

## **PURCHASE/SALE OF RESIDENTIAL PROPERTY**

### **I. PRELIMINARY CONSIDERATIONS**

#### **A. DETERMINE PROPER APPROACH TO CLIENT AND TRANSACTION**

1. IN GENERAL                      When first meeting with a new client about a real estate transaction, the attorney must remember that the purchase or sale of a residence may be the largest financial undertaking the client has ever engaged in. The potentially heightened anxiety accompanying the transaction may require more frequent communication from the attorney to assure the client that the sale is proceeding as intended.

The attorney will go a long way toward allaying the client's concerns if the facts and circumstances of the client's desired transaction are clearly related from the start (see paragraph 2. below and I.C. on page 7), and if the resultant proposed action to be taken by the attorney is understood by the client before this first meeting is ended (see I.B.2. on page 2).

2. STATUS OF TRANSACTION

At the initial client conference, the attorney must develop a clear understanding of the status of the transaction and the facts surrounding the desired sale or purchase.

The attorney may be contacted before a sales contract is signed, shortly afterward, or just before closing. Although precontract employment may be preferred, the attorney nonetheless has the opportunity to offer valuable advice during the execution of the contract and through closing.

If the circumstances of either a buyer or seller warrant it, the attorney should review with the client certain alternatives to a purchase/sale (see I.B.3. on page 3).

If a purchase or sale is clearly the action of choice, the attorney should discuss the steps typically involved in a residential sales transaction to familiarize the client with the process and to ensure that nothing has been overlooked thus far (see paragraph B.1. below). This discussion should entail the need to employ others to assist in the sales transaction (see I.B.4. on page 5) as well as any potential ethical issues that the attorney may foresee in the representation of the particular client (see I.B.5. on page 6).

#### **B. ADVISE CLIENT REGARDING NATURE OF SALES TRANSACTION**

1. DISCUSS STEPS REQUIRED IN TYPICAL SALE

The steps required to successfully close a typical sales transaction generally include, but are not limited to, the following:

- seller personally advertises the house for sale (For Sale By Owner — FSBO) or lists it with a real estate broker who advertises the house with a multiple listing service or otherwise (see II. on page 9);
- buyer discovers the property and makes an offer directly to seller (for a FSBO) or through seller’s or buyer’s broker (see V. on page 49);
- buyer and seller exchange counter-offers until an agreement is reached (see V. on page 49);
- buyer attempts to obtain financing, if needed, either by entering into a purchase-money mortgage, assuming the seller’s mortgage, or independently seeking financing through an institutional lender or mortgage broker (see IV.G.2. on page 24);
- if buyer seeks financing from an institutional lender such as a bank, the lender typically requires an appraisal, a survey, roof and termite inspections, a credit report and employment history of buyer, and title evidence from seller, all before closing the transaction (see VI.F. on page 62);
- the documents necessary to convey the property are drafted and reviewed along with a title commitment for buyer, a survey, and a closing statement listing all financial obligations (see VI.C. on page 52);
- the parties attend a closing where the documents are signed and financial obligations are settled through payment or otherwise (see VII. on page 64); and
- the documents are recorded and title policies are issued following the closing (see VIII. on page 64).



The attorney should advise the client that after the contract is signed, barring complications, the completion of the sale may take 30–45 days (on average) depending on time constraints of the lender, the title insurer, or the closing agent.

2. DISCUSS  
PROPOSED  
ACTION OF  
ATTORNEY

The attorney should tell the client what the typical role of counsel is during the various phases of the sales transaction, including:

- advise the client regarding the function and need for a real estate broker and review any broker contracts (see II. on page 9);
- discuss various alternatives for listing residential property (see II.F.2. on page 14);

- advise the client regarding favorable terms of a purchase/sale contract (see IV. on page 20);
- interact with real estate agents, inspectors, appraisers, title insurers, and other professionals as needed to ensure timely performance of duties and delivery of documents (see VI. on page 50);
- examine the title to property and prepare the client for the mechanics of the closing process, explaining the need for escrows, homeowner's insurance, etc. (see VI. on page 50); and
- prepare and review closing documents including any promissory note, mortgage, closing statement, title commitment, deed, and other documents as necessary (see VI. on page 50).

Beyond these duties, the attorney generally should ensure that the client's interests are protected throughout the transaction. The attorney may need to advise the client regarding land use issues, environmental matters, and remedies for breach of contract.

### 3. CONSIDER ALTERNATIVES TO SALE

#### a. In General

Real estate sales contracts contain several clauses such as financing terms and payment obligations that can be devised to benefit either the seller or the buyer in the transaction (see IV. on page 20). However, there are a few alternatives to a straight sale of the property that might be even more suitable to the parties. The attorney should make sure that the client is aware of the alternatives that may be appropriate depending on the financial and personal situations of either or both parties to the transaction.

