACTS

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13 The drafting of legal documents or legal instruments for others is considered to be  
14 the practice of law. Unless they are attorneys, real estate brokers and associates may not  
15 prepare deeds, mortgages, promissory notes, or most other legal documents. Licensees who  
16 prepare such instruments are subject to discipline and could lose their licenses, even if the  
17 licensee did not receive compensation. Brokers and associates may also be charged with  
18 the unlicensed practice of law, a third-degree felony.

19 **Authority of Real Estate Licensees to Prepare Contracts.** Real estate licensees may not  
20 draft leases. However, licensees may fill in the blanks on residential lease instruments for  
21 lease periods that do not exceed one year, provided licensees use forms that have been  
22 preapproved by the Florida Supreme Court.

23 Real estate licensees may assist buyers and sellers with the completion of four types of  
24 contracts, as directed by the buyers and/or sellers:

- 25 1. *Listing agreement.* A listing agreement is an employment contract between a  
26 broker and a seller.
- 27 2. *Buyer brokerage agreement.* A buyer brokerage agreement is an employment con-  
28 tract between a broker and a buyer.
- 29 3. *Sale and purchase contract.* A sale and purchase contract is a contract between a  
30 buyer and a seller. If the licensee acts as agent or facilitator for one or both of the  
31 contracting parties, the licensee may prepare the sale and purchase contract.
- 32 4. *Option contract.* An option contract is an agreement between an owner of a prop-  
33 erty (the *optionor*) and a party interested in the property (the *optionee*) to keep  
34 open for a specified period of time an offer to sell or lease real property. In order  
35 to reduce liability, licensees are strongly advised to recommend that the buyer or  
the seller have a real estate attorney draft option contracts. Option contracts are  
explained in detail later in this unit.

36 Real estate brokerage offices typically use standardized listing agreements, buyer  
37 brokerage agreements, sale and purchase contracts, and option contracts. The Florida  
38 REALTORS® and other professional groups have developed standardized contracts for  
39 use by their members. This is desirable because the use of standardized contracts greatly  
40 reduces liability. Changing the preprinted words of any form contract by a nonlawyer can  
41 be viewed as the unlicensed practice of law. If more extensive language is needed in a con-  
42 tract beyond simply filling in the blanks, this language should be approved by an attorney  
43 before it is inserted.



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## ESSENTIAL ELEMENTS OF A CONTRACT

A **valid contract** is one that complies with the provisions of contract law and contains four essential elements:

- Contractual capacity of the parties (competent parties)
- Offer and acceptance (mutual assent)
- Legality of object (legal purpose)
- Consideration

### Contractual Capacity of the Parties

Not all persons have the ability or capacity to make a valid contract. A person who is legally insane, intoxicated, suffering from dementia, or legally a minor may have only limited contractual capacity. The parties to a contract are **competent** if they have the *legal capacity to contract*, meaning they have no mental defects or insanity and are of legal age to contract.

### Offer and Acceptance

One party (the *offeror*) makes an offer, and the other party (the *offeree*) accepts that offer. A contract is formed at the instant that acceptance of the offer is communicated to the offeror. A complete and mutual understanding must exist to produce a **meeting of the minds**.

### Legality of Object

The agreements of a contract must be for a legal purpose.

**EXAMPLE:** Unbeknownst to the seller, a broker has an inactive real estate license at the time she takes a listing. At title closing, the seller discovers that the broker does not have a valid active real estate license, and the seller refuses to pay the commission. The listing agreement between the seller and the broker is void because the purpose of this employment contract is not legal. License law requires a valid active license to conduct real estate services for another for compensation, and the broker did not have an active license at the time the services were provided. A lawsuit for unpaid commission would be unenforceable in a court of law.

### Consideration

*Consideration* is a thing of value given in exchange for some other value. People often think of consideration as the money exchanged by the parties. Legally, however, consideration is the *obligation* that each party makes to the other to make the contract enforceable. The parties to the contract must obligate themselves individually by placing some consideration in the agreement. A promise undertaken by one party must be supported by a promise undertaken by the other party. Mutual promises to perform or to forego some specific act are sufficient consideration, even if the benefit or sacrifice may not be equal. A common misconception is that the good-faith deposit (earnest money) in a real estate sale contract is the consideration. The good-faith deposit is made by a buyer to assure the seller that the buyer is serious about the transaction and the buyer intends to purchase the property. In real estate

1 sale contracts, the seller normally promises to sell and convey, and the purchaser promises  
2 to pay for the property. There are two types of consideration:

- 3 ■ **Valuable consideration** is the money or a promise of something that can be  
4 measured in terms of money. Valuable consideration is used to support an arms-  
5 length transaction where the parties have conducted negotiations in their own  
6 best interest and money is paid.
- 7 ■ **Good consideration** is a promise that cannot be measured in terms of money,  
8 such as love and affection. Good consideration is used to support a gift, such as a  
9 father giving property to his daughter and the daughter either paying nothing or  
10 only token consideration for the property.

11 Either type of consideration is sufficient to enforce a contract. The law generally does  
12 not concern itself with the relative fairness of consideration. What is exchanged need not  
13 have the same measurable value. The law will accept that the parties thought the consid-  
14 eration to be fair because they freely agreed to the exchange.

## 15 STATUTE OF FRAUDS

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16 The **statute of frauds** requires that contracts *conveying an interest* in real property and  
17 all contracts that are not performed within one year from the date they become effective  
18 must be in writing and signed to be enforceable. An **enforceable contract** is a contract  
19 that the courts will recognize as legally binding. Contracts covered by Florida's statute of  
20 frauds include the following:

- 21 ■ Purchase and sale contracts
- 22 ■ Option contracts
- 23 ■ Deeds and mortgage instruments
- 24 ■ Lease agreements for a term longer than one year
- 25 ■ Listing agreements for a term longer than one year
- 26 ■ Buyer representation agreements for a term longer than one year

## 27 STATUTE OF LIMITATIONS

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28 The **statute of limitations** is the period of time, set by statute, during which the terms  
29 of a contract may be enforced. It protects people from being compelled to perform or oth-  
30 erwise be sued after a period of time has expired. The times vary, depending on whether it  
31 is an oral contract or a written contract:

- 32 ■ Written contracts—five years
- 33 ■ Oral contracts—four years
- 34 ■ Partly written and partly oral—five years for the written portion and four years  
35 for the oral portion

## 36 TRANSFER OF REAL PROPERTY

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37 Like all contracts, real estate purchase contracts must contain the four essential ele-  
38 ments to be valid. Furthermore, to be enforceable in court, real estate purchase contracts  
39 must be in writing and signed by all parties who are bound by the agreement. Real estate  
40 purchase contracts are not required to be witnessed or notarized. Real estate contracts are  
41 not recorded.

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**TO REMEMBER: ELEMENTS OF A VALID AND ENFORCEABLE REAL ESTATE SALE CONTRACT**

<b>C</b>	Competent parties
<b>O</b>	Offer and acceptance (meeting of the minds)
<b>L</b>	Legal purpose
<b>I</b>	In writing and signed (statute of frauds applies to real estate contracts)
<b>C</b>	Consideration (valuable or good)

1 The fact that a contract for the purchase and sale of real estate is oral does not auto-  
 2 matically make the contract unenforceable. An oral real estate contract that contains all  
 3 of the essential elements of a valid contract is valid and may be enforceable under certain  
 4 circumstances. For example, if a buyer and a seller verbally agree to a purchase and sale  
 5 of real estate, and the buyer pays part of the purchase price and takes possession of the  
 6 property or has made improvements to the property, the courts will recognize the contract.

7 A contract does not have to be in any particular format to be valid, as long as it con-  
 8 tains all the essential elements. The contract should have an unambiguous property iden-  
 9 tification. Because a contract is an agreement designed to clearly spell out the meeting of  
 10 the minds between parties on a particular subject, it creates certain enforceable rights. It  
 11 should also provide remedies for the affected parties if the contract is breached.

### 12 **Void, Voidable, and Unenforceable Contracts**

13 A **void contract** lacks one or more of the required elements of a valid contract and,  
 14 therefore, has no legal effect. A contract that is void was never a legal contract. For  
 15 example, the use of a forged name in a listing agreement would make the contract void.

16 A **voidable contract** allows one of the parties to potentially disavow contractual duties.

17 **EXAMPLE 1:** A contract in which one of the parties is an individual under the  
 18 legal age to contract is voidable because the minor does not have capacity to contract—  
 19 the minor does not meet the competent parties element of an enforceable contract.

20 **EXAMPLE 2:** A real estate contract that includes a home inspection contingency  
 21 is voidable because if the contingency is not satisfied and released, the offer and accep-  
 22 tance (mutual assent) element of an enforceable contract is not met.

23 An **unenforceable contract** will not be enforced by a court of law. For example, a con-  
 24 tract may be unenforceable because the statute of limitations has passed. Void contracts  
 25 are also unenforceable contracts. An oral contract for sale and purchase of real estate may  
 26 otherwise be valid but unenforceable because the statute of frauds requires such contracts  
 27 to be in writing.

