

# Answering your questions about buying/selling residential real estate

The process of buying and selling a home consists of multiple steps that can take weeks, even months, to complete. This pamphlet can't begin to cover all aspects of home buying or selling. Rather, it focuses on specific stages in the process when a lawyer's advice would be helpful, even crucial, to get the best results for you.

By law, only an attorney can provide you *legal* advice – not a real estate agent, loan officer, or closing agent. Whether you're a buyer or seller, you need your own legal advisor who will look out for your interests. Because the buyer's and seller's interests differ, it's not a good idea for both parties to use the same attorney.

## For Buyers and Sellers

### What is the Offer to Purchase?

The Offer to Purchase states the price the buyer is willing to pay for the house, the date the sale will close, and other important terms of the transaction. There is a standardized, state-approved form for Offers that is used in nearly all home sales. It can be completed by a party to the transaction, a real estate agent, or an attorney. There often are one or more additional attachments (or addendums), which add more terms to the Offer.

The Offer will usually include contingencies. Contingencies protect the parties by setting conditions that must be met. Common contingencies include buyer financing and a professional house inspection. Depending on the transaction, the Offer might include other contingencies, such as septic and well inspections, land survey showing structures on the property and boundaries, sale of the buyer's home, and occupancy by the seller after closing. The attorney can advise the buyer or seller about which contingencies are appropriate. By law, the seller also must provide a condition report disclosing any known defects in the property, and a disclosure regarding lead-based paint.

The seller can respond to the buyer's Offer by accepting it, rejecting it, or making a Counteroffer presenting different terms for the sale. The Offer/Counteroffer process may go back and forth until both the buyer and seller are satisfied. When the buyer and seller sign the contract, it becomes a legally binding contract, subject to satisfying any contingencies.

If the inspection discloses significant defects in the property there may be further negotiations on repairs or credits. The lawyer can advise the buyer or seller about the inspection provisions that are best for the client. The lawyer also can prepare an amendment if the parties modify their purchase agreement due to the inspection, or for other reasons.

It's critical that the contract be complete and legally enforceable. If your attorney didn't write the Offer, it's wise to at least have him or her review this document and any Counteroffers. If your attorney can't review the Offer before you submit it to the seller, insert a contingency for attorney approval.

### What happens at the closing?

When all contingencies are met and amendments signed, the transaction can close. The Offer provides the date when the closing will occur. At the closing, the buyer and seller must sign numerous, complex legal documents. It's wise to have your attorney there to explain the documents and to answer questions you may have. Attorneys often spot potential problems that can be cleared before the closing. An attorney also will be able to assist with unanticipated problems that can arise

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at the closing, such as new title issues, newly discovered defects in the property, and issues with the buyer's lender. After closing, the deed is recorded at the register of deeds office for the county in which the property is located. This puts the buyer's ownership of the property on public record. Once the deed is recorded, it is returned to the buyer. The buyer also will receive his or her title insurance policy. Your attorney can review these documents for legal accuracy.

### What about real estate agents?

Real estate agents are frequently involved in real estate transactions and work under various arrangements, including providing limited services for reduced fees. If you see an advertisement for a house for sale, the agent is working for the seller, as you'd expect, under a "listing" contract. That agent has professional obligations to look out for the seller's interests.

In recent years, a new type of agent relationship has become increasingly popular – that is, the buyer's agent. The buyer's agent is professionally bound to represent only the buyer's interests. The agent can tell you information about the seller or the property that might be useful to you. And the agent won't disclose information you prefer the seller not know about you. The buyer agency agreement obligates the buyer to pay a commission to the buyer's agent on any property purchased during the time the agreement is effective.

Is a buyer required to work with a buyer's agent? No. Many buyers work satisfactorily under the traditional agent arrangements.

Whether the agent is primarily the agent of the seller (under a listing contract) or of the buyer (under a buyer agency contract), the agent owes a duty of "fair dealing" to all parties. Part of that duty is to keep confidential anything that someone wants or would reasonably expect to be kept confidential, such as a buyer's top price and a seller's bottom price.

If you decide to work with a real estate agent, have your attorney review the agency agreement before you sign it, to be sure the arrangement is exactly what you believe it to be.

## What is FSBO?

You also can buy and sell a home without working with an agent at all. Then it's even more critical to seek an attorney's assistance at various stages of the buying and selling process.

This arrangement is what's known in the real estate business as "for sale by owner," or FSBO (pronounced "fizzbo"). By selling your house yourself, you save the commission you would have paid to a real estate agent. But count on investing more of your own time. You'll need to analyze the market, decide on a price, advertise the house and host open houses, handle all negotiations with prospective buyers, and so on.

Buying a FSBO also is somewhat different than buying with a broker involved. The buyer will need to become familiar with values in the area to decide what price to offer for the home. When it comes to preparing the Offer to Purchase it is wise to have a lawyer prepare it for you. The lawyer can suggest contingencies that are appropriate for the contract, and can guide you through the rest of the transaction.

