

## **WORKING WITH FSBOs**

Hello, Michigan Realtors® and welcome back to the “Letter of the Law”, a monthly video series designed to provide introduction and analysis on various legal issues impacting your industry. I’m Brian Westrin and today’s Letter of the Law is on the topic of working with unrepresented sellers - or FSBO’s.

Realtors® working with buyers must be particularly cautious when working with a buyer who becomes interested in a FSBO home. Ordinarily, if a Realtor® wants to get paid on this type of transaction, the Realtor® will need the FSBO sellers to sign a written agreement in which they agree to pay a commission should this particular buyer purchase their home. A Realtor® can work with a FSBO seller as either a seller’s agent or a buyer’s agent. The “One Party Agreement” available on MR’s website (Form “N”) can be used in either situation. It is very important that the Realtor®’s agency capacity is clearly established early on and that both the buyer and seller understand that role. Remember that the law requires agency disclosure before any confidential information is disclosed.

## **PRACTICAL CONSIDERATIONS**

If you are working with a buyer-client – *i.e.*, if you have an agency relationship with the buyer, then it is probably unwise to create an agency relationship with the seller as well. While it is certainly legally permissible to do so as long as you enter into a disclosed dual agency agreement, we believe most Realtors® would agree that single agency is a much easier role to fill. Remember, you do not need to create an agency relationship with the FSBO seller in order to get paid. Rather, you can use the One Party Agreement and check the box indicating that you represent an identified buyer and that the sellers agree to pay you a commission in the event your

buyer purchases their home. Remember to make it very clear to the sellers that even though the sellers will be paying your commission, you will, at all times, be working for the buyer.

What if you do NOT have an agency relationship with the buyer? In this situation, you should use the One Party Agreement to create an agency relationship with the sellers. In this situation, you need to make certain that the buyers that you have been working with understand that you now have an agency relationship with the sellers. Even if the buyers were given an agency disclosure form months ago when their search began, a careful Realtor® may very well want to go back to his buyer customers and give them another agency disclosure form that specifically references this particular home and these particular sellers.

### **RISK REDUCATION**

If you represent the buyer rather than the FSBO sellers, you should encourage the FSBO sellers to hire an attorney to assist them in negotiating a purchase agreement and closing the sale. In the event that the FSBO sellers choose not to have an attorney, then a Realtor® must be very careful when presenting his client's offer to those sellers. A Realtor® working as a buyer's agent should never advise the sellers as to the wisdom or reasonableness of a particular provision. A FSBO seller should NEVER be told that a particular clause is "just boilerplate" or that something "is always done this way." While such statements may be viewed as nothing more than persuasive argument where the seller is working with a listing agent who can offer his/her own opinion, the statements may be deemed misleading and overreaching where the seller is unrepresented.

### **THE SLIPPERY SLOPE**

A buyer's agent who is asked to help the FSBO seller prepare a counteroffer may find himself in a difficult situation. It is probably fairly easy to prepare a counteroffer at a seller's

dictated price without overreaching or creating the appearance of an agency relationship. But what if the seller wants you to prepare an addendum dealing with post-closing occupancy responsibilities? What if the seller wants to treat your buyer's offer as a backup offer?

The farther you stray from the "standard" form, the more difficult it will be for you to prepare clauses dictated by the seller while at the same time representing the buyer's best interests.

In some instances, it may be advisable to take the seller's verbal requests back to your client and prepare a new offer on behalf of your buyer-client which contains the term or terms that the seller has requested (assuming that these terms are acceptable to your buyer-client). In this way, it will be more readily apparent that the clauses are being drafted on behalf of, and in the interest of, the buyer-client.

Of course, as Realtors® are well aware, the work is not done once the purchase agreement is signed. Realtors® working with FSBOs often express frustration at the fact that they must do the work of two agents. Of course, the simple fact is that the transaction must move forward and the Realtor® is typically the only person involved that knows how to get this done. (A Realtor® may wish to keep this in mind when negotiating his commission amount for a one party agreement.) Again, Realtors® working with FSBOs as buyer's agents should assist the seller in ministerial matters only. While it is perfectly appropriate for a buyer's agent to order title insurance on the seller's behalf, it is not appropriate for a buyer's agent to advise the seller as to his rights and obligations under the sales contract.

To summarize, when talking directly to unrepresented sellers, buyer's agents should make their agency status known early on and are well-advised to remind these sellers of that role from time to time throughout the transaction. While a buyer's agent may assist the FSBO seller

with ministerial tasks, buyer's agents should never offer FSBO sellers advice or attempt to persuade them that a particular provision is either unimportant or nonnegotiable.

As always, thank you for tuning in and watching this installment. If you have questions or would like to suggest topics for future videos, please send suggestions to the email below.

Again, thanks for watching and see you next time.