**FIGURE 11.1** ■ **Contracts in General**

Valid	Contains all required essentials
Void	No contract; lacks one or more essentials
Voidable	May be made valid or void by one of the parties
Enforceable	Courts will enforce
Unenforceable	Courts will not enforce

## Practice Questions

1. List the four types of contracts that may be prepared by a licensed real estate broker.
  1. \_\_\_\_\_
  2. \_\_\_\_\_
  3. \_\_\_\_\_
  4. \_\_\_\_\_
2. A contract for an illegal purpose, such as illegal gambling, is \_\_\_\_\_.
3. A sane person contracting with an insane person produces a \_\_\_\_\_ contract.
4. An oral real estate contract, with certain specific exceptions, is \_\_\_\_\_.

## 11.2 CONTRACT CLASSIFICATIONS

Contracts can be classified by their method of formation, their content, or their legal effect.

### Formal and Informal Contracts

**Formal Contract.** Historically, a formal contract was in written form and under seal. The seal has evolved from the old wax impression on a document to the word *seal* or the letters *L.S.* (*locus sigilli*, Latin for “the place of the seal”) that appear after the signatures of parties signing the contract. The term *formal contract* also refers to a contract that depends on a particular form. For example, a negotiable instrument such as a promissory note is called a formal contract. A fill-in-the-blank contract on a preprinted form is also considered to be a formal contract. Today, the seal is not required for contracts to be valid.

**Informal Contract.** Informal contract refers to an oral contract as opposed to a written contract or specialty instrument. An oral agreement is also called a *parol contract*. Therefore, informal or parol contracts are verbal agreements as opposed to written or formal contracts.

### Bilateral and Unilateral Contracts

The very name of the contract classification often indicates the way in which the contract was arranged, the requirements for its performance, or even the type of parties bound by the contract.

**Bilateral Contract.** A **bilateral contract** obligates both parties to perform in accordance with the terms of the contract. Both parties promise to do something; one promise is given in exchange for another.

**EXAMPLE:** A sale contract is a bilateral contract because the buyer and the seller exchange reciprocal promises to buy and sell the property.

**Unilateral Contract.** A **unilateral contract** obligates only one party to an agreement. One party makes an obligation to perform without receiving in return any promise of performance from the other party. There is no obligation on the part of the other party involved.



**EXAMPLE:** A broker promises to pay a \$1,000 bonus to the sales associate who gets the greatest number of new listings by the end of the month. The broker has promised to pay a bonus; however, the sales associates working for the broker are under no obligation to acquire new listings.

### Express and Implied Contracts

A contract is classified as either express or implied according to how the contract is created.

**Express Contract.** An express contract is an actual agreement between the parties, the terms of which are declared orally or in writing, at the time of entering into the agreement. At the time parties enter into and communicate the terms of the agreement, an express contract is created. The primary requirements are mutual understanding and agreement. Real estate listing agreements and sale contracts are express contracts.

**Implied Contract.** An implied contract is inferred by the acts or conduct of the parties. The obligations and conditions of the contract are not stated in words but are implied by the acts of the parties. Every day, we enter into implied contracts. For example, if a person walks into a restaurant and orders dinner, an implied contract has been created. It is implied that the customer will pay for the service after enjoying the meal without actually discussing the actual payment or agreeing to pay for the meal until after the service has been rendered.

### Executory and Executed Contracts

A contract is either executory or executed, depending on the extent to which the contract has been performed.

**Executory Contract.** An executory contract is an agreement between parties that involves promises to be completed at a future date. A purchase and sale real estate contract, between the time of signing the contract and the time that the title is conveyed from the grantor to the grantee, is an executory contract because the parties have not fully performed.

**Executed Contract.** An executed contract exists when both parties have performed their obligations. All of the parties to the contract have performed the promises stated in the contract. At title closing, a real estate sale contract is executed. A real estate sale contract becomes an executed contract when the title closing is completed and all the promises of both buyer and seller have been fulfilled (see Figure 11.2).

**FIGURE 11.2** ■ Contract Classifications

Formal	In writing
Informal	Oral (Parol)
Bilateral	Both parties obligated
Unilateral	One party obligated
Express	In words
Implied	By acts and conduct
Executory	Not yet fully performed
Executed	Completed all terms and conditions

1 **Executed Contract vs. Executing a Document.** When people refer to executing a docu-  
 2 ment, they mean the document has been signed by the parties to the contract. Real estate  
 3 professionals who refer to an executed real estate contract typically mean that the docu-  
 4 ment, whether a hard copy document or a digital contract, has been signed (executed) by  
 5 the buyer and the seller. In this sense, the date of execution is the date on which the last  
 6 of all parties' signatures are inscribed on the contract. Typically, this date is referred to as  
 7 the effective date. Remember that when referring to contract classifications, an executory  
 8 contract involves some future act that is yet to be accomplished (such as title closing).  
 9 Thus, the term executed contract has two meanings. It can mean a signed document;  
 10 however, when referring to an executed contract classification, it refers to a contract that  
 11 is fully performed and nothing remains to be done by either party.

### Practice Questions

5. A contract with an obligation by only one party is a \_\_\_\_\_ contract.
6. A contract that is under seal is a \_\_\_\_\_ contract.
7. A sale contract after the title closing is completed is an \_\_\_\_\_ contract.

## 11.3 CONTRACT NEGOTIATION

12  
 13 An offer demonstrates an intention to enter into a contract. In the normal sequence  
 14 of forming a contract, one party begins by making an *offer*. Assume that Rebecca is selling  
 15 a parcel of land that she owns. Ken makes an *offer* to purchase the lot from Rebecca for  
 16 \$34,000. Ken is the *offeror* (the person making the offer) and Rebecca is the *offeree* (the  
 17 person who receives the offer).

18 A common misconception is that the purchase contract form, when completed with  
 19 the buyer's information, is a contract. In actuality, it is the buyer's offer; the buyer's criteria  
 20 has been inserted in the blanks on the contract *form* to create the buyer's offer. It is not a  
 21 contract until both parties have reached an agreement on the price, terms, and conditions.

22 Frequently, the offeree will make a *counteroffer* by altering the terms of the original  
 23 offer. For example, if Rebecca decides to make a counteroffer of \$35,500 and asks Ken to  
 24 pay all the closing costs, Rebecca has replaced Ken's original offer with a counteroffer. A  
 25 counteroffer nullifies the original offer and substitutes a new offer in its place.

26 When a counteroffer is made, the role of both parties also changes. Because Rebecca's  
 27 counteroffer is based on new terms and conditions, she has "changed hats" and is now the  
 28 offeror. Likewise, Ken is receiving the new terms and conditions, so he has become the  
 29 offeree. It is not uncommon for a series of offers and counteroffers to take place before a  
 30 meeting of the minds is accomplished. Once a meeting of the minds is reached—that is,  
 31 when one party accepts the offer of the other party and communicates such acceptance—  
 32 a contract has been formed. Both parties then are obligated to perform according to the  
 33 contract.

34 An offer is terminated when any of the following happens:

- 35 ■ *Counteroffer.* A counteroffer indicates a willingness to contract, but on terms or  
 36 conditions different from those contained in the original offer. It is not an accep-  
 37 tance because it indicates an unwillingness to agree to the terms of the original  
 38 offer. The original offer is dead forever and cannot be later accepted. Each time a



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- 1 counteroffer is made, it nullifies the corresponding offer. The only offer that the  
2 offeree can consider is the one that is currently being made to the offeree.
- 3 ■ *Acceptance.* Communication of the acceptance of an offer creates a contract. An  
4 acceptance must be a mirror image of the terms of the offer. Letters and other  
5 written communications, including a signature, may be sent by electronic means  
6 or facsimile, and will be considered part of the contract. If Rebecca had accepted  
7 Ken's offer of \$34,000 for her property instead of making a counteroffer, the offer  
8 would have become a contract on that acceptance and its communication.
- 9 ■ *Rejection.* To effectively terminate an offer, a rejection must be communicated by  
10 the offeree to the offeror. If Rebecca had chosen to reject Ken's offer, the offer  
11 would have terminated when Rebecca communicated the rejection to Ken.
- 12 ■ *Withdrawal by offeror.* An offeror may withdraw (or *revoke*) the offer at any time  
13 until notice of the offeree's acceptance is received by the offeror or the offeror's  
14 designated agent. Suppose, for example, that Rebecca decides to withdraw her  
15 counteroffer of \$35,500. She may do so as long as her intention is communicated  
16 to Ken before he accepts her counteroffer.
- 17 ■ *Lapse of time.* Ordinarily, when an offer is made, a time limit for acceptance  
18 of the offer is specified. The offer terminates after expiration of that time. If  
19 no time limit for acceptance is specified, the offeree is considered to have a  
20 *reasonable length of time*. This time period is based on such considerations as the  
21 method of communication used, the location of the parties involved, and the  
22 terminology and nature of the offer.
- 23 ■ *Death or insanity.* The death or insanity of either the offeror or the offeree termi-  
24 nates the offer. An offer is not assignable (transferable); it may be accepted only  
25 by the person to whom it is made.
- 26 ■ *Destruction of the property.* Destruction of the subject matter terminates the offer.

