



A Primer On

# DEALING WITH FSBOS

MICHIGAN ASSOCIATION OF REALTORS

## 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 un-knowledgeable 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.**

## 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.



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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.

## **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.”



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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.

## **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,



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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 sub-agent 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.

## **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.



One Party Listing Agreement

Seller(s): \_\_\_\_\_

Property: \_\_\_\_\_

This Agreement is entered into this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between the above mentioned Broker and the above mentioned Seller(s). This agreement is NOT to be construed as an exclusive listing, but is binding for 180 or \_\_\_\_ days from execution of this agreement. Seller agrees to pay said Broker a commission of \$\_\_\_\_\_ or \_\_\_\_ % of the sale price upon the consummation of the sale. The commission will be due and payable only if said property is sold to the following prospective Buyer(s): \_\_\_\_\_

**AGENCY:** Seller acknowledges that Broker has explained the different types of real estate agency relationships. Seller further acknowledges receipt of a "Disclosure Regarding Real Estate Agency Relationships" form.

**MARKETABLE TITLE:** Seller represents title to the Property to be in good and marketable condition. Seller further represents and warrants that they are the exclusive holders of the interest to be conveyed hereunder, or that they are the duly authorized agents of the holders of said interest and are specifically empowered to enter into this contract and to convey the interest set forth.

**NON-DISCRIMINATION:** It is agreed by Seller and Broker, that as required by law, discrimination because of race, religion, color, national origin, sex, marital status, age, height, weight, physical or mental disability, and/or familial status by said parties in respect to the sale of the subject Property is PROHIBITED.

**SHOWINGS:** Seller grants Broker permission to show said property only to the above mentioned prospective Buyer, all showings will 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 person(s) or damage or loss to property arising out of the showing of Seller's property pursuant to this listing agreement.

**ADVERTISEMENTS:** Seller acknowledges that Broker will NOT market or otherwise advertise said property for sale.

**OTHER:** \_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**ACKNOWLEDGEMENT:** The Seller has read, acknowledges, and accepts the terms of this contract and has received a completed copy of same.

\_\_\_\_\_  
Seller(s):

\_\_\_\_\_  
Date:

\_\_\_\_\_  
Accepted By, Agent for National Realty Centers, Inc

\_\_\_\_\_  
Date: