



# **A FLORIDA BAR BOARD-CERTIFIED ATTORNEY’S GUIDE TO BUYING AND SELLING REAL ESTATE IN FLORIDA UPDATED APRIL 2026**

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As Florida Bar Board Certified Attorneys, we have written this Buyer’s and Seller’s real estate guide for purposes of identifying the key points that we believe are significant to make the sale or purchase of your home is a smooth and efficient experience.

## **BACKGROUND:**

Our law firm has handled thousands of residential real estate contracts, assisting both Sellers and Buyers. We negotiate and draft contracts, prepare closing documents and issue title insurance for seamless and successful real estate closings. Our office has two Florida Bar Board Certified attorneys who work in conjunction with Title Masters, LLC, a Florida Title Company, and with three (3) experienced real estate closing agents. Between the five (5) of us, we have well over 100 years of experience in closing residential real estate transactions.

## **BUYER’S AND SELLER’S CONSIDERATIONS**

### **1. “FOR SALE BY OWNER” - GOING IT ALONE**

Buyers and Sellers first need to determine if they are willing to go it alone (see discussion below as to For Sale By Owner with the assistance of a qualified real estate attorney and a For Sale By Owner with a real estate attorney and a discount broker). In the Sellers’ case, this means listing their home without a real estate agent and utilizing the “For Sale by Owner” method. For Buyers, this means searching listings without the use of a qualified real estate agent.

With the advent and continued expansion of real estate search engines as well as the easy access to information online (Zillow.com, Realtor.com, etc.), many Sellers are tempted to list and sell their homes themselves and many Buyers are interested in purchasing single-family homes without the use of a realtor. Although some have had success in buying or selling their property without using a realtor, often times, many find they still need assistance and expertise from a qualified real estate attorney.

Our office has assisted many Sellers who have utilized the “For Sale by Owner” method of selling their home. We have also assisted Buyers who have chosen not to use a Broker, and we agree that there are certain unique situations where a realtor may not be necessary. However, a Seller and/or Buyer may need a qualified attorney to create the contract and close the deal. For example:

- A. You have a neighbor or close friend who knows your house and wants to make an offer to purchase on their own behalf.
- B. As a Seller, you feel comfortable with pricing, showing and negotiating the sale of the house.
- C. As a Buyer, you have located the house(s) that you want to make an offer on and want to utilize the concept that the Seller will not be paying 3% of the sale price to the Buyer's agent. Therefore, whether listed with a real estate broker or not, you want to use that fact to negotiate a reduction in purchase price by another 3%.
- D. As a Seller, you have advertised your property as a "For Sale By Owner" and have been approached by several different Buyers who have indicated that they want to make an offer on your home. As the Seller, you need assistance in sorting out those offer to determine whether the offer prices are fair, and both the Seller and Buyer need assistance in getting a contract drafted that properly reflects the intent of both parties.

However for Sellers, the consensus is that using a qualified and experienced Florida realtor is the most efficient way to sell your home for the highest and best net price to you while having the house on the market for the least amount of time.

The same can be said for using a qualified real estate agent to assist you in the search for your new home. Keep in mind that a properly selected and qualified Buyer's agent can be **invaluable** in assisting you in locating that ideal home for your needs. Another important consideration for selecting a Buyer's agent is that generally, the Seller pays the Buyer's agent's real estate commission from the co-brokerage arrangement.

Here are the statistics published by the National Association of Realtors as to For Sale by Owner properties for reference information:

*"For-Sale-by-Owner (FSBO) Sellers*

1. *Only eight percent of recent home sales were FSBO sales this year. This remains close to the lowest share recorded since this report started in 1981.*
2. *The median age for FSBO sellers is 57 years. Sixty-four percent of FSBO sales were by married couples that have a median household income of \$96,700.*
3. *FSBOs typically sell for less than the selling price of other homes; FSBO homes sold at a median of \$217,900 last year (up from last year), and significantly lower than the median of agent-assisted homes at \$242,300.*
4. *FSBO homes sold more quickly on the market than agent-assisted homes. Seventy-seven percent of FSBO homes sold in less than two weeks—often because homes were sold to someone the seller knows.*
5. *Eighty-one percent of successful FSBO sellers who knew the buyer were very satisfied with the process of selling their home."*

Our comments to these statistics by the NAR is that it appears that a For Sale by Owner is faster and results in more than an 80% satisfaction rate by home sellers. Although the selling price is less than the median sale price by owners, for several reasons we can discuss with you if you are considering a for sale by owner, the for sale by owner seller also saves a significant portion of the real estate commission or in

the case of a sale to a neighbor or friend, perhaps the entire real estate commission since the typical real estate commission is not paid with a for sale by owner property absent a buyer being represented by a real estate agent and the agent requesting the Seller pay that agent a percentage of the sale price.

