

# **“Why You Need a Lawyer When You Buy or Sell a House”**

By: Thomson Reuters - FindLaw (2016)

Revised, Adapted & Supplemented by Theodore M. Simon, Esq. (8/2/16)

A buyer needs a lawyer. A seller needs a lawyer. Why? Two phrases from Latin: *caveat emptor* - let the buyer beware, and more recently, *caveat venditor* - let the seller beware. Two parallel doctrines of law, each of which can be summed up as follows: A real estate transaction is complex, as a matter of fact so complex that only an experienced attorney understands the consequences of a contract to buy and sell property, and how to protect the individual interests of a party to the transaction, and protect against unexpected consequences. Be you buyer or seller, when you retain an attorney, his/her sole concern is protecting the client's interest. This is not the function of a real estate agent, nor a non-attorney title insurance agent. Buying a home will probably be the largest and most significant purchase you will make in your life. It also involves the law of real property, which is unique and raises special issues of practice, and problems not present in other transactions. A real estate lawyer is trained to deal with these problems and has the most experience to deal with them.

Not only is this sound advice and practice, but the standard contract presented by a real estate agent to buyer and seller states, at Paragraph 14:

## **PROFESSIONAL ADVICE; BROKER LIABILITY:**

Broker advises Buyer and Seller to . . . consult appropriate professionals for legal, tax, environmental, and other specialized advice concerning matters affecting the Property and the transaction contemplated by this Contract.

In the typical home purchase, the seller enters into a brokerage contract with a real estate agent, usually in writing. There will be a lot of fine print, which is generally neither explained nor read. But there are consequences to this agreement, and often not pleasant. At the “get go”, an attorney can review the real estate brokerage agreement, and make any changes which are appropriate, including issues related to type and extent of marketing; advertising schedule and budget; scheduling of open houses; access to premises by sales agents; costs and fees; duration of representation; entitlement to, and amount of commissions; fees and costs, to name just a few.

If the seller is marketing the property as "FSBO," which is becoming increasingly popular in our Internet age, what happens when he/she/they find a buyer? Who prepares the contract, and what is to be included as the terms of the deal? Unless the seller is thoroughly experienced in the purchase and sale of property, an experienced real estate attorney is the only answer. Only the attorney has the knowledge and experience to guide the seller through the obstacles and complications of the sale; there is simply no one else to rely on. It would be a gross mistake for the seller to pick out a "standard" form from a website and try to use it for this transaction. Simply put, there is no such thing as a typical deal! Indeed, the average homeowner wouldn't even have a clue about the right questions to ask.

If using a real estate agent, when the agent finds a potential buyer, negotiations are conducted through the real estate agents (some agents use the term "realtor", to signify their membership in the National Association of Realtors, or their local real estate association, but Florida law refers to them as simply "real estate agents" and "real estate brokers"), who most often act as intermediaries between buyer and seller. Once an informal agreement is reached, buyer and seller enter into a formal written contract for the sale/purchase agreement. The buyer then obtains a commitment for financing. Title is searched to satisfy the lender and the buyer. Finally, the property is transferred from the seller to the buyer, and the seller receives the purchase price bargained for in the contract. This seems simple, but without a lawyer, the consequences may be more disastrous than purchasing a car that turns out to be a lemon, or a stock investment that was unwise.

In Florida, as opposed to many other states, parties to a real estate transaction often leave the contract for the agents to prepare. However, a real estate agent is prohibited by law from giving you legal advice as to the terms of a contract of sale and, so, does not represent you in that sense and is not your adviser. Indeed, when you are presented with a real estate contract, they are unable to provide you with legal advice. Nor does a licensed, non-attorney title agent, represent you, whether buyer or seller, and regardless of who pays for title insurance or other closing costs. A title agent who is not an attorney is simply a facilitator to handle the transaction in behalf of both buyer and seller (regardless of who chooses the title agent), and is unable to provide you with help in the event of a dispute with the other party. Neither a real estate agent nor a non-attorney title agent will confide this to you.

