

“The ‘Mail Away’: Buying and Selling By Remote Control”

By: Raymond J. Bowie, Esq. (Naples 2016) (excerpted)

Many buyers and sellers of Florida real estate owe a big debt of gratitude to whoever invented the remote control – not just the device that opens garage doors or controls the TV from an armchair, but rather the very concept itself. A click on the remote here, a click there, and a property gets put under contract, inspected, financed and closed, all without the buyer or seller having to set foot in the property – or even in the State of Florida, for that matter.

In industry parlance, when buyer or seller conducts a real estate transaction in absentia, it is called a “mail away.” The term “mail away” arose because the documents relating to transaction – often ranging from sales contracts through the closing statement – must be sent to the buyer or seller at a distant location, often out of state and sometimes even out of country. Decades ago, this process was indeed accomplished by mail. While the U.S. mails are still used, other media are now primarily utilized to ship documents or funds, including overnight delivery, fax transmission, email and wired funds.

[With the ubiquitous use of email and overnight delivery,] “mail away” transactions have become increasingly prevalent, to the point where it is a rarity for buyer and seller ever to meet, ever to communicate directly, or ever to sit down together at the same closing table. Few buyers or sellers, however, understand the increased risks and liabilities which can accompany a “mail away” transaction if it is not choreographed properly.

First and foremost, a successful “mail away” buyer or seller needs to know at what points in the transaction he or she must be personally and actively involved. Buying or selling real estate – whether for residential, investment or business use – is simply not a spectator sport. There are critical parts of every transaction that cannot effectively be delegated or accomplished by proxy. In every real estate purchase or sale, there are certain decisions to be made and actions taken that cannot be done figuratively by pushing buttons on a remote control device.

While some portions of every transaction can be handled by the parties' real estate brokers or attorneys acting as their agents, keep in mind that real estate agents generally cannot sign for or make decisions for their clients, and an attorney cannot substitute his/her judgment for his/her client's. At critical junctures in the transaction, the parties must make themselves available by telephone, fax or email.

For the buyer, choosing the property to be acquired should require on-site visit and evaluation. Even with 360-degree photographs and video footage of properties now viewable on-line, real estate is like fine art: It has to be seen close up to be properly evaluated and appreciated.

Furthermore, no media presentation of a property can adequately convey its environs, its neighborhood, location, or surrounding community or business amenities.

In some "mail away" transactions, the buyer's real estate agent will actually preview properties on the buyer's behalf, sending the buyer packets of photos, videotapes, floor plans and other data about properties the buyer has not personally seen. While not recommended, it is possible for a buyer to make a contract offer on a property he has not personally viewed. Prudently, any such contract includes a clause making the contract contingent upon the buyer actually viewing the property within a certain time frame and being satisfied with the purchase. Another contract clause might be added making the contract contingent upon the review and approval of the buyer's attorney, accountant or other advisor, for the buyer's added protection.

If personal property such as furniture is being sold with the real estate, the parties should ensure that they each receive a comprehensive personal property inventory to be attached to the sales contract, and that this written inventory perhaps be supplemented by photographs or videotape of the items. Each party should content himself that this inventory specifically and accurately describes all of the personal property items to be conveyed.

For both buyer and seller, the stage of negotiating the terms of the sales contract also requires a heavy commitment of personal input, feedback, flexibility and availability to receive and respond to offers and counter-offers. While contracts, forms and notices can legally be executed by facsimile and even email, the buyer and seller must, at this early stage of the transaction, remain available and in ready communication with their real estate agents or attorneys handling the contract negotiations.

Once the sales contract is in place, there are several other points in the transaction requiring the personal involvement of one or both of the parties, but particularly the buyer. For instance, the buyer himself should receive and review condominium documents and financial statements, submit any required application to community associations for approval to purchase, meet any conditions requested by his lender if seeking a mortgage, and review the results of property inspection reports.

This is not, of course, to suggest that either the buyer or seller are left on their own at these significant transaction junctures requiring their personal involvement. Indeed, for the success of a "mail away" transaction, it becomes more critical than ever for the parties to each put together a team of experts – local professionals chosen to serve as their eyes, ears and mouthpiece at each step of the transaction. The buyer and seller should choose local professionals with expertise in specific areas of the transaction, together with the trustworthiness to serve as fiduciaries committed to the client's best interests and an understanding of how to conduct business on a "mail away" basis.

The first thing an absentee buyer or seller should do is to secure representation by both a real estate attorney and real estate agent. The attorney and real estate agent can help put together the rest of the team of real estate professionals.

Even prior to the contract offer stage, the "mail away" buyer or seller should select a local real estate attorney to represent him in the transaction as well as serve as his closing agent. A local attorney can answer the party's questions about local real estate practices or particular contract provisions, draft or review the actual contract offer before the client signs it, suggest specific additional contract clauses, and thereafter work with the party's real estate agent to protect the party's interests through the transaction.

