

## **DEALING WITH FSBOs – WALKING THE AGENCY TIGHTROPE**

### **I. INTRODUCTION**

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 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" attached as Exhibit A 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 the REALTOR®'s role. Remember that the law requires agency disclosure before any confidential information is disclosed.

Once agency status is established, a REALTOR® must be very careful to work consistently within that framework while moving the transaction forward to closing. An unknowledgeable and inexperienced seller is likely to look to the REALTOR® for guidance, even where the REALTOR® is representing the buyer. Obviously, it is in the interest of the buyer-client to move the transaction forward, but at some point, the client may conclude that the REALTOR®'s assistance to the seller was so significant as to amount to a breach of the fiduciary duties owed to the buyer. Alternatively, the seller may begin to believe that the REALTOR® has become his agent, in which case the REALTOR® has a potential undisclosed dual agency problem. In either case, the REALTOR® could lose his commission, whether or not either party suffered any actual harm.

## **II. DISCUSSION**

### **A. Identifying Your Role**

Before you produce an agency disclosure form, you first need to be clear in your mind as to the role you will play in this transaction.

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 your sellers in order to get paid. Rather, you can simply enter into an agreement whereby the sellers acknowledge that you represent an identified buyer and 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 can either create a one party agency relationship with the sellers or you can work as a transaction coordinator. If you enter into a one party agency agreement with the sellers, you need to make certain that the buyers 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. Such a form would be particularly helpful should the buyers later claim that based on your prior relationship, they were under the clear understanding that you were representing them in this transaction.

While it is technically possible to act as a transaction coordinator with a FSBO seller, as a practical matter, it will be extremely difficult, if not impossible, unless both the sellers and the buyers are knowledgeable in real estate. Remember that the role of a transaction coordinator is that of a “middleman” – *i.e.*, a person who brings the parties together after which the parties put the deal together themselves. If a REALTOR® is going to serve in this capacity, he or she will need a transaction coordinator agreement, which includes a provision whereby one or both of the parties agree to pay the REALTOR® a commission.

### **B. Closing the Deal**

As REALTORS® are well aware, it can be extremely difficult to close the deal where the seller is unrepresented. FSBO sellers should be encouraged to hire an attorney to assist them in negotiating a purchase agreement and closing the sale. In the likely event that the FSBO seller chooses not to have an attorney, then the REALTOR® must be very careful not to inadvertently create an agency relationship with the seller by advising and assisting the seller in the transaction.

Buyer’s agents who customarily present offers to sellers may find these presentations more difficult where the seller is a FSBO. In this situation, REALTORS® should never advise the seller 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 on such, the statements may be deemed misleading and overreaching where the seller is unrepresented. A REALTOR® is well-advised to always offer a FSBO seller the opportunity to discuss the offer with an attorney.

A buyer's agent who is asked to help the 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. 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.

### **C. Ethical Considerations**

Buyer's agents working with FSBO sellers should remember that Article 1 of the Code of Ethics provides that while a REALTOR®'s duty to his client is primary, the REALTOR® also

owes a duty to treat the other party honestly. For example, while it may be in your client's best interest to convince the seller that taxes are "always" prorated a particular way, if it is only the case that taxes are "often" prorated this way, such statement may be deemed a violation of Article 1. As stated previously, FSBOs should never be told that any particular provision is either unimportant or nonnegotiable as a matter of law.

What if the seller is not a FSBO, but a seller that has entered into a limited service agreement with another company? At the outset, the REALTOR® should make certain that he or she has the consent of the listing broker to deal with that broker's client directly. This advice is not only good legal advice, but is also consistent with the REALTORS® Code of Ethics. Article 16 of the Code of Ethics prohibits a REALTOR® from taking any action inconsistent with another REALTOR®'s agency relationship. REALTORS® would be well-advised to ask the limited service broker to fax over written authorization to contact the seller directly. At a minimum, the REALTOR® should obtain the listing broker's verbal consent and then make a note for his file. Once a REALTOR® has authority to deal with the seller directly, the REALTOR® should identify his agency role, either as a buyer's agent or a subagent of the seller. (Where the seller has entered into a limited service agreement with the REALTOR®, the REALTOR® cannot act as a dual agent or a transaction coordinator in the transaction.) In presenting an offer to a seller with a limited service agreement, a buyer's agent should take the same precautions he would take if the seller was a FSBO.

### **III. CONCLUSION**

When talking directly to FSBO 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. A "hard sell" approach that may be perfectly acceptable where a seller has his own representation may be deemed to be a misrepresentation where the seller is unrepresented.

EXHIBIT A



One Party Agreement



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Contract Date: \_\_\_\_\_  
 Brokerage Firm: \_\_\_\_\_ (“Broker”)  
 Address of Firm: \_\_\_\_\_  
 REALTOR®: \_\_\_\_\_  
 REALTOR®’s Email Address: \_\_\_\_\_  
 REALTOR®’s Phone # \_\_\_\_\_ REALTOR®’s Facsimile # \_\_\_\_\_  
 Seller(s): \_\_\_\_\_ (“Seller”)  
 Seller’s Home Address: \_\_\_\_\_  
 Seller’s Email Address: \_\_\_\_\_  
 Seller’s Phone # \_\_\_\_\_ Seller’s Facsimile # \_\_\_\_\_

1. **PROPERTY DESCRIPTION:** Seller is the owner of property located in the  Village  Township  City of \_\_\_\_\_, County of \_\_\_\_\_, MI.  
 Street Address: \_\_\_\_\_  
 Legal Description/Tax Parcel ID: \_\_\_\_\_  
 \_\_\_\_\_ (the “Property”).