It is obvious that a lawyer is needed if any of the following issues are involved in the transaction, but read on any, you will see that even "typical" transactions also require the advice and counsel that only a lawyer can provide:

### Buyers:

- Are you an out of town buyer?
- Are you buying a property that is a short sale or bank owned?
- Are you buying a property that is part of an estate sale?
- Are you buying a commercial property?
- Are you buying a property that could potentially have some structural issues?
- Are you buying a property in a problematic area such as a flood zone or areas with adverse conditions (tornado prone, radon, toxicity levels, etc.)?

### Sellers:

- Are you selling a property that is in some state of distress?
- Are you the heir or executor of a property whose owner is now deceased?
- Are you selling a house with a non-cooperative partner?
- Do you have that gut feeling that something could possibly go wrong based on knowledge you have about the property?
- Do you have judgments or liens in your background?

A lawyer can help you avoid some common problems with a home purchase or sale. This happens quite often; "realtors" often use standard forms, expecting that they will cover all circumstances or will be easily customizable for unusual circumstances. The simple fact is that rarely will your transaction completely "fit the mold", and most contracts require a "rider" or "addendum" in order to incorporate the necessary changes to satisfy your needs.

For example, a seller may sign a brokerage agreement that does not deal with a number of legal problems. In the absence of an agreement to the contrary, the seller may become liable to pay a brokerage commission even if a sale does not occur, or to pay more than one brokerage commission. If the agreement allows the seller the right to negotiate on his or her own behalf, for example, you may avoid this problem. A lawyer can explain the effect of multiple listings. He or she can negotiate the realtor's rights if the seller withdraws the property from the market, or can't deliver good marketable title. Indeed, if the seller fails to disclose a known structural defect and the deal falls through, seller may be liable to the real estate agents for a commission on an incomplete transaction!

The seller should have the advice and guidance of an attorney with respect to a brokerage agreement. Even if the agreement is a standard form, its terms should be explained to the seller and revised, if necessary. An attorney should also determine if the agreement was properly signed.

BEFORE A CONTRACT IS SIGNED, even if a lawyer is not needed during the course of negotiations, the buyer and seller should each consult with a lawyer to answer important questions, such as the tax consequences of the transaction, and the flexibility, if any, of a closing date. To a seller, the tax consequences may be of critical importance. Once the contract is signed by all parties, it can only be revised with the consent of all parties and, for all intents and purposes, it is too late thereafter to renegotiate or change its terms – regardless of whether or not it was a mistake to sign the contract as written.

For example, the income tax consequences of a sale, particularly if the seller makes a large profit, may be considerable. An attorney can advise whether the seller can take advantage of tax provisions allowing for exclusion of capital gains in certain circumstances. In fact, recent changes in the Internal Revenue Code can result in serious tax consequences to the buyer in the event that the seller is a foreigner (FIRPTA).

The purchase agreement is the single most important document in the transaction. Although standard printed forms are useful, a lawyer is helpful in explaining the form and making changes and additions to reflect the buyer's and the seller's desires. There are many issues that may need to be addressed in the purchase agreement; below are some common examples:

- If the property has been altered or there has been an addition to the property, was it done lawfully?
- If the buyer has plans to change the property, may what is planned for the property be done lawfully?
- What happens if a buyer has an engineer or architect inspect the property and termites, asbestos, radon, or lead-based paint is found?
- What if the property is found to contain hazardous waste, asbestos or lead paint?
- What are the legal consequences if the closing does not take place, and what happens to the down payment? This question raises related questions: Will the down payment be held in escrow by a lawyer in accordance with appropriately worded escrow instructions? How is payment to be made? Is the closing appropriately conditioned upon the buyer obtaining financing of their choice? What happens in the event of an unavoidable delay of the scheduled closing?
- In the event of a dispute between buyer and seller, what provisions are set forth in the contract for the resolution of a dispute, if any?

- Importantly, who pays the various closing costs, and how much? These are substantial costs, which buyer and seller ought to know before signing the contract. For example, in Palm Beach County the seller customarily pays the closing costs, including title insurance. However, if the buyer prefers to choose their own attorney or title insurance agent to attend to the closing, at the point before signing the contract, the buyer may renegotiate the price to offset the inclusion of these costs in the property price, and then choose the closer themselves. Beware of the cozy relationships between real estate agent and title insurance agent – illegal kickbacks are often involved. In Broward, the buyer usually pays most of the closing costs, but **an attorney owned title agency like Budget Title can significantly lower these costs.**

Most buyers finance a substantial portion of the purchase price for a home with a mortgage loan from a lending institution. The purchase agreement should contain a carefully worded provision that it is subject to the buyer's obtaining a commitment for financing. Recent changes in federal law require that the lender be "up front" and disclose much more information than what was required in the past. Only a lawyer can explain to you all of the various charges and whether or not these "truth in lending" requisites have been complied with and, if not, whether a complaint to the Consumer Protection Finance Bureau is justified.

