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Though a real estate transaction is one of the few times most people need an attorney, there is virtually nothing taught in law school to help you the first time a client tells you he wants to buy a house. For a general overview and some practical tips to handle a house closing, leave your Real Property textbook on the shelf and read on.

## **Intake**

The first thing you do, as in any other matter, is to get information from your client. This should include the exact name of your client; the name(s) of any co-purchasers (spouse, fiancée, mother, brother, etc.); property location; purchase price; down payment amount; and whether your client intends to apply for a mortgage (it may be an all cash transaction or the seller may hold a mortgage) and the amount of the mortgage. You also need the name and phone number of the seller's attorney and, if there is a real-estate broker involved (which you will probably know before your client even contacts you), her name and phone number.<sup>1</sup>

Once you and the client have agreed as to your representation and your fee, you should have the client sign a retainer agreement.<sup>2</sup> The importance of a retainer cannot be stressed enough. Without one, when the transaction becomes anything but simple, your client will not understand why you want to charge him more than your basic fee for the extra thirty hours needed to close the deal (unforeseen problems relating to the mortgage, c.o., title, judgments, or anything else).

## **The Engineer**

The engineer is the chap who slithers into the crawlspaces of homes and climbs extension ladders to view areas of a house not seen since the house was built. The client should be advised to hire an engineer to inspect the subject home before any contract is drafted or signed. The client must be advised that the engineer will generally find things that are not perfect. As a result, it is important to advise your client to accompany the engineer during the inspection and to keep in mind that the subject house is however old it is.

If the engineer gives the house a clean bill of health, you can move on to the next step. Oftentimes, however, the engineer finds something wrong. A decision must be made whether to address the engineer's findings through the attorneys, the real-estate broker(s), or directly between the parties. Whatever the case, it is best to resolve the issues raised by the engineer prior to drafting the contract.

## **The Real Estate Broker**

The real estate broker can be a big help, but may also be a big problem. You must realize that the broker wants your client to buy this house. From your point of view, it does not matter whether your client buys this or some other house; her rights must be protected. Make sure to remember who you represent. Keep in mind, however, that most buyers do get a bout of cold feet at some point early in the process and usually need guidance so they can make a decision that is right for them.

## **The Contract**

After resolution of the engineer's issues, it is time to review the Contract of Sale, which is customarily prepared by the seller's attorney. Try and have the contracts forwarded as soon as possible after the engineer's inspection and, similarly, have the clients in to review the contracts as soon as possible after receipt. This will prevent everyone involved in the transaction, particularly your clients, from blaming you for delaying the process.

In preparation for the client meeting, make sure that you have read the contract carefully and completely. You should also have four duplicate original contracts for your client's signature.

You should count on this meeting lasting approximately one hour. I usually start with the lead paint disclosure form, which I provide if the seller has not. Give your client a copy of the pamphlet entitled "Protect Your Family from Lead in Your Home," and instruct your client to read it. Although the lead paint disclosure is required only for homes built prior to 1978, some lenders still require execution of this form for newer homes.

It is extremely important to listen carefully to your client's particular concerns and to remember what is important for this particular transaction. For example, that a particular contract does not represent that the roof is free of leaks is irrelevant once the client advises you that he has negotiated a lower price on the home because of the roof's condition.

In reviewing the contract, make sure to strike all inapplicable items. Similarly, there are certain items that must be included as they are generally not on the form. For example, many practitioners use NYBTU Form #8041 which has no mortgage contingency provision (meaning if the buyer cannot secure a mortgage, she can lose her down payment); the mortgage contingency clause found in newer forms, however, wipes out the contingency if proper notice is not given in accordance with a rigid timetable. Other clauses to consider involve a seller's representation that the premises have proper certificates for all existing structures; that the property will be properly maintained; that the systems will be in good working order and the roof is free of leaks at closing. In large part, the specifics of your transaction determine clauses to include.