**TO REMEMBER: WAYS AN OFFER IS  
TERMINATED**

W	Withdrawal by offeror
I	Insanity
L	Lapse of time
D	Death
C	Counteroffer
A	Acceptance
R	Rejection
D	Destruction of the property

### Practice Questions

8. The person making an offer is the \_\_\_\_\_.
9. A change in price or other terms by the seller to the buyer creates a \_\_\_\_\_.

## 11.4 TERMINATION OF CONTRACTS

A contract is terminated when any of the following happens:

- *Performance.* When both parties have fully performed the terms and conditions of a contract, the purpose of the contract has been accomplished and the contract is terminated. The emphasis is on full performance of each and every contract term or condition. This is, of course, the desired outcome of any contract. However, sometimes contracts are terminated for other reasons.
- *Mutual rescission.* An agreement between the contracting parties to terminate their respective duties under the contract is called *mutual rescission* or *renunciation*. Both parties must mutually agree to discontinue the contract.
- *Impossibility of performance.* Performance may be impossible and beyond the control of the parties. For example, destruction of the physical improvements is a good excuse for impossibility of performance. The death of the buyer or the seller will usually be considered a reason for impossibility of performance, unless the real estate contract provides otherwise, such as binding the heirs of the deceased party.
- *Lapse of time.* Certain circumstances, such as lapse of time, will cause a contract to be terminated by operation of law. For example, a contract may be terminated as a result of the expiration of the statute of limitations. The words “time is of the essence” in a contract mean that dates and time limits in the contract must be complied with to avoid breach.
- *Breach.* A contract is breached when one of the parties fails to perform a valid obligation. The aggrieved party may sue over a breach of contract.

### TO REMEMBER: WAYS TERMINATION OF CONTRACTS COULD OCCUR

B	Breach
L	Lapse of time
I	Impossibility of performance
M	Mutual rescission
P	Performance

### Remedies for Breach

The Florida Real Estate Commission ordinarily has no authority or jurisdiction over breach-of-contract actions. Remedies for breach of contract are imposed by the court that considers the lawsuit. There are four legal remedies for breach of a contract:

1. *Specific performance.* If awards of money damages do not afford sufficient relief, the wronged party may sue for specific performance to have the courts force the other party to perform as the contract specifically states. This action is termed *relief in equity* because the party bringing the lawsuit is not seeking money damages. Instead, the party is asking the court for a remedy to create a fair outcome. If the party bringing the lawsuit is successful, the court will order the breaching party to do what the party promised to do in the contract. Typically, specific performance is sought by a buyer against a breaching seller.



- 1 2. *Liquidated damages.* Frequently the parties will stipulate an amount of money in  
 2 the contract (usually the earnest money deposit) to be paid in the case of default  
 3 by the buyer. This amount is called **liquidated damages** to the seller.
- 4 3. *Rescission.* To rescind is to cancel or annul the contract. If a court orders the  
 5 parties placed back to their original positions as though the contract had never  
 6 existed, both parties are relieved of their respective obligations under the con-  
 7 tract. An injured buyer is entitled to the return of any earnest money, and the  
 8 seller is obligated to return any earnest money or payment received.
- 9 4. *Compensatory damages.* Another remedy for breach of contract is a suit for dam-  
 10 ages. Usually the party bringing suit seeks an amount of money equal to the  
 11 extent of loss suffered (*compensatory damages*). A wronged party may find that  
 12 a certain property was misrepresented but decide to accept the property and, in  
 13 addition, sue for damages. On the other hand, the buyer may decide to refuse the  
 14 property and still sue for damages.



## REMEDIES FOR BREACH OF CONTRACT

<i>Specific performance</i>	Court orders a party to perform according to the terms of the contract.
<i>Liquidated damages</i>	Amount of damages (usually the earnest money deposit) stipulated in the contract. If the buyer breaches the contract, typically the seller claims the earnest money deposit as liquidated damages.
<i>Rescission</i>	The contract is canceled and the parties are restored to their original positions.
<i>Compensatory damages</i>	This is the actual amount of the monetary loss to a party (also called <i>unliquidated damages</i> ).

## 15 Assignment and Novation

16 A party may end involvement with a contract without actually terminating the con-  
 17 tract. An **assignment** refers to the transfer of a person's rights and duties under a contract  
 18 to another person. A contract is assignable (transferable) unless assignment is prohibited  
 19 by the contract.

20 A person who assigns (transfers) legal rights in a contract is called the *assignor*. The  
 21 person to whom legal rights in a contract are transferred (assigned) is called the *assignee*.

22 An assignor does not escape the obligation to perform the terms and conditions of  
 23 the contract or to see that they are performed by the assignee, unless given a release from  
 24 the other party to the original contract. The parties to a contract may agree to substitute  
 25 another person's obligation to perform. A **novation** agreement is used to substitute a new  
 26 party for the original one. The effect is to discharge the original party from the obligation.

## Practice Questions

10. Damages specified in the contract are \_\_\_\_\_ damages.
11. A \_\_\_\_\_ agreement relieves the assignor from the liability to perform in a contract.



1 **11.5 CONTRACTS IMPORTANT TO REAL ESTATE**

2 **Listing Agreements (Employment)**

3 A listing agreement is an employment agreement between a property owner and a real  
 4 estate broker authorizing the broker to find a buyer (or tenant) for a certain property. A  
 5 listing agreement may be written, oral, or implied. However, listing agreements for a term  
 6 longer than one year must be in writing to be enforceable under the statute of frauds.

7 Even though Florida law recognizes oral listing agreements, the prudent practice is to  
 8 put listing agreements in writing. If litigation should result from some misunderstanding,  
 9 default, or breach, it is easier to find a remedy by showing the written terms and conditions  
 10 rather than trying to prove the terms or conditions of an oral listing.

11 A real estate sales associate's authority to provide real estate services originates with  
 12 the broker. Even though the real estate sales associate may perform most, if not all, of  
 13 the real estate services agreed to, the listing belongs to the broker. Sales associates are  
 14 employed by the broker and are working on behalf of the broker when negotiating listing  
 15 agreements. A sales associate cannot directly enter into a listing agreement with the owner.

16 Chapter 475, F.S., requires written listing agreements to include the following  
 17 information:

- 18 ■ A definite expiration date
- 19 ■ Description of the property
- 20 ■ Listing price and terms
- 21 ■ Broker's compensation (fee or commission)
- 22 ■ Signature(s) of all owner(s) of record

23 Florida law prohibits a provision in a listing agreement that requires the owner to  
 24 notify the broker of the intent to cancel the listing once the listing has expired. A copy of  
 25 the listing agreement must be given to the owner(s) within 24 hours of execution. Further-  
 26 more, the listing may not include an automatic renewal clause. Any extension of the listing  
 27 agreement must be negotiated. The DBPR may issue a \$400 citation for including a self-  
 28 renewal clause in the listing or failure to timely deliver a copy of the listing to the owner.

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**COMPARISON OF LISTINGS**

Type of Listing	Agent	Compensation
Open	One or more brokers	Only to broker who sells property
Exclusive-agency	One broker	To listing broker if not sold by owner
Exclusive-right-of-sale	One broker	To listing broker no matter who sells

29 **Types of Listings**

30 The type of listing agreement used by the broker and owner determines the rights and  
 31 obligations of the parties.

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32 **Open Listing.** In an **open listing**, the owner reserves the right to sell the property and to  
 33 list it with any number of brokers. The first broker to secure a buyer who is ready, willing,  
 34 and able to purchase at the terms of the listing earns the commission. If the owner sells



1 the property, no broker is entitled to a commission. Open listing agreements are unilateral  
 2 contracts because the only promise made is that the seller will pay a commission if the  
 3 broker causes a transaction to be consummated.

4 **Exclusive-Agency Listing.** A seller gives an **exclusive-agency listing** to one broker who  
 5 handles the transaction. The seller reserves the right to sell the property without paying  
 6 a commission, unless the buyer was introduced to the property by the broker or others  
 7 acting under the broker. If the broker or another person acting under the broker's author-  
 8 ity sells the property before the seller is able to do so, the broker is entitled to a commis-  
 9 sion. Exclusive-agency listings are bilateral contracts because both parties are obligated  
 10 to perform.

11 Brokers rarely agree to this type of listing. When brokers and their associates market  
 12 a property, they are expending resources up front in hopes that the listing sells and the  
 13 expenses, plus a profit, are realized. There is too great a risk with an exclusive-agency list-  
 14 ing that the seller will sell the property and the marketing expenses will go unreimbursed.

15 **Exclusive Right-of-Sale Listing.** The **exclusive right-of-sale listing** (or *exclusive-right-*  
 16 *to-sell listing*) is the type of listing that gives the broker the greatest degree of protection.  
 17 The seller gives the listing to a selected broker, who then becomes the exclusive real estate  
 18 agent of the owner for the sale of the property during the time the listing agreement is in  
 19 effect. The broker therefore is assured of a commission regardless of who sells the property.  
 20 Even if the owner sells the property during the contract period, the broker is entitled to  
 21 a commission. Exclusive right-of-sale listings are bilateral contracts because both parties  
 22 are obligated to perform.

23 **Net Listing.** The amount of commission to be paid in a listing agreement is most often  
 24 based on a percentage of the sale price. Alternatively, the commission can be paid on a  
 25 *net* basis. An open listing, exclusive right-of-sale listing, or exclusive-agency listing can be  
 26 structured as a net listing. A **net listing** is created when a seller agrees to sell a property for a  
 27 stated acceptable minimum amount, called the *seller's net*. The broker retains the proceeds  
 28 in excess of the seller's net as commission. The seller's net plus the broker's commission and  
 29 closing costs equal the total sale price. Net listings are legal in Florida, however, the broker  
 30 may not misrepresent the value of the property to gain a financial advantage. The broker  
 31 and the seller jointly arrive at a listing price. The broker then retains, as commission, all  
 32 proceeds of the sale after the costs of sale are paid and the seller receives the agreed-upon  
 33 net amount.

#### Formula: Net Listing

$$100\% - \text{listing commission percentage} = \text{percentage for seller's net}$$

$$\text{total seller's net} \div \text{percentage for seller's net} = \text{desired sale price}$$

34 **EXAMPLE:** Assume the property owner indicates to the sales associate that the  
 35 owner wants to net \$142,000 from the sale of the property. The sales associate must  
 36 assist the property owner with a listing price that will cover the owner's estimated closing  
 37 costs and provide the brokerage with a commission. The sales associate estimates that  
 38 the seller's closing costs will be approximately \$3,700.

39  $\$142,000$  required net to seller +  $\$3,700$  closing costs =  $\$145,700$  total needed by seller

40 The negotiated commission rate is 6%.

41  $100\% - 6\%$  commission rate = 94% remaining for seller

42  $\$145,700 \div .94$  (94%) =  $\$155,000$  selling price

43 The property must sell for  $\$155,000$  to cover estimated closing costs of  $\$3,700$ , to  
 44 provide a commission of 6%, and for the seller to net  $\$142,000$ .



1 **Multiple Listing Service.** A *multiple listing service* (MLS) is not a specific type of listing; it  
 2 is a tool that enables real estate professionals to share listing information and contribute to  
 3 shared databases. The service helps participants prepare accurate appraisals and analyses,  
 4 such as CMAs or BPOs, of real property for their customers. The ultimate goal is to better  
 5 serve the public by providing a platform for efficiently distributing listing information.

## 6 **Buyer Brokerage Agreements**

7 A *buyer brokerage agreement* is an employment contract with the buyer. The broker is  
 8 presumed to be employed as the buyer's transaction broker. If the broker is to be employed  
 9 as the buyer's single agent or have no brokerage relationship with the buyer, the broker  
 10 must provide the required written disclosure. Buyer broker agreements typically include  
 11 the following:

- 12 ■ The parties to and term of the agreement (beginning and ending dates)
- 13 ■ General characteristics of the property being sought by the buyer, including type  
 14 of property, price range, and location
- 15 ■ Broker's obligations
- 16 ■ Buyer's obligations
- 17 ■ Retainer and compensation (either as a dollar amount or a percentage of pur-  
 18 chase price)
- 19 ■ Protection period
- 20 ■ Early termination of the agreement and dispute resolution (buyer and broker  
 21 agree to mediate first)
- 22 ■ Authorized brokerage relationship

### WEBLINK



23 To learn more about buyer brokers, visit the National Association of Exclusive Buyer  
 24 Agents website at <https://naeba.org/>.

## 25 **Broker's Compensation**

26 Generally, the broker's compensation is specified in the brokerage agreements; the  
 27 listing agreement when working with sellers or the buyer brokerage agreement when  
 28 working with buyers. The compensation can be in the form of a commission or a broker-  
 29 age fee. The compensation is computed as a percentage of the total sale price, a flat fee, or  
 30 an hourly rate. The amount of a broker's commission is negotiable.

31 If the listing agreement requires the licensee to *find a purchaser*, the licensee must find  
 32 a buyer who is ready, willing, and able to buy at a price and terms acceptable to the seller.  
 33 A licensee who has performed these actions is entitled to a commission, even if a sale is  
 34 not finalized (similar to earning a finder's fee). If required to *effect a sale*, the commission  
 35 is earned only if the prospective buyer actually closes on the property.

36 The broker earns the commission. The broker may split the commission with a coop-  
 37 erating broker if the seller agrees to contribute to the buyer's agent. The employing broker  
 38 splits the commission with the sales associate involved with the sale. Sales associates  
 39 must receive compensation from their employing brokers and not directly from the seller,  
 40 the buyer, or other brokers. Some brokers have adopted a 100% commission plan. Sales  
 41 associates in these offices pay the broker a monthly service fee for the use of office space,  
 42 telephones, and clerical support. In return, associates receive 100% of the commissions  
 43 from the sales transactions they negotiate for the broker.

475.42(1)  
(d), F.S.

1 The closing agent for a real estate transaction can legally prepare a check payable to a  
2 real estate sales associate for the sales associate's share of the commission. The check may  
3 be given to the associate at the closing, provided the broker has given the closing agent  
4 written authorization and instructions regarding the specific amount of commission the  
5 associate is to be paid for the particular transaction (a blanket authorization cannot be  
6 given to a closing agent).

7 To be paid a commission, the broker must:

- 8 ■ hold a current, active real estate license at the time the listing or buyer broker  
9 agreement is entered into and the real estate services are conducted;
- 10 ■ be employed by the seller and/or the buyer through a listing agreement or a buyer  
11 broker agreement; and
- 12 ■ be the procuring cause (note that payment could also result from a referral).

13 To be a **procuring cause**, the broker must have started the chain of events that resulted  
14 in a sale. The facts dictate who is the procuring cause. The person whose efforts cause the  
15 parties to enter into a contract is generally considered the procuring cause. The broker  
16 who has a current listing agreement with the seller is not necessarily the procuring cause.  
17 That broker may be entitled to a fee when another broker sells the property, but procuring  
18 cause goes to the broker who brings the buyer.

19 Procuring cause disputes between licensees are usually settled through an arbitration  
20 hearing. Disputes between a broker and a buyer or a seller may be litigated in court.

### Practice Questions

12. A real estate licensee must give the owner a copy of a written listing agreement  
within \_\_\_\_\_.
13. An \_\_\_\_\_ listing is given to one broker; however, the seller  
reserves the right to sell the property without paying a commission.

## 21 11.6 OPTION CONTRACTS

22 An **option contract** is an agreement to keep open for a specified period of time an offer  
23 to sell or lease real property. The property owner (*optionor*) grants a prospective buyer or  
24 tenant (*optionee*) the exclusive right to buy or lease the owner's property for a specified  
25 price and terms within a certain period of time. Option contracts must be in writing and  
26 signed because they fall under the statute of frauds.

27 **Unilateral Contract.** In an option contract, the owner (optionor) is bound to perform  
28 the terms of the option if required to do so by the optionee. The optionee, however, may  
29 elect to walk away from the transaction because the option contract grants the optionee  
30 a right, not an obligation to buy the property. This makes the option a unilateral con-  
31 tract. The optionee can easily turn an option contract into a sale contract by notifying  
32 the optionor in writing that the option is being exercised. At that point, the option con-  
33 tract becomes a normal (bilateral) sale contract (see "Bilateral and Unilateral Contracts,"  
34 earlier in this unit).

35 **Consideration.** The optionee pays a fee (valuable consideration) for the right to pur-  
36 chase the property for a specified price within a specified period of time. The option con-  
37 tract may provide that the money paid to purchase the option be applied as a part of the



1 purchase price in the event the option is exercised. If the optionee does not exercise the  
2 option, the fee (consideration) is retained by the optionor.

3 **Information Required.** Options must contain all the terms and provisions required for a  
4 valid contract. The option must clearly specify the length of time the option is effective,  
5 the names of the contracting parties, the price of the property, a complete legal descrip-  
6 tion, and the terms of the fee paid.

7 **Options Assignable.** Unless prohibited in the terms of the agreement, an option con-  
8 tract is assignable (transferable).

9 **Licensee Requirements.** Real estate licensees may draw option contracts. There is no  
10 case law indicating otherwise, and the legal counsel for the DBPR has indicated that  
11 licensees may draw options. However, because there isn't any case law that specifically  
12 addresses licensees and option contracts (only sale contracts), some attorneys disagree  
13 with this position. Licensees are encouraged to either fill in the blanks on standardized  
14 option contract forms or recommend to the buyer or the seller to have option contracts  
15 drawn by real estate attorneys. After all, you don't want to make your mark in real estate  
16 by being the subject of precedent-setting case law!

475.43, F.S.

17 Licensees who are really interested in obtaining an option on a property as a true  
18 optionee (not as a listing agent) must first divest themselves of their role as licensees.  
19 The licensee must give a valuable consideration (substantial and not nominal) for the  
20 option contract. They must inform the property owners that they are not functioning as  
21 real estate brokers or sales associates but are personally interested in acquiring an option  
22 on the property.

### Practice Questions

14. The property owner in an option contract is the \_\_\_\_\_.
15. The person asking for an option of real property is the \_\_\_\_\_.
16. In an option contract, a \_\_\_\_\_ is paid for the right to purchase the property at a specified price within a specified period of time.
17. Licensees who are interested in obtaining an option on a property as a true optionee (not for a listing agent) must \_\_\_\_\_ themselves of their role as licensee.

## 11.7 SALE AND PURCHASE CONTRACTS

24 The parties to a sale and purchase contract (sale contract) are the *vendor* (or seller)  
25 and the *vendee* (or buyer). Unlike the option contract, a real estate sale contract (also a  
26 *purchase agreement*) is a bilateral contract because it contains promises to perform by both  
27 parties.

28 **Information Contained in Sale Contracts.** Sale contracts must be in writing and signed  
29 and contain all the terms and provisions required for a valid contract. Although the  
30 Florida statute of frauds requires that sale contracts be in writing, courts have required  
31 that oral sale contracts be honored in some instances (see "Statute of Frauds" in this unit).

32 Information spelled out in the contract includes the following:

- 33 ■ Names of the vendor and vendee (or their legal representatives)
- 34 ■ Legal description (preferred) or street address of the property

- 1 ■ Consideration
- 2 ■ Purchase price
- 3 ■ Financing or cash terms
- 4 ■ Type of deed the seller will deliver (general warranty deed, unless agreed
- 5 otherwise)
- 6 ■ Title evidence to be provided
- 7 ■ Terms of expenses and any prorations to be paid
- 8 ■ Personal property to be included with the real property
- 9 ■ Date, time, and place of closing
- 10 ■ When possession of the property will occur

11 The consideration in a sale contract is the promises the buyer and the seller make to  
 12 each other. However, it is also a good idea to include a provision for an earnest money  
 13 (binder) deposit and when it is to be paid. An earnest money deposit is valuable con-  
 14 sideration given by the buyer to indicate serious intent to purchase the property under  
 15 contract. Earnest money is not required to make the contract valid. However, it shows  
 16 the buyer's intent to go through with the transaction. The contract usually states that the  
 17 seller may retain the earnest money deposit as liquidated damages if the buyer breaches  
 18 the contract.

19 Unless otherwise stated in the contract, the seller must convey a clear and merchant-  
 20 able title. Equitable title is the beneficial interest in real property that the buyer receives  
 21 upon executing the contract and before title closing. Equitable title implies that the buyer  
 22 will receive legal title at closing. Licensees may be guilty of fraud and subject to disci-  
 23 plinary action if they are aware of any title problem and do not inform the buyer before  
 24 a contract is entered into or any part of the purchase price is paid. Most sale contracts  
 25 require that the seller provide the buyer with an up-to-date abstract or a title insurance  
 26 policy. If no such requirement is included in the sale contract, then the seller need not  
 27 deliver either.

28 **Spouse's Signature.** When the property is co-owned by a married couple, or if it is the  
 29 homestead and ownership is in only one spouse's name (*in severalty*), both spouses must  
 30 sign the real estate sale contract. If the seller's spouse signs the sale contract, that spouse  
 31 indicates a willingness to convey ownership rights and to relinquish homestead interest  
 32 when the time comes to sign the deed that transfers title. If the buyer's spouse signs the  
 33 sale contract, that spouse also becomes bound to purchase the property. Then, in the  
 34 event of failure to perform, either party can be sued. If only one spouse signs a contract to  
 35 purchase, only that spouse is accountable.

36 **Power to Bind the Seller or the Buyer.** A broker does not have the authority or power to  
 37 sign a contract for the buyer or the seller or to bind the buyer or the seller to a contract  
 38 unless the power to do so is specifically granted.

39 **Power of attorney** is a written legal document designating some other person as an  
 40 **attorney-in-fact**. The attorney-in-fact then may sign for the person who granted the  
 41 power of attorney, provided that power is specifically granted. A real estate licensee occa-  
 42 sionally may come in contact with either a general power of attorney or a special power  
 43 of attorney. The *general power of attorney* authorizes the attorney-in-fact to act generally  
 44 for the principal in all matters. The *special power of attorney* limits the attorney-in-fact  
 45 to one specified area of activity or one special act, such as signing a contract for sale or

46



- 1 purchasing a designated property. When power of attorney is granted for acts related to  
2 title to real property, the instrument must be witnessed, acknowledged, and recorded in  
3 the public records. Licensees should consult an attorney before agreeing to be an attorney-  
4 in-fact for the buyer or seller whom they represent.

### Practice Questions

18. When property is co-owned by a married couple, or if it is the homestead and owner-  
ship is in only one spouse's name, \_\_\_\_\_ must sign the real  
estate sale contract.
19. The consideration in a sale contract is the \_\_\_\_\_ the buyer and the seller  
make to each other.

## 11.8 CONTRACT DISCLOSURES

6 Florida has enacted mandatory disclosure laws. These laws help consumers make  
7 informed decisions regarding real estate transactions. Most real estate contracts refer to  
8 the disclosures in the real estate contract, or the disclosures may be a separate form.

### Material Defects Disclosure

9  
10 Sellers of residential real property must disclose material defects concerning the prop-  
11 erty. *Johnson v. Davis*, a well-known legal case in Florida, set legal precedence concerning  
12 material defects. Mr. and Mrs. Davis entered into a contract to purchase a home from  
13 Mr. and Mrs. Johnson. Before the closing, Mrs. Davis asked about the peeling plaster  
14 around the corner of a window frame and stains on the ceilings. The sellers indicated  
15 that a minor problem with the window had been corrected a long time ago and that  
16 the stains on the ceiling resulted from wallpaper glue and ceiling beams being removed.  
17 Before closing, the buyers entered the then-vacant home following a downpour to find  
18 water "gushing" in from around the window frame and the ceiling of the family room. The  
19 Davises ordered a roof inspection and were informed that the roof was defective and would  
20 need to be replaced. The Davises sued to rescind the contract and to get a refund of their  
21 deposit. The Florida Supreme Court found in favor of the Davises and stated, "We hold  
22 that where the seller of a home knows of facts materially affecting the value of the prop-  
23 erty which are not readily observable and are not known to the buyer, the seller is under  
24 a duty to disclose them to the buyer."

25 The case is considered important because, before the *Johnson v. Davis* decision, the  
26 courts had favored the seller under the philosophy of *caveat emptor* (buyer beware). This  
27 court decision makes sellers accountable to truthfully disclose the condition of the prop-  
28 erty. A later case (*Rayner v. Wise Realty Co. of Tallahassee*) extended the duty to disclose  
29 material defects to real estate licensees. Although *Johnson v. Davis* concerned residential  
30 property, licensees are cautioned to always use sound ethical standards when dealing in all  
31 types of real property.

32 **"As Is" Provision.** The use of an "as is" provision in a contract for the sale of real prop-  
33 erty does not circumvent the duty to disclose all known material defects. The "as is" sale  
34 contract or addendum is typically used to remove the seller's obligation to make repairs  
35 for items not in working condition or for damage caused by wood destroying organisms.



1 The terms and conditions of the contract typically require the buyer to perform any inspec-  
 2 tions or pursue whatever due diligence the buyer deems necessary to fully understand the  
 3 condition and cost of repair of the known defects before becoming obligated to purchase  
 4 the property.

### 5 **Information That Is Not a Material Fact**

689.25, F.S.

760.50, F.S.

6 Questions sometimes arise regarding whether certain information concerning the  
 7 seller or previous occupants of a property must be disclosed to prospective buyers. Federal  
 8 fair housing law and the Florida statutes specifically mandate that the fact that an occu-  
 9 pant of real property is infected or has been infected with human immunodeficiency  
 10 virus (HIV) or is diagnosed with acquired immune deficiency syndrome (AIDS) is not a  
 11 material fact in a real estate transaction. This is personal medical information and must  
 12 not be disclosed without prior authorization. Individuals inflicted with (or perceived to  
 13 have) AIDS and HIV are entitled to the protections available to persons with disabilities,  
 14 including fair housing protections.

15 Furthermore, Florida statute mandates that the fact that a property was, or was at any  
 16 time suspected to have been, the site of a homicide, suicide, or death is not a material fact  
 17 in a real estate transaction. A cause of action will not arise against a property owner or a  
 18 real estate licensee for failure to disclose information regarding HIV, AIDS, or that the  
 19 property was the site of a homicide, suicide, or death.