In today's current real estate market in Southwest Florida (2026) it is still a Buyer's market, and many sellers must compete to secure a buyer for their property. This requires knowledge of the market issues with a For Sale by Owners and the right guidance to result in netting a sale price that should approach the price that might achieved by a listing with a real estate agent.

## **2. For Sale by Owner using a qualified real estate attorney**

Legal Expertise: By retaining a qualified Florida real estate attorney to draft and review contracts, you get the legal protection that a realtor usually provides, without paying full commission. The attorney handles complex issues, such as ensuring legal compliance with Florida's disclosure laws, managing escrow, and issuing/reviewing the title. By retaining attorneys at the Law office of Jursinski and Murphy, you also can request a Florida Bar Board Certified Attorney represent you through the closing.

## **3. For Sale by Owner using a qualified real estate attorney and a discount real estate broker (Alternate FSBO format)**

Some of our clients have inquired about the use of a lower price/discount broker in conjunction a For Sale By Owner (FSBO) in Florida. We again recommend that the client have some guidance by a qualified real estate attorney, such as the Florida Bar Board Certified Attorneys at the law office o Jursinski and Murphy. When such a qualified attorney is working with a discount broker, the benefits to the Seller are as follows:

- A. The Seller can be assured that they have legal guidance throughout the entire closing process with a qualified real estate attorney.
- B. The Seller can maximize its equity by reducing the exposure to a full real estate commission. In this alternate approach and using a lower priced/discount real estate broker, Sellers can realize a savings on commissions between what the lower priced/discount broker charges them and what a typical residential real estate broker charges to represent Seller on the list side. If the discount broker charges only 1% to place the property on the multiple listing service and the Sellers perform all of the duties that the listing broker/agent would do, Sellers may save on commission 1% to 2% of the listing commission. The discount broker gives the Seller the needed multiple listing exposure mandatory and with the assistance of a qualified real estate attorney, a Sellers also receive professional legal protection throughout the real estate contract, from initial contract negotiations through inspections and through the issuance of title insurance and closing. Many Sellers comment on the benefit of this approach,
- C. Sellers need to accept the fact that they will be showing their own property, making appointments for showing and also staging their home or property to show. The Sellers need to be prepared to do that and present to the Buyer the proposed contract that the Sellers want to utilize. The Sellers have the benefit of a prepared contract that leaves blank only the Buyer's name, the Buyer's offer and the inspections/closing dates. the Buyer and then have their legal counsel ready to assist.

Summary of Benefits By a Qualified Real Estate Attorney and Discount Broker:

**Commission Savings:** By using a discount broker, you typically pay a flat fee or reduced percentage (often 1–2% instead of 3% for a listing agent). Combined with the FSBO format, you can save roughly 2%–4% of the sale price in total commissions, as you only pay the buyer's agent and, in that situation, you can indicate your maximum percentage of buyer's agent commission and calculate that into the sale.

Sellers should anticipate that a typical lower priced/discount broker lists the home on the multiple listing service gives the Sellers the same exposure as if the listing was placed with a traditional real estate listing broker. This is far better than a traditional FSBO format since that at typical format relies upon friends, neighbors/word of mouth or signage for marketing.

Sellers should also consider implementing the use of a qualified real estate attorney to be the professional guide through the entire process while using the lower price/discount broker to maximize the exposure of the house on the multiple listing service.

#### **4. PURCHASE OF NEW CONSTRUCTION SINGLE-FAMILY HOME: NATIONAL BUILDER**

The purpose of this article is to address the buying and selling of existing homes. However, we also assist clients who are acquiring single-family homes from national builders. We want to provide the following tips:

- A. Generally, national builders provide the purchaser with a specific, pre-printed contract identifying the terms of the agreement. It also specifies that the buyer generally places approximately 20% down as a deposit toward the home to be built by the builder.
- B. The inspection rights are limited in the contract to a very short time period, which is usually just prior to the title being transferred.
- C. The contract also generally provides a paragraph addressing a financing contingency which has specific restrictions in it. Caution should be given by the buyer under this type of contract, especially if the buyers is considering getting financing through a source that is not an affiliated lender of the builder. Since most of the time it is nine (9) to 12 months or longer before the home is constructed, and that precludes the buyer from getting current loan approval as well as obtaining a rate lock.
- D. During construction, the buyer is advised to consider obtaining a licensed, insured and bonded home inspector deemed “qualified” per Florida Statute 468, who has the right and opportunity, with adequate notice, inspect the property during construction. Often times, the construction methods, starting with the pouring of the slab, need to be looked at by a home inspector to verify that the work is done in accordance with the architectural drawings and the building code. We’ve had experiences, even with national builders, in which certain components of the construction were not met and which could not be determined if there is only a final inspection at the time the unit is substantially complete or a certificate of occupancy is issued. Examples of construction issues that need earlier inspection are improper slab pour, installation of tile without a proper underlayment, etc.

#### **5. SELECTING THE PROPER LISTING OR BUYERS’S AGENT**

As to the real estate agent that is selected to list the house on behalf of the Seller or the real estate agent that is selected to assist the Buyer in the transaction, below are some key factors to consider.

- A. Knowledge: The Seller's agent (Listing agent) needs to have knowledge of the community in which the house is located and all of the intrinsic positive features of the house and location. The agent needs to know the Seller's price, time frame for occupancy and any items that may be a part of the negotiations.

The Buyer's agent needs to have knowledge of the Buyer's needs and requirements such as the type and size of the home, the preferred school district, access to shopping, churches, beaches, whether the Buyer is looking for a gated community and all of the other essentials that go into understanding the needs of the Buyer, as well as the Buyer's price range.

- B. Education: What specific education does the agent have and what industry specific education has the agent taken besides the general two-year cycle of real estate continuing education? A number of real estate brokerages also offer advanced training for their agents. Continuing education keeps an agent knowledgeable on the current trends and options available to Buyers and Sellers.

- C. Experience:  
As to the Seller: What is the real estate agent's experience in listing similar type homes in the community or general area? How many home sales have they successfully listed and sold? Identify referral sources of other satisfied Sellers and, of course, check all of their Google and other website reviews.

As to the Buyer: The same type of questions should be posed related to their experience in negotiating purchases of homes in the price range and community that best fits the Buyer's needs.

- D. Negotiation Skills: An agent's level of skill can be discerned by asking the agent pertinent questions. For example: If we select a listing price of the house that we believe is fair based upon objective criteria such as a CMA but the Buyer makes an offer 10% less, what is the approach the agent will take in response? Split the difference? Advocate for the listing price?

Same type of question for the Buyer's agent as to how they will evaluate and negotiate the initial offer, since that advice almost always comes from the agent. The approach that the agent describes will give you insight into the type of agent you will have representing you in one of the biggest investment decisions of your life - the sale or purchase of your home.

- E. Honesty: This is a subjective determination and is usually determined by the Buyer's or Seller's interaction with the agent as well as the agent's response to selected questions about their experience, education, contacts in the area (networking) and a general description of their overall strategy for selling the home as to the Seller's interest or their efforts in locating the ideal home for the Buyer.
- F. Communications and Contacts: What is the agent's format for communicating with you? Does the agent prefer to communicate information to you primarily by text, email or phone?

What is the agent's network of contacts? Has the agent worked with other agents in the community in selling or purchasing homes and, if so, how often?

If you drive around the target community, you will see the top two or three agents with the most listings. Does your agent know these other agents? Is the agent's brokerage one of those firms whose sign is seen in the community or surrounding areas? Going back to Item E: "Honesty", see how the agent communicates with you and the rapport that is developed. That will tell you a great deal about how they will interact with the Seller/Buyer or their respective agents.

- G. Referrals: Besides friends and colleagues within the real estate industry who would offer a referral, there are also numerous websites such as [www.Homelight.com](http://www.Homelight.com), [www.Upnest.com](http://www.Upnest.com), [www.topagentsranked.com](http://www.topagentsranked.com) and others which rate real estate agents. The specific real estate agent and broker agencies' website should also display their reviews on performance.

## 6. SELLER'S AND BUYER'S PERSPECTIVE ON USING A QUALIFIED REALTOR

Qualified realtors can assist you in evaluating your home and its position in the marketplace from a pricing standpoint. A realtor can also help determine the approximate time you can expect the home to be listed prior to the contract being accepted.

Realtors can provide Comparative Market Analysis (CMA), Broker Price Opinions (BPO) and/or Broker Opinion of Values so you can know what is currently listed in the marketplace in a comprehensive format. This information tell you what has been selling and at what price comparable units have sold. Agents also can advise and assist you with necessary pricing adjustments to your property. This may be an increase or decrease of the sale price of the property based upon comparable conditions of your home in relation to other similar properties on the market or that have recently sold. This is in addition to the many other positive factors provided by qualified real estate agents.

Most real estate agents will list the property for a six percent (6%) commission. They may reduce that commission on the listing side as the property values increase. Often, we find the demarcation line for the reduction on commissions is somewhere in the \$500,000 to \$1 million range for property pricing, whereby many Brokers will list those properties for five percent (5%) allowing for a split Co-Broker fee. We have also seen where this five percent (