A termite clause must be included and it is imperative that termites are defined to include all wood-destroying insects. This ensures insects like carpenter ants are within the clause. As termites are generally considered to be a hidden defect, it is customary that the clause defines the responsibilities of both parties. Typically, the buyer hires an exterminator to inspect the premises within a prescribed time period and the seller is responsible to treat and repair any termite damage and provide a one-year guaranty if treatment is required (the guaranty being required by the lender). Some attorneys argue that damage need not be repaired by the Seller as it should be discovered by the engineer. Some attorneys will agree to a maximum dollar amount the seller would have to spend on termite treatment and/or repairs, allowing the seller to cancel the contract if treatment and/or repair exceeds the cap. (When this happens, the seller usually agrees to pay up to the cap and the purchaser pays the balance.)

After you have reviewed the contract with your client, contact the other attorney to negotiate the contract's terms and conditions as necessary. If this cannot be done in a telephone conference, draft a letter containing the proposed modifications and fax them with a request for a quick response. An alternative is to have a "sit-down", where the parties and their attorneys meet to negotiate and execute the contract. Though this may expedite the process, there are attorneys who find it necessary to grandstand for the benefit of their client on minor issues, making the conference an unpleasant experience. Keep in mind, real-estate transactions generally tend to be less adversarial than many other areas of law because both sides have the same goal -- a smooth transfer of title from the seller to the buyer.

Prior to releasing executed contracts to the seller's attorney with the down payment (made payable to the seller's attorney "as attorney"), make sure that you have a metes and bounds description of the property, copies of Certificates of Occupancy or Compliance whenever possible and a survey. Each document you can obtain will make for an easier transaction. Most lenders will require them. The documents are to be reviewed to ensure there are no surprises or delays.

## **Closing Costs**

A major concern of your client will be closing costs -- how much are they and why does she have to pay them. You can get an idea of some of the closing costs based on the taxes on the property, the price of the property and the amount of the mortgage. With this information you can contact your title company and they can give you an estimate as to title charges (which will include title insurance premiums, recording charges, search fees and mortgage tax). Generally, you will not have enough information at the time of execution of the contract to ascertain bank closing costs (which will include tax escrows, per diem interest, points and processing fees). As a general rule, four to seven percent of the purchase price is a good estimate.

## **Ordering and Reading a Title Report**

One of the most important things in representing clients in real estate transactions is to use a good title company or title abstract company. This is the company that will perform the title search. There should be helpful staff to answer questions and to see that problems are solved quickly. There should also be an attorney available to help resolve the sticky situations which may arise. You need to feel comfortable with all of the people you will be in contact with in connection with the transaction. As title insurance premiums are prescribed by law, service should be your only concern in making a choice. I recommend that a title report be ordered from the title company once your client has received a mortgage commitment (to ensure that the client does not have to pay for searches on a deal that does not materialize). The title company will inquire as to the necessary information for it to perform the appropriate searches. You should not hesitate to ask questions as necessary as the title company is working with, not against, you. Once you receive the title report (approximately two weeks after being ordered), you must review it to ascertain whether any title issues exist. If so, they should be outlined in a letter to the seller's attorney (who should have also received a copy of the report from the title company). If you are not sure if something is an issue, ask your title company. Additionally, it is essential that the title company forward the title report to the bank or bank attorney as set forth in your client's mortgage commitment, so you must give the title company this information.

## **Scheduling the Closing**

Once you obtain bank clearance, you are ready to schedule the closing. You must coordinate the schedules of the bank attorney, the seller's attorney, the buyer, the seller and you. Once scheduled, contact your title company to have a title closer appear at the closing. The title closer's job includes making sure that the closing documents are properly executed and forwarded for filing.