404.056(5),  
 F.S.

### 20 **Radon Gas Disclosure**

21 A radon disclosure statement on real estate sale and lease contracts is required on at  
 22 least one document before or at the time of executing a sale contract or a rental agree-  
 23 ment. At present, the disclosure consists only of what radon is; it does not require testing  
 24 to disclose radon gas levels before a sale or lease.



## **RADON GAS DISCLOSURE**

Notification shall be provided on at least one document, form, or application executed at the time to, or prior to, contract for sale and purchase of any building or execution of a rental agreement for any building. Such notification shall contain the following language:

RADON GAS: Radon is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county health department.

Reference: Section 404.056(5), F.S.

### **WEBLINK**



25 The EPA offers the *Consumer's Guide to Radon Reduction* at [www.epa.gov/radon](http://www.epa.gov/radon). The EPA  
 26 also provides a video concerning radon in real estate. The video *Breathing Easy: What Home  
 27 Buyers and Sellers Should Know About Radon* is intended for consumers and real estate pro-  
 28 fessionals. View it online at [www.epa.gov/radon/radon-and-real-estate-resources#breath](http://www.epa.gov/radon/radon-and-real-estate-resources#breath).

## 1 **Lead-Based Paint Disclosure**

2 When purchasing or renting pre-1978 housing, the Residential Lead-Based Paint  
3 Hazard Reduction Act requires that:

- 4 ■ sellers and landlords disclose to prospective buyers and tenants the presence of  
5 known lead-based paint in residential property built before 1978;
- 6 ■ sale contracts and leases include a disclosure about lead-based paint, either as a  
7 separate document, or the disclosure may be incorporated into the sale contract  
8 or lease;
- 9 ■ an EPA pamphlet regarding the danger of lead-based paint be given to buyers  
10 and tenants before the sale or lease of residential property built before 1978; and
- 11 ■ sellers allow homebuyers a 10-day period during which to conduct an inspection  
12 for the presence of lead-based paint (sellers are not required to pay the cost of  
13 the inspection).

14 Renovations and demolitions of properties built before 1978 can create harmful lead  
15 dust and chips. Because of this hazard and to prevent possible lead contamination, the  
16 Environmental Protection Agency (EPA) issued a rule that became effective in April  
17 2010. The rule requires contractors who disturb paint in these properties to be certified  
18 and follow specific work practices. To become certified, a renovator must successfully com-  
19 plete an eight-hour training course offered by an accredited training provider.

20 When a real estate licensee lists pre-1978 property for sale, it becomes the responsibil-  
21 ity of the licensee to make certain sellers comply with the law. The federal law does not  
22 require the testing or removal of lead-based paint. The focus of the law is disclosure of  
23 lead-based paint dangers and its presence. If a seller or landlord does not comply with the  
24 requirements of the lead-based paint law, a buyer or tenant who is harmed by the presence  
25 of lead-based paint may sue the seller or landlord.

### WEBLINK



26 Visit the EPA's Office of Pollution Prevention and Toxics website at [www2.epa.gov/](http://www2.epa.gov/)  
27 lead. The EPA also provides extensive ways to protect against lead at home at [www2.epa](http://www2.epa.gov/lead/protect-your-family)  
28 [.gov/lead/protect-your-family](http://www2.epa.gov/lead/protect-your-family).

553.996, F.S.



## 29 **Energy Efficiency Disclosure**

30 The Florida legislature passed the Florida Building Energy-Efficiency Rating Act (Act)  
31 to provide for a statewide uniform system for rating the energy efficiency of new and exist-  
32 ing buildings. The rating system applies to all public, commercial, and residential build-  
33 ings. The Act requires that buyers, at the time of or before signing a sale contract, receive  
34 an information brochure notifying the purchaser of the option for an energy-efficiency  
35 rating on the building. The brochure contains a notice to residential purchasers that the  
36 energy-efficiency rating may qualify the purchaser for an energy-efficient mortgage from a  
37 lending institution.

### WEBLINK



38 For helpful information concerning energy, visit the Florida Solar Energy Center at  
39 <https://energyresearch.ucf.edu/>.

720.401,  
F.S.

## 40 **Homeowners Association Disclosure**

41 A homeowners association is a Florida corporation responsible for the operation of a  
42 community or a mobile home subdivision. Voting membership is made up of parcel owners,  
43 and membership is a mandatory condition of parcel ownership. Homeowners associations  
44 may impose assessments that, if unpaid, may become a lien on the parcel. Florida Statute



54

- 1 720 requires sellers of property subject to a mandatory homeowners association to provide  
 2 buyers with a disclosure summary regarding the association, the existence of restrictive  
 3 covenants, and any assessments that the association imposes (see Figure 11.3). The disclo-  
 4 sure summary must be supplied by the developer or by the current owner.

**FIGURE 11.3 ■ Homeowners Association Disclosure Summary**

1. As a purchaser of property in this community, you will be obligated to be a member of a homeowners association.
2. There have been or will be recorded restrictive covenants governing the use and occupancy of properties in this community.
3. You will be obligated to pay assessments to the association. Assessments may be subject to periodic change. If applicable, the current amount is \$\_\_\_\_\_ per \_\_\_\_\_. You will also be obligated to pay any special assessments imposed by the association. Such special assessments may be subject to change. If applicable, the current amount is \$\_\_\_\_\_ per \_\_\_\_\_.
4. You may be obligated to pay special assessments to the respective municipality, county, or special district. All assessments are subject to periodic change.
5. Your failure to pay special assessments or assessments levied by a mandatory homeowners association could result in a lien on your property.
6. There may be an obligation to pay rent or land-use fees for recreational or other commonly used facilities as an obligation of membership in the homeowners association. If applicable, the current amount is \$\_\_\_\_\_ per \_\_\_\_\_.
7. The developer may have the right to amend the restrictive covenants without the approval of the association membership or the approval of the parcel owners.
8. The statements contained in this disclosure form are only summary in nature, and as a prospective purchaser, you should refer to the covenants and the association governing documents before purchasing property.
9. These documents are either matters of public record and can be obtained from the record office in the county where the property is located, or if not recorded, can be obtained from the developer.

Purchaser's signature \_\_\_\_\_

Date \_\_\_\_\_

5 In addition to providing the Homeowners Association Disclosure Summary, the con-  
 6 tract for sale and purchase must state that:

- 7 ■ the buyer should not sign (execute) the contract without first receiving and read-  
 8 ing the homeowners disclosure summary;
- 9 ■ if the disclosure summary is not provided to the buyer before executing the con-  
 10 tract for sale and purchase, the contract is voidable;
- 11 ■ to void the contract, the buyer must give the seller or the seller's agent written  
 12 notice of the buyer's intention to cancel the contract within three calendar days  
 13 after receipt of the disclosure summary or before closing, whichever occurs first; and
- 14 ■ the right to void the contract cannot be waived by the buyer. (The right termi-  
 15 nates at closing.)

720.303,  
F.S.

**WEBLINK**



689.261,  
F.S.

16 Homeowners associations are required to register with the DBPR. Registration is  
 17 accomplished online. Refer to the web link that follows.

18 For information about registering homeowners associations, visit [http://www.  
 19 myfloridalicense.com/DBPR/condos-timeshares-mobile-homes/homeowners-associations/](http://www.myfloridalicense.com/DBPR/condos-timeshares-mobile-homes/homeowners-associations/).

### 20 **Property Tax Disclosure**

21 Prospective buyers of residential property must be presented a disclosure summary  
 22 concerning ad valorem taxes before or at the time of execution of the contract for sale.  
 23 The purpose of the disclosure summary is to caution prospective buyers that they cannot

1 rely on the amount of the seller's property taxes as an indication of the taxes purchasers  
2 will be required to pay in the year following purchase of the property.

3 The disclosure may be either attached to the contract for sale, or the wording may be  
4 inserted into the contract. If the disclosure is not inserted into the contract, the contract  
5 must refer to and incorporate by reference the disclosure summary. The reference to the  
6 disclosure must include, in prominent language, a statement that the potential purchaser  
7 should not execute the contract without first reading the required disclosure summary.  
8 The wording of the disclosure summary is presented in the text box.



### PROPERTY TAX DISCLOSURE SUMMARY

Buyers should not rely on the seller's current property taxes as the amount of property taxes the buyers may be obligated to pay in the year subsequent to purchase. A change of ownership or property improvements triggers reassessments of the property that could result in higher property taxes. If you have questions concerning valuation, contact the county property appraiser's office for information.

#### WEBLINK



9 You can download the property tax disclosure summary contained in the Florida stat-  
10 ute. The Florida statutes are available online at [www.leg.state.fl.us/welcome/index.cfm](http://www.leg.state.fl.us/welcome/index.cfm).  
11 Under the Senate seal, select "Florida Statutes," then "Title XL Real and Personal Prop-  
12 erty," and then "Chapter 689." The summary is in section 689.261, F.S.

125.69(4)  
(d), F.S.