It's unwise to tackle a FSBO transaction without some legal advice. An attorney can help review Offers, write Counteroffers, and guide you through the many steps involved in a FSBO transaction.

## For Buyers

### How can an attorney help a buyer?

An attorney can:

- review and advise the buyer about a buyer agency agreement and dealing with real estate brokers;
- draft or review the buyer's Offer to Purchase and help negotiate Counteroffers and amendments to the Offer to Purchase;
- help evaluate financing options and resolve any problems;
- review the commitment for title insurance;
- help you decide how to hold title to the property;
- help answer questions and resolve problems during the course of the transaction;
- review closing documents;
- represent you at the closing; and
- provide advice if you're building a home.

### What legal issues does financing involve?

Buyers usually obtain financing from a commercial lender, such as a bank, credit union, or other loan provider. The lender investigates the buyer's finances and credit history to determine eligibility for a home mortgage. An attorney can help evaluate the various mortgage options and check mortgage documents. If problems arise regarding your application, an attorney can help resolve them. There are special concerns when the financing is for new construction.

Another financing option is to buy on a land contract, in which the seller finances the buyer's purchase of the property. This arrangement involves a lot of negotiations between the buyer and seller. Be sure you get sound legal advice to protect your interests.

### What is title insurance and why do I need it?

When you buy a home, you need to be sure the seller has good title to the property. That's where title insurance comes in. It protects you against any defects in the seller's title.

The title insurance company checks various records and issues a *title insurance commitment* that gives information about the title. For instance, who owns the property? Are there liens (such as unpaid tax bills) the seller should pay off before selling? Are there any easements and restrictions on the property's use? It is important to understand all

of these matters, because they can seriously affect your use and enjoyment of the property.

The title insurance commitment is an important and complex legal document that requires legal expertise to understand. Simply receiving a title insurance commitment before the closing does not by itself mean that you are getting "clean title." Ask your lawyer to review the title insurance commitment to be sure the title presents no problems that will surface to haunt you later.

### What are my options for holding title?

You can hold title to property as an individual, with another person(s), or in the name of an entity, such as a trust, limited liability company, or corporation. If you're married, Wisconsin's Marital Property Act affects how you own property. The law presumes that all property owned by spouses is marital property, belonging to both of you equally, but you may have individual ownership, if you desire.

A lawyer can advise you on your options for holding title. (See also the State Bar's pamphlet, "Answering Your Legal Questions About Marital Property.")

Two or more unmarried people can own property together as tenants in common or joint tenants. It's wise to have an attorney prepare an ownership agreement spelling out the parties' rights and obligations in the property.

### What if I'm building a home?

You'll need a contract with a builder that covers what's to be built, what happens if there are changes to plans, costs, performance standards (time for construction, warranties, and so on), and more. A contract describes all parties' rights and obligations. Construction contract forms in Wisconsin are not standardized or state-approved as are the Offer to Purchase, buyer agency, and listing forms. You should be sure the contract protects your interests and that you fully understand it. Your attorney can negotiate and review a construction contract on your behalf. If you're buying a home that a builder is already building, you'll most likely use the Offer to Purchase contract form to address most of these issues, especially warranties, included amenities, and time for completion.

## For Sellers

### How can an attorney help a seller?

A seller's attorney can:

- write or review the listing agreement with the seller's real estate agent;
- review the buyer's Offer to Purchase, or draft or review the seller's Counteroffer and amendments;
- help satisfy contingencies to the Offer;
- draft the deed and other legal documents required to close the sale;
- advise the seller at closing to be sure all closing documents, including financial arrangements and others are in order; and
- advise the seller if you decide to sell on a land contract.

Again, if legal conflicts or questions arise at any point during the course of the sale, only your attorney can provide you legal advice.

### What about tax considerations?

Most sales of a person's primary residence are exempt from taxes on capital gains, that is, the difference between the sale price (including some costs of the sale), and your "basis" (what you paid for the home, some costs of the purchase, plus any capital improvements you made to the home). This is generally true as long as the gain is less than \$250,000 (or \$500,000 for a

couple) and the owner has owned and lived in the property at least two out of the last five years. Thus, the timing of your sale can affect whether you will owe any capital gains tax, and how much you will owe. Details of taking advantage of this valuable exemption can be discussed with your attorney. To calculate your gain, you should keep good records of the purchase and sale of the home, and all capital improvements made while you own it. Consult with your attorney or financial advisor if you have questions.

Many of the processes described above apply in any real estate transaction, including the sale or purchase of vacant land and vacation properties. Buying or selling certain types of properties – such as a farm, lake property, condominium, cooperative, investment property, time-shares and so on – also may involve special legal considerations. Investment real estate is subject to capital gains tax; however, it's possible to create legal arrangements to defer this tax. See an experienced real estate attorney for advice. ◀

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