At this time a "pre-close letter" should be forwarded to your client, reminding them of the following: (i) bring picture identification to the closing; (ii) bring an insurance binder and paid receipt (check the commitment); (iii) transfer water, electric, phone, and/or gas service into your client's name as of date of possession; (iv) bring the necessary certified funds to closing; and (v) check the physical condition of the property very carefully in a walk-through prior to closing or acceptance of keys, whichever is to occur last.

At this time, request from the lender that the "closing numbers", which are the bank charges, be forwarded to you as soon as possible (though it usually is not done until the day before the closing). You may also want to ask for copies of the closing documents to review ahead of time. A request to your title company for its charges must also be made. The bank and title charges, along with an estimate of adjustments (taxes, fuel in tank), are needed to calculate the money your client will need to bring to the closing, in both certified funds and in personal check. Generally, the lender will deduct all of its charges from the loan proceeds. You may also want the title charges and/or other expenses taken from mortgage proceeds as well.

Once you are comfortable with the numbers, contact the seller's attorney and ask if and how she would like certified checks for the closing. Instruct your client's lender and your client accordingly. At this time, the client generally wants you to review these calculations with him.

## **Vacant Possession**

This issue probably creates more problems and gray hair for attorneys than any other. Oftentimes, a seller wants to remain in possession of the property after the closing. Though this should be strongly discouraged, it sometimes is necessary. The issue should have been negotiated during the contract. The seller's attorney should prepare a possession agreement which mirrors the terms of the contract with some elaboration. It is customary for all adjustments (including per diem interest on the purchaser's mortgage since this has begun to accrue as of the date of the closing) to be adjusted as of the date of possession and for the seller's attorney to retain \$2,000.00 to \$2,500.00 in escrow to partially be used to pay the purchaser an agreed upon daily fee (\$150.00 plus adjustments) if the seller does not timely vacate. It is important to protect your client by making sure that he has an opportunity to inspect the premises when the keys are tendered and that the property be in the same condition it was at time of contract with reasonable wear and tear accepted. Contact the seller's attorney immediately if you are advised that there is a problem with the condition of the property or that the seller has not moved out. Furthermore, your agreement should also contain a clause that the seller remains personally liable for any damages as well as the per diem charge above the amount held in escrow by the seller's attorney.

## **The Closing**

Keep in mind that this is probably the most important purchase of your client's life. Be prompt and patient. You should be somewhat familiar with the documents prior to closing. To analyze each line of each closing document at closing will, plainly, take too long. Make sure that the terms of the mortgage match the commitment terms. Also make sure that there are no surprises in the documents. This will be something that you will learn as you do more closings. Pay particularly close attention to the Mortgage, Mortgage Note, and your numbers. Take your time at the closing and if there is something you do not understand, ask. Generally, a closing should be completed in one to two hours.

It is customary for your clients to give a tip to the title closer at the end of the closing. Depending on the difficulty of the transaction and the wherewithal of your client, a tip in the range of \$50 - \$100 is usually appropriate.

At the closing the bank representative will give you copies of everything your client executed. You should make sure that you have copies of everything else.

## **Post-Closing**

When you get back to your office after the closing, review the file and prepare a final closing statement, unless you have a laptop computer and can generate the closing statement directly at the closing. The closing statement is a breakdown of the monies exchanged at the closing as well as the closing costs and adjustments.<sup>3</sup> Attached to the closing statement should be copies of all of the relevant documentation, including the Mortgage Note, Mortgage and other documentation executed at the closing, and the Deed (the recorded Deed will be forwarded after its receipt from the County Clerk). This closing package should be forwarded to your client under cover of a letter congratulating her on her purchase and outlining the services your firm can provide for her in the future.

## **Conclusion**

Though a real estate transaction can be time consuming, once completed you will feel good knowing that you have truly helped a client in obtaining a piece of the American dream.

## **Endnotes**

1. On the Nassau Lawyer web site is a copy of an information and procedure list that I have found helpful.
2. A sample retainer is on the Nassau Lawyer web site.
3. An example of a closing statement can be found on the Nassau Lawyer web site.