### Building Code Violation Disclosure

13 A seller who has been cited for a building code violation and who is the subject of a  
14 pending enforcement proceeding must disclose in writing to the buyer that the property  
15 has been cited for a violation of the building code and that the buyer will be responsible  
16 for the violation after closing. The seller must give the buyer a copy of the pleadings, the  
17 code violation notice, and any other applicable documents received by the seller. The dis-  
18 closure must inform the buyer that the buyer will be responsible for compliance with the  
19 applicable code and with the orders issued in the county court proceeding.  
20

21 The statute does not require the seller to clear the violation before closing. The stat-  
22 ute also does not address the liability of the seller regarding the costs associated with the  
23 code violation. Liability costs should be addressed and negotiated in the contract for sale  
24 and purchase. The seller must forward to the code enforcement agency the name and  
25 address of the new owner and a copy of the disclosures given to the buyer within five days  
26 after the title transfer.

190.048,  
F.S.

### Community Development District

27 A *community development district (CDD)* is an independent special district created,  
28 pursuant to Florida law, to service the long-term specific needs of its community. A CDD  
29 constructs, operates, and maintains communitywide infrastructure and services for the  
30 benefit of its residents. CDDs provide an alternative way to fund and construct capi-  
31 tal infrastructure to service projected growth without overburdening other governments  
32 and their taxpayers. The developer finances the construction of infrastructure by issuing  
33 bonds. Tax assessments are imposed on the homeowners to repay the bonds. The CDD tax  
34 assessments are in addition to county and city property taxes.  
35



1 Initial contracts for sale of a parcel of real property and initial contracts for residential  
 2 units within the CDD are required by law to include a disclosure to purchasers. The dis-  
 3 closure statement must appear immediately before the space reserved for the purchaser's  
 4 signature and be written in boldfaced, conspicuous type that is larger than the type used  
 5 in the rest of the contract:

6 **The [name of district] community development district may impose and levy**  
 7 **taxes or assessments, or both taxes and assessments, on this property. These**  
 8 **taxes and assessments pay the construction, operation, and maintenance costs**  
 9 **of certain public facilities and services of the district and are set annually by**  
 10 **the governing board of the district. These taxes and assessments are in addi-**  
 11 **tion to county and other local governmental taxes and assessments and all**  
 12 **other taxes and assessments provided for by law.**

### Practice Questions

20. The Florida Supreme court case that obligates sellers to disclose to buyers all known defects that materially affect the value of residential property and that are not readily observable is \_\_\_\_\_ v. \_\_\_\_\_.
21. The *Rayner v. Wise Realty Company of Tallahassee* extended the duty to disclose material defects to real estate \_\_\_\_\_.
22. The use of an "as is" provision in a contract for sale does \_\_\_\_\_ eliminate the duty to disclose all known material defects.
23. Homeowners associations are required to register with the \_\_\_\_\_.

## 11.9 MISREPRESENTATION AND FRAUD

14 The law allows real estate agents to enthusiastically describe the value of real estate  
 15 and/or the potential of the property. Licensees may not, however, exaggerate, conceal, or  
 16 misrepresent by making statements they know to be untrue. For example, the statement  
 17 "The apartment has a fantastic view" is simply boasting about the property because the  
 18 prospect is clearly able to assess the view, and the statement is the licensee's opinion.  
 19 However, if the licensee had instead said, "The apartment has a fantastic view of the  
 20 lake," when in fact the lake is not visible from the apartment, the statement is untrue and  
 21 is illegal misrepresentation.

22 **Misrepresentation** is the misstatement of fact or the omission or concealment of a  
 23 factual matter. Misrepresentation can lead to fraud. The elements of a cause of action  
 24 for **fraud** are that the (1) licensee made a misstatement or failed to disclose a material  
 25 fact, (2) licensee either knew or should have known that the statement was not accurate  
 26 or that the undisclosed information should have been disclosed, (3) party to whom the  
 27 statement was made relied on the misstatement, and (4) party to whom the statement was  
 28 made was damaged as a result.

29 The law prohibits deceptive practices. For example, it is fraudulent and dishonest  
 30 dealing by trick, scheme, or device for a licensee to:

- 31 ■ knowingly sell or offer for sale any property covered by a mortgage that also  
 32 covers other property sold, unless the particular property sold or offered for sale  
 33 may be released from the mortgage anytime before foreclosure sale on payment  
 34 of an amount less than that remaining due from the purchaser after the sale (see  
 35 "Blanket Mortgage," Unit 12);

475.25(1)  
(b), F.S.

- 1 ■ induce any person to buy property by promising that the licensee or the owner  
2 will resell or repurchase the property at any future time, unless there is proof that  
3 the guaranteed repurchase agreement has been approved by an agency of the  
4 State of Florida or there is evidence that the repurchase has been accomplished  
5 as promised;
- 6 ■ offer lotteries and schemes of sale involving the sale of chances or similar devices  
7 whereby it is represented that the purchaser is to receive property in an order  
8 to be determined by chance, whereby the price will depend on chance or the  
9 amount of sales made, or whereby the buyer may or may not receive any prop-  
10 erty; and
- 11 ■ invite the public to solve puzzles on the pretense of a drawing to receive property  
12 free, at a nominal price, or at cost.

13 Any representation made by a broker may later become the basis for charges of fraud,  
14 breach of contract, or breach of trust. In general, a purchaser has only a limited right to  
15 rely on the statements of a broker. However, if a broker invites trust and then betrays that  
16 trust, the broker is guilty of breach of trust. This legal concept brings to light an important  
17 ethical principle relating to those engaged in the sale of real estate: Whenever the trust  
18 or confidence of a buyer or a seller is invited, by actions or words, that trust or confidence,  
19 once given, must not be betrayed.

20 **Ethical Practices.** The real estate business is becoming increasingly complex, with rapid  
21 changes and constant pressures. A real estate brokerage firm is only as good as its reputa-  
22 tion, and a good reputation can result only from a history of ethical business practices.  
23 Because just one dishonest or unethical person in a firm may destroy years of honest effort  
24 by others, ethical service is the only focal point around which a lasting reputation and  
25 career can be built.

26 The best policy is for the brokerage company to always instill ethical practices. When  
27 in doubt, always disclose to the parties facts material to the transaction. Document and  
28 communicate with the employing broker. A broker who does not give ordinary, careful  
29 attention to the brokerage or does not exercise reasonable control over sales associates  
30 can be charged with culpable negligence (see "Legal Terms to Know," Unit 6). Licensees  
31 must strive for individual ethical conduct and strive to maintain a high standard of ethical  
32 professionalism within the industry.

### Practice Questions

24. \_\_\_\_\_ is the misstatement of fact or the omission or concealment of a  
factual matter.
25. When in doubt, the best course of action is to \_\_\_\_\_.

## 33 11.10 SUMMARY OF IMPORTANT POINTS

- 34 ■ Real estate licensees are allowed to assist buyers and sellers with the preparation  
35 of four types of contracts: (1) listing contracts, (2) buyer brokerage agreements,  
36 (3) option contracts, and (4) sale and purchase contracts.
- 37 ■ The statute of frauds requires that contracts conveying an interest in real prop-  
38 erty be in writing and signed to be enforceable. The statute of frauds applies to  
39 purchase-and-sale contracts, option contracts, and lease agreements and listing  
40 agreements of more than one year.



- 1 ■ The statute of limitations designates that written contracts are enforceable for  
2 five years. Oral (parol) contracts are enforceable for four years.
- 3 ■ A *valid contract* is one that complies with the provisions of contract law and  
4 contains four essential elements: (1) contractual capacity of the parties, (2) offer  
5 and acceptance, (3) legality, and (4) consideration.
- 6 ■ Real estate contracts must contain the four essential elements, be in writing, and  
7 be signed by all parties who are bound to the agreement. Real estate contracts  
8 are not required to be witnessed or notarized.
- 9 ■ *Valuable consideration* is the money or a promise of something that can be mea-  
10 sured in terms of money. *Good consideration* is a promise that cannot be measured  
11 in terms of money.
- 12 ■ A bilateral contract obligates both parties to perform in accordance with the  
13 terms of the contract. A unilateral contract obligates only one party to an  
14 agreement.
- 15 ■ The *offeror* is the person who makes an offer. The *offeree* is the person who  
16 receives the offer.
- 17 ■ A contract is terminated when any of the following occurs: performance, mutual  
18 rescission, impossibility of performance, lapse of time, bankruptcy, and breach.
- 19 ■ The four legal remedies for breach of a contract are (1) specific performance,  
20 (2) liquidated damages, (3) rescission, and (4) compensatory damages.
- 21 ■ *Assignment* refers to a transfer (from assignor to a new assignee) of rights and  
22 duties under a contract.
- 23 ■ *Novation* is the substitution of a new party for the original one.
- 24 ■ Written listing agreements must include the following information: a definite  
25 expiration date, street address and legal description of the property, price and  
26 terms, fee or commission, and signature of the owner. A copy of the agreement  
27 must be given to the owner within 24 hours of execution. Listing agreements  
28 may not feature an automatic renewal clause.
- 29 ■ *Power of attorney* is a written legal document designating some other person as  
30 an attorney-in-fact. An attorney-in-fact is authorized to perform certain acts for  
31 another as authorized in the power of attorney.
- 32 ■ An *open listing* is given to one or more brokers. The seller reserves the right to  
33 sell the property and to list with other brokers. Only the broker who sells the  
34 property is entitled to commission.
- 35 ■ An *exclusive-agency listing* is given to one broker. The seller reserves the right to  
36 sell the property. The listing broker is entitled to commission unless the property  
37 is sold by the owner.
- 38 ■ An *exclusive-right-of-sale listing* is given to one broker who is assured of a commis-  
39 sion regardless of who sells the property.
- 40 ■ A *net listing* is created when a seller agrees to sell a property for a stated accept-  
41 able minimum amount. The broker retains, as commission, all proceeds of the  
42 sale after the costs of the sale are paid and the seller receives the agreed-on net  
43 amount.
- 44 ■ A *buyer brokerage agreement* is an employment contract between a broker and a  
45 buyer.