A real estate agent is professionally unqualified to, and prohibited from, properly responding to these concerns. A licensed non-attorney title insurance agent will, most likely, not even respond. Only an attorney is qualified to represent you and provide competent advice with regard to the interpretation and meaning of a real estate contract, and make necessary changes as the need requires, and to help if problems develop along the way.

Again, it is important to remember that printed contract forms are generally inadequate to incorporate the real understandings of the buyer and seller without significant changes. In addition, there are many kinds of mortgages that may be available. Mortgage loan commitments and mortgage loan documents are complex. Lawyers can review and explain the importance of these various documents. The mortgage process is often daunting, but having a lawyer to move the process along will be a source of great relief from the burden of trying to navigate through the financing thicket.

After the purchase agreement is signed, it is necessary to establish the state of the seller's title to the property to the buyer's - and the finance institution's - satisfaction. Generally, a title search is ordered from a title insurance agent. In Florida, by virtue of their professional status, attorneys affiliated with a title insurance company are authorized to issue title insurance. Otherwise, a title insurance agent must be separately licensed. The big difference between the two is that for the same price, if not less, you have the benefit of having that attorney represent you, and only you, in addition to performing all of the customary closing services. And, you have the advice and counsel, which a non-attorney cannot provide. Also, if there are any problems disclosed in the title report, an attorney will be better able to resolve them in a competent professional manner, whereas a non-attorney will simply be beyond the scope of his/her knowledge, experience or expertise.

Since title insurance is customary in Florida, an attorney will review the title search and explain the title exceptions as to what is not insured, and determine whether the legal description is correct and whether there are problems with adjoining owners or prior owners. He or she can also explain the effect of easements and agreements or restrictions imposed by a prior owner, and whether there are any legal restrictions which will impair your ability to sell the property.

The title search does not tell the buyer or seller anything about existing and prospective zoning. A lawyer can explain whether zoning prohibits a two-family home, or whether planned improvements violate zoning ordinances.

The closing is the most important event in the purchase and sale transaction. The deed and other closing papers must be prepared. Title passes from seller to buyer, who pays the balance of the purchase price. Frequently, this balance is paid in part from the proceeds of a mortgage loan. A closing statement should be prepared prior to the closing indicating the debits and credits to the buyer and seller. An attorney is helpful in explaining the nature, amount, and fairness of closing costs. The deed and mortgage instruments are signed, and an attorney can assure that these documents are appropriately executed and explained to the various parties, and to help the parties make sense of the increasingly complex closing documents. It is a mistake to believe that a real estate agent or a non-attorney title agent can do this, as well as will a lawyer.

The closing process can be confusing and complex to the buyer and seller. Those present at the closing often include the buyer and seller, their respective attorneys, the title closer (representative of the title company), and real estate sales agents. There may also be last minute disputes about delivering possession and personal property or the adjustment of various costs, such as fuel and taxes and HOA fees. If you are the only person there without a lawyer, your rights and interests may

be at risk. When you hear someone say "don't worry", that is precisely the time that you should start to worry.

Perhaps the most important reason to be represented by an attorney is conflicting interests of the parties. Throughout the process, the buyer's and seller's interests can be at odds with each other, and even with those of professionals involved in the sale, such as the real estate agents. The sales agent generally serves the seller, and the lender is obtained by the buyer. Both want to see the deal go through, since that is how they will get paid. Neither can provide legal counsel. The respective lawyers for the buyer and seller will serve only their own clients' best interests.

Seeking the advice of a lawyer is a very good idea from the time you decide to sell or to buy a home until the actual closing. Only the lawyer can provide you with the peace of mind to know that you are receiving all of the benefits of your bargain, and only the lawyer functions under the Rules of Professional Ethics.