In evaluating real estate brokers, the absentee buyer or seller should initially confirm how the broker is willing to do business with them, also called in technical jargon: "the nature of the brokerage relationship." A real estate broker in Florida can do business with either party either as a buyer's agent, a seller's agent, a transaction broker providing "limited representation" to both parties at the same time, or in a total non-representative capacity. Since the "mail away" buyer or seller will be so heavily dependent on the judgment and commitment of the real estate broker with whom he works, the preference should be clear: The buyer should work with a buyer's agent and the seller should work with a seller's agent. Each "mail away" party needs an experienced real estate agent whose loyalties are devoted exclusively to that party's interests.

This is not to suggest, of course, that either party's evaluation of real estate brokers should stop with the question of agency loyalties. Other criteria must include years of local experience, specific areas of relevant market expertise, satisfactory references, marketing strategies, advanced education and designations, and familiarity in dealing with "mail away" clients.

Upon entering into a contract to purchase a property, the next professional the buyer will need is a professional home inspector in order to take advantage of the property inspection clause in the sales contract. Look for an inspector who conducts inspections, at minimum, to the standards of the American Society of Home Inspectors (ASHI). Professional inspectors can also be employed to test for radon gas, for lead-based paint in older properties and for special environmental concerns such as mold if circumstances warrant. In a "mail away" situation, all property inspections should be done as early as possible so that there is time to ship or fax the inspection reports to the buyer for him to review, ask questions of the inspector, and if necessary notify the seller of defective conditions and negotiate required repairs.

If the buyer desires mortgage financing for the purchase, he will also need the services of a local mortgage broker, lender or banker. The buyer should secure from his attorney or real estate agent perhaps three lender references, in order to be able to "shop" the best available mortgage rates and terms for his desired financing. To a large extent, mortgage financing is still a local industry. A good mortgage broker or loan officer will serve the distant buyer well by providing his knowledge of the local mortgage market and localized lending conditions. The absentee buyer should also satisfy himself that the lender understands the need for and will deliver the loan in time for a "mail away" closing.

The absentee buyer also needs to begin early the process of securing quotes from local insurance agents for the various insurance coverages required on the property. "Mail away" buyers often do not realize the difficulty they may encounter, post Hurricane Andrew, in obtaining hazard insurance coverage on Florida real estate, nor do they understand the need for separate flood and windstorm policies required on many properties. The buyer should work with a knowledgeable property insurance agent to get needed insurance underwritten, paid for and the policies to be issued well prior to taking effect on the closing date.

If the "mail away" buyer or seller does not plan to attend the closing, a number of special arrangements will need to be made. Both parties should make themselves readily available, preferably in the vicinity of a fax machine, on the day of closing and a few days prior. There are always some documents, including the critical settlement statements, that may only become finalized at the last minute. Fortunately, most of these documents can be faxed to the parties, signed and return faxed.

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Certain other elements of the closing mandate more advance planning. If there is a mortgage lender, numerous loan documents including the note and mortgage will need to be shipped to the absentee buyer, signed by him and his signatures notarized, and return shipped to the closing attorney, all with clockwork precision within perhaps a 48 hour window immediately prior to the closing date. The buyer will also need to have a representative conduct his final "walk-through" inspection of the property just prior to closing, perhaps his real estate agent, or perhaps his home inspector if there are any questions as to the property's physical condition or as to seller repairs being properly made.

The logistics of getting the buyer's funds to the closing table also warrant particular attention in a "mail away" closing. The buyer will need to arrange to have his required funds to his closing attorney on or prior to the closing date, in the form of wired funds, a bank cashier's check or a similar instrument acceptable to the attorney. This requires even more careful planning when the buyer is out of country, as transferring funds from foreign financial institutions, converting into U.S. currency, and having the funds available at closing is no small feat.

The absentee seller likewise will need to make himself available immediately prior to and on the date of closing. The seller's attorney will ship to the seller the deed and other documents needing the seller's notarized signature, to be immediately shipped back by the seller. The seller will also need to be standing by at the time of closing in case last-minute questions or property conditions need to be addressed.

Success in managing a "mail away" transaction depends upon allowing ample time for each step of the transaction, extensive communication, and precise coordination between the buyer and seller and their service providers. The greater the distance and the more difficult the buyer or seller may be to reach, the more essential it becomes to set reasonable performance dates in the sales contract and to establish effective communication and delivery channels to and from each party and his service providers. For both the buyer and seller, this is not the time to be off on a sailboat circumnavigating the globe, hiking the Gobi desert or jet-setting between numerous different locations.

Surely, the invention of the remote control has made easier numerous tasks ranging from opening a garage door to operating a TV. However, when it comes to real estate, buying or selling by "remote control" actually requires a lot more than simply pushing the right buttons.