#### b. Lease

The attorney should advise the client of the advantages of leasing the premises and obtaining either an option to purchase or a right of first refusal.

For a reluctant buyer, a short-term lease may be advantageous in that it usually requires only a minimal security deposit rather than a considerable down payment, and allows the prospective buyer time to become familiar with the new location. A lessee who is dissatisfied with the premises may be able to terminate the lease with little loss whereas a dissatisfied buyer must sell the premises to avoid further involvement. Although perhaps less advantageous to a seller, a lease of what otherwise might be vacant premises brings rental income in the short run and may give the prospective buyer/lessee sufficient time to obtain the necessary financing to meet the seller's contract list price.

When considering the alternative of leasing, the client should be advised of two lease options that may make the transaction more attractive:

(1) Lease With Option To Purchase

If an option to purchase the premises is included in the lease terms and the lessee decides to exercise the option and purchase the property, the parties may agree to apply a portion of each month's rent toward the contract purchase price.

(2) Lease With Right Of First Refusal

If a right of first refusal is incorporated into the lease terms, the lessee is given the first chance to purchase the premises if a third party makes an offer to purchase. Under this provision, a seller who receives an acceptable, bona fide offer to purchase from a third party must put the offer to the lessee, who then has an opportunity to offer this same or a better price for the property. If the lessee does not make an equal or better offer within a specified time, the seller may sell to the third party.

c. Agreement  
For Deed

Although not widely used today, the agreement for deed allows the seller to retain title to the property until the price indicated in the agreement for deed is paid in full. However, the seller's retention of title exposes the buyer to potentially serious consequences if the seller encounters financial difficulties (such as those resulting in foreclosure or bankruptcy proceedings).



If this alternative is chosen, the attorney should strongly consider having the agreement for deed recorded so that record notice of the transaction exists. An agreement for deed does not automatically preclude the need for a foreclosure action if the buyer defaults.

d. Purchase  
Option

A straight option to purchase (one not connected to a lease agreement as discussed above) is used when one of the parties is not ready to consummate the transaction. It gives the prospective buyer an option to purchase the property by a certain future date. An option fee typically is paid for this right.

e. Sale/  
Leaseback

A sale/leaseback may be a viable alternative if the seller desires to remain in possession of the property for a fixed term but be relieved of his or her ownership interest.

This is most commonly used when a seller sells a home but leases it back from the buyer to use until the seller's new home is ready.

In this situation, the seller "cashes-out" his or her equity immediately and performs in the capacity of a tenant rather than an owner, maintaining possession until sometime in the future.

4. DISCUSS  
EMPLOYMENT  
OF OTHER  
PROFESSIONALS

- a. In General During the initial meeting with the client or soon thereafter, the attorney should discuss the likelihood of the client’s having to retain other professionals to assist in the sales transaction, be it for the sole benefit of the client or at the behest of a lender. Professionals commonly employed by buyers and/or sellers include real estate agents, inspectors, financial consultants, environmental analysts, pest control technicians, appraisers, surveyors, and title insurers.
- b. Real Estate Agents Real estate brokers or agents, who typically see the transaction through from the time of listing to the closing, can be employed by the buyer, the seller, or both. For a discussion of these professionals, see II. on page 9.
- c. Inspectors Typically the buyer will employ inspectors to examine the premises and provide reports detailing the condition of items such as the roof, plumbing, electrical systems including the heating and air conditioning, and the presence of damage to structural components including dry rot and termite damage as well as damage to appliances (see the list at VI.B.3.b on page 51). Inspectors should be employed as soon as possible (see IV.G.3. on page 27 and VI.C.12. on page 57). This is an out-of-pocket expense of the buyer that typically is not reimbursed by the seller and not subtracted from the sales price.

The contract frequently specifies licensing requirements for inspectors. For example, the contract might provide that inspections be made by “a firm or individual specializing in home inspections and holding an occupational license for such purpose (if required), or by an appropriately licensed Florida contractor.”



The attorney should review any agreement with an inspector to make sure the inspector has not included a clause waiving his or her liability to the client for failure to discover significant defects.

If an inspection reveals problems that the seller contests, the seller may employ his or her own inspector (see VI.C.12. on page 57).

- d. Accountants  
Or Tax  
Consultants Occasionally, it is necessary to employ tax consultants regarding FIRPTA (Foreign Investment In Real Property Tax Act — Title 26 *U.S.C.* §1445) or other tax issues that arise (see IV.H.2.e. on page 36 and VIII.F.–G. on pages 66–67).
- e. Environmental  
Analysts It is sometimes necessary to engage environmental consultants to evaluate the condition of wells located on the premises, radon levels, mold, or other