SELLER WARRANTS THAT THE PROPERTY IS NOT PRESENTLY LISTED WITH A LICENSED REAL ESTATE BROKER OR ANY OTHER PARTY.

2. **REPRESENTATION:** Broker has a potential buyer (“Buyer”) for the Property, the identity of whom will be disclosed upon the execution of this Agreement. (Check one):  
 Seller hereby appoints Broker as his/her exclusive agent for purposes of marketing the Property to Buyer.  
 or  
 Seller acknowledges that Broker will exclusively represent the Buyer in this transaction. Broker is not representing Seller.

3. **TITLE/YEAR BUILT:** Seller represents title to the Property to be good and marketable title. In addition, (check one):  
 Seller represents and warrants that the Property was **built in 1978 or later** and that therefore the federally-mandated lead-based paint disclosure regulations **do not apply** to this Property.  
 or  
 Seller represents and warrants that the Property was **built before 1978** and that therefore the federally-mandated lead-based paint disclosure regulations **do apply** to this Property.

4. **COMMISSION:** If within \_\_\_\_\_ (\_\_\_\_\_) months of the date hereof, Seller sells all or a portion of the Property to Buyer, Seller agrees to pay Broker at closing a fee equal to \$ \_\_\_\_\_ and a commission equal to \_\_\_\_\_ % of the sale price.

5. **EXCLUSIVITY:** Seller shall deal exclusively with the Broker for all negotiations with Buyer during the term of this Agreement.

6. **ADVERTISING/SHOWINGS:** Seller acknowledges that Broker will NOT market or advertise the Property for sale. Seller grants Broker permission to show the Property only to the Buyer identified below; all showings to be by appointment only. Seller shall indemnify and hold harmless Broker and Broker’s agents from any and all liability for any reason as a result of injury to persons or damage or loss to property arising out of the showing of the Property.

7. **SUBSEQUENT LISTINGS:** Seller’s commission obligation hereunder shall apply regardless of whether Seller subsequently lists the Property with another licensed real estate broker or any other party. Seller is advised that if Seller later

EXHIBIT A

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enters into a listing agreement to sell the Property with another real estate broker or any other party, Seller should exclude Buyer from said listing agreement. Failure to do so could result in Seller being responsible for two commission payments.

8. **NON-DISCRIMINATION:** It is agreed by the Broker and the Seller, parties to this Agreement, that as required by law, discrimination because of religion, race, color, national origin, age, sex, disability, familial status or marital status by said parties in respect to the sale of the Property is PROHIBITED. Local ordinances may offer protection against additional discrimination.

9. **SELLER DISCLOSURE:** Seller agrees to provide Buyer with a "Seller's Disclosure Statement" prior to accepting a Buy and Sell Agreement from the Buyer, unless the transaction is exempt under Michigan law. Seller agrees to release and hold harmless Broker and its agents from any liability arising as a result of Seller's failure to comply with Seller's disclosure obligations at law, such obligations to include, but not be limited to, reasonable attorneys' fees and costs.

10. **ELECTRONIC COMMUNICATION:** The parties agree that this Agreement, any amendment or modification of this Agreement and/or any written notice or communication in connection with this Agreement may be delivered by electronic mail or by fax via the contact information set forth above. Any such communication shall be deemed delivered at the time it is sent or transmitted. The parties agree that the electronic signatures and initials shall be deemed to be valid and binding upon the parties as if the original signatures or initials were present in the documents in the handwriting of each party.

11. **OTHER:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

12. **CANCELLATION:** This Agreement can be CANCELLED or REVOKED only by mutual consent in writing.

13. **RECEIPT:** Seller has read this agreement and acknowledges receipt of a completed copy of this Agreement.

Accepted by:

\_\_\_\_\_  
(REALTOR®) (Seller)

For:

\_\_\_\_\_  
(Broker) (Seller)

**DISCLOSURE OF IDENTITY OF BUYER**

Broker and Seller agree that the term "Buyer" as used in the above-referenced Agreement shall mean:

\_\_\_\_\_  
\_\_\_\_\_  
and his/her/their spouse or other immediate family member and any entity in which he/she/they have a controlling interest.

Accepted by:

\_\_\_\_\_  
(REALTOR®) (Seller)

For:

\_\_\_\_\_  
(Broker) (Seller)

**Disclaimer:** This form is provided as a service of the Michigan Association of REALTORS®. Please review both the form and details of the particular transaction to ensure that each section is appropriate for the transaction. The Michigan Association of REALTORS® is not responsible for use or misuse of the form, for misrepresentation, or for warranties made in connection with the form.