- 1 ■ An *option contract* is a unilateral contract to keep open for a specified period of  
2 time an offer to sell or lease real property. The property owner (optionor) grants  
3 a prospective buyer (optionee) the exclusive right to buy the property within a  
4 specified period for a specified price and terms.
- 5 ■ The parties to a sale and purchase contract are the vendor (seller) and the  
6 vendee (buyer). Real estate sale contracts are bilateral contracts.
- 7 ■ Sellers must disclose material defects to a potential buyer even if selling the  
8 property "as is."
- 9 ■ A radon gas disclosure is required before or at the time of executing real estate  
10 sale and lease contracts. The disclosure explains what radon gas is and the pos-  
11 sible health hazards associated with radon gas; however, it does not require a  
12 radon gas inspection.
- 13 ■ A lead-based paint disclosure must be given to buyers and renters of residential  
14 units built before 1978. Sellers must disclose the presence of any known lead-  
15 based paint, and buyers and renters must be given an EPA pamphlet.
- 16 ■ At the time of or prior to signing the sale contract, purchasers must receive an  
17 informational brochure about energy efficiency that informs them of the right to  
18 have an energy-efficiency rating performed on the structure.
- 19 ■ Florida law requires sellers of property subject to a mandatory homeowners asso-  
20 ciation to provide buyers with a disclosure summary regarding the association,  
21 the existence of restrictive covenants, and any assessments that the association  
22 imposes.
- 23 ■ Purchasers must be given a property tax disclosure concerning ad valorem taxes  
24 before or at the time of executing the sale contract. The disclosure cautions  
25 buyers not to rely on the amount of the seller's property taxes as an indication of  
26 future property taxes the purchaser will pay.
- 27 ■ The seller must disclose to the buyer any pending building code violations.
- 28 ■ A community development district (CDD) is an independent special district cre-  
29 ated to service the long-term specific needs of its community.
- 30 ■ *Misrepresentation* is the misstatement of fact or the omission or concealment of a  
31 factual matter.



# UNIT 11 EXAM

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1. Which group of legal instruments may legally be prepared by a licensed real estate broker?
  - a. Listing agreements, buyer brokerage agreements, commercial leases, and deeds
  - b. Leases, option contracts, promissory notes, and buyer brokerage agreements
  - c. Listing agreements, buyer brokerage agreements, sale contracts, and option contracts
  - d. Mortgages, promissory notes, commercial leases, and option contracts
2. Failure to comply with the statute of frauds
  - a. may not constitute an illegal act but would always invalidate a sale contract.
  - b. would have to do with whether a contract is in writing.
  - c. concerns adherence to prescribed time frames of enforcement.
  - d. is prima facie evidence of the intent to commit fraud.
3. Which contract does NOT come under the jurisdiction of the statute of frauds?
  - a. Lease agreements for one year or less
  - b. Option contract
  - c. Sale contract
  - d. Listing agreement for more than one year
4. A valid real estate sale contract
  - a. contains all the essential elements and is in writing.
  - b. has been acknowledged.
  - c. requires witnessing.
  - d. transfers title to real property.
5. An adult contracting with a minor is an example of failure to meet which essential of a real estate contract?
  - a. Legality of the object
  - b. Offer and acceptance
  - c. Meeting of the minds
  - d. Competent parties
6. Canceling a daughter's property indebtedness in a contract because of love and affection is an example of
  - a. good consideration.
  - b. valuable consideration.
  - c. insufficient consideration.
  - d. inadequate consideration.
7. A contract that is NOT in writing is called
  - a. a formal contract.
  - b. a parol contract.
  - c. a unilateral contract.
  - d. an executory contract.
8. When a contract has been formed but an undertaking remains to be performed by one or both parties, it is an example of
  - a. an implied contract.
  - b. an express contract.
  - c. an executory contract.
  - d. a unilateral contract.
9. Which statement is FALSE regarding counteroffers?
  - a. The original offer is terminated by the counteroffer.
  - b. The original offeree becomes the offeror.
  - c. A contract is created when the new offeree accepts the counteroffer and communicates the acceptance to the new offeror.
  - d. The offeror and the offeree remain the same even though the terms are modified.
10. An offer is NOT terminated by
  - a. a counteroffer.
  - b. an acceptance.
  - c. a rejection.
  - d. an extension.

11. A closing is scheduled for next week. The broker would like the closing agent to prepare a check payable to the sales associate for the associate's share of the commission. Which statement is TRUE?
- The closing agent is required by law to make the check payable to the brokerage company.
  - The broker may telephone the closing agent with instructions on how to disperse the escrow funds due the sales associate.
  - The broker may enter into a written blanket authorization with the closing agent to always make the sales associates' commission payable to the associate.
  - The broker must give specific written instructions to the closing agent regarding the exact amount of commission due the sales associate for next week's closing.
12. A woman gave an exclusive-right-of-sale listing to a broker to find a buyer for her residential lot. While the woman was vacationing with her family, a buyer signed an offer to purchase the woman's lot at the full price and terms of the listing agreement. Which statement is TRUE?
- Because this is an exclusive-right-of-sale listing, the broker is authorized to accept the offer on the woman's behalf.
  - The broker may accept the offer on the woman's behalf, as long as she gets the woman's signature on the contract immediately upon the woman's return.
  - The exclusive-right-of-sale listing does not give the broker the authority to accept the offer on the woman's behalf.
  - The broker may accept the offer because it is a full-price offer.
13. A man and a woman enter into a written agreement. The man will mow the woman's lawn every week during the mowing season and every third week during the winter. In the middle of the summer, the man has back surgery. He hands over his lawn maintenance contracts to a friend, who assumes the responsibility for all of the man's customers for the remainder of the contract period. Which term describes this situation?
- Breach
  - Assignment
  - Specific performance
  - Mutual rescission
14. Which applies to exclusive-right-of-sale listings?
- The broker is due a commission regardless of who finds the buyer.
  - The listing may be submitted to the MLS by the listing broker.
  - The seller must consent to the terms of the listing agreement.
  - All of these apply.
15. Which disclosure regarding radon is required when purchasing or leasing real property in Florida?
- A disclosure statement in the contract indicating that the house has been tested for radon and that the test indicated a safe level of radon
  - An estimate of the cost for a required radon test
  - A disclosure statement in the contract indicating that the seller is required to have the property tested for radon at the seller's expense if requested by the buyer
  - A disclosure statement in the contract explaining radon gas
16. A real estate sales associate must disclose to a prospective buyer that
- a former occupant of the property committed suicide in the home.
  - the seller has been diagnosed with HIV.
  - the family room addition does not comply with local building codes.
  - families of other racial groups live in the immediate area.
17. Normally, a sale contract involving real property contains a provision that in case of breach by the buyer, the earnest money deposit will be regarded as
- compensatory damages to the seller.
  - liquidated damages to the seller.
  - compensatory damages to the broker.
  - liquidated damages to be divided between seller and buyer.
18. The most advantageous type of listing from the broker's point of view is
- an open listing.
  - an exclusive-agency listing.
  - an exclusive-right-of-sale listing.
  - a net listing.



19. Which statement is FALSE concerning Florida's building code violation disclosure?
- The seller is responsible for the costs associated with the code violation.
  - The seller must inform the code enforcement agency regarding the name and address of the buyer within five days of the title closing.
  - Copies of the pleadings and other documents concerning the code violation must be given to the buyer.
  - The disclosure requires a statement that the buyer is responsible for compliance with the building code.
20. A couple have decided to make a written offer to purchase a home built in the 1950s. Which task is NOT required before signing the sale contract?
- The couple must be given a copy of the EPA pamphlet concerning lead-based paint hazards in the home.
  - The seller must disclose any known presence of lead-based paint.
  - The couple must have the home inspected for lead-based paint.
  - The real estate sale contract must include a disclosure concerning lead-based paint.