
ANSWERING YOUR QUESTIONS ABOUT BUYING/SELLING REAL ESTATE

A public service of this law firm and the State Bar of Wisconsin

What can an attorney do for a seller?

A lawyer can protect the seller's interests in the sale process by:

- writing or reviewing listing contracts and offers; and advising on issues related to sale;
- helping satisfy conditions to the offer and resolving problems that arise;
- drafting deeds, transfer returns, and other transaction documents; and
- reviewing financial arrangements and assuring obligations are met at closing.

What can an attorney do for a buyer?

The buyer's attorney can make sure the buyer receives what the contract provides by:

- drafting or advising on buyer agency agreements and offers, including conditions and contingencies added for buyer's protection;
- examining seller's title (abstract or title insurance commitment) and explaining the documents affecting that title;
- answering legal questions about the property and its purchase including options for holding title;
- checking the note and mortgage, deed, and other documents; explaining buyer's legal rights and obligations under them at closing; and
- reviewing title after closing to make sure all legal requirements have been met.

This information, which is based on Wisconsin law, is issued to inform and not to advise. No person should ever apply or interpret any law without the aid of a trained expert who knows the facts, because the facts may change the application of the law.

Can't the real estate agent handle the transaction?

Real estate agents are prohibited by law from giving legal advice and representation. In Wisconsin, real estate agents act as intermediaries in a sale or purchase but can't advocate for either side nor provide legal advice.

In many transactions no real estate agent is involved. In those transactions the attorney should be more deeply involved in the negotiation and drafting of the offer and seeing the transaction through to closing.

Should the same attorney represent the buyer and seller?

It's not a good idea. The buyer and seller have conflicting interests in a real estate transaction. There also may be other parties to the transaction (the lender and title company, for example) and their attorneys represent their interests, which are not the same as the buyer's and seller's interests.

How important is the offer to purchase?

The offer to purchase is critical. Buyers and sellers should seek legal assistance in dealing with it. The offer is a legally binding contract when both parties have signed it and its contingencies are met. Contingencies (such as financing or property inspection) protect the parties by setting conditions that must be resolved before the sale is completed or "closed."

The offer establishes what property will be sold, what it will cost, when the sale will close, how closing costs will be allocated, and the other terms of the transaction. It also determines if the buyer's earnest money will be forfeited or returned if the sale does not close.

Many offers include a contingency for attorney approval. This allows the attorney to review the offer and recommend changes to it to assure the contract is valid and the parties' interests are protected.

What information is available on the property's condition?

An offer to purchase includes representations about the property and often contains a contingency to allow the buyer to have the property inspected and to cancel the offer if major defects are found. Professional home inspectors, regulated by the state, provide this service for a fee. For most residential property, the seller must provide a condition report disclosing defects of which the seller is aware

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and a disclosure regarding lead-based paint. Some property is sold in “as-is” condition, which makes the buyer’s inspection even more important. Real estate licensees also must inspect the property and disclose defects. Nonresidential property transactions also may include property condition reports as a contingency. Parties should discuss property disclosure issues and questions with their attorneys. The amount and quality of information that the parties have will help assure the fairness of the transaction and prevent later problems.

How do you hold title to real estate?

Individuals and entities (such as corporations or limited liability companies) may own property individually or with another person as tenants-in-common or joint tenants.

Married couples living in Wisconsin are subject to the Marital Property Act, which affects how title is held. Under that law, property may be: individual property of one spouse; marital property (owned in equal shares by the spouses); or survivorship marital property (marital property with a right of the survivor to full ownership when the first spouse dies). Couples who owned property before the Act went into effect (1986) may hold it individually, in joint tenancy, or in tenancy-in-common, or may change the title to one of the options described above under the Act.

Management and control of the property (including the right to sell) is given to the spouse who has title as shown on the public records except for “homestead” property (generally the couple’s primary residence). For homestead property, both spouses must sign deeds and most mortgages affecting it.

An unmarried couple may own property together as tenants-in-common or joint tenants, but it is advisable for them to have an attorney prepare an agreement spelling out their respective rights and obligations in regard to the property.

Does a buyer need title insurance?

An attorney can help the buyer determine whether to ask for title insurance or an abstract and title opinions. Most lenders require title insurance, even though it may cost less to use an abstract, if one exists. The lender may require title insurance regardless what the offer to purchase says. Buyers should contact a lender before writing the offer to purchase to determine the lender’s requirements.

What’s the difference between a warranty deed and a quit claim deed?

A warranty deed “warrants” or guarantees that the title is free of all title claims against the property except those mentioned in the deed. A quit claim deed transfers what title the seller has (if any), without such guarantees.

What legal issues are involved in financing?

Financing is the key to most real estate transactions. Financing provides the funds necessary to make the purchase. There are several financing options, and an attorney can help a buyer evaluate them. Buyers may wish to seek loan prequalification to help evaluate what they can afford.

Buyers usually get financing from a commercial lender – a bank, savings institution, or the like. To make sure the loan is repaid, the lender will take a mortgage on the property purchased. The lender also will look into the buyer’s finances and credit history, and may require mortgage insurance. If any problems arise, an attorney can help work them out.

The documents surrounding a mortgage can be very complicated. Buyers should seek legal assistance to understand these documents and be sure their rights are protected under them.

What is a land contract?

A land contract is used when the seller finances the buyer’s purchase of the property. Rather than paying the entire purchase price at closing, the buyer pays the seller in installments and receives a deed when all payments are made.

For the buyer, the land contract may be the only financing available depending upon economic conditions, the type of property, or the buyer’s creditworthiness. A land contract may have a small down payment, fewer closing costs, and even a lower interest rate than a mortgage. Often a land contract will have a short term and involve a lump sum (balloon) payment of the balance when the buyer’s equity will allow mortgage financing of the property. For the seller, land contract financing may be the only way to put the sale together.

Enforcement of a land contract is somewhat easier than a mortgage, but the seller assumes the risk that it will have to retake the property and resell it.

The land contract is a flexible financing instrument that involves detailed negotiation. The parties need good legal advice to assure that the land contract reflects their agreements and that their interests are protected.

When can a lender foreclose on a property?

A significant breach, such as failing to make payments or damaging the property, will allow the lender or land contract vendor to foreclose. Foreclosure terms are stated in the mortgage or land contract. Foreclosure may result in the sale of the property and loss of the buyer’s interest in it.

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Under state law, the buyer may have the right to be notified of his or her breaches and to correct them. Because different provisions apply in different circumstances, buyers should see a lawyer if they have been threatened with foreclosure.

Does the purchase and sale process vary with the type of real estate involved?

The basic process remains the same regardless what type of real estate is involved in the transaction, but certain elements may have greater or lesser importance. There are things to consider in buying or selling a farm that differ from those involved in a resort condominium unit, a factory, a home, or an investment property. An attorney can help assure the different elements of the transaction are fully considered.

What do owners need to know about building a home?

Building, remodeling, or adding on to a home or property involves additional contracts that an attorney should review and negotiate on the owner's behalf. The owners must decide what they need and can afford, which often requires the help of an architect or engineer with whom the owner will have a contract. The owner and the builder will need a construction contract covering what is to be built, changes to the plans, performance standards for the builder (including time for construction and delays, and warranties), and costs and extras. The owner may need a construction or home equity loan. Construction can be exciting and satisfying if the rights of the parties are clearly spelled out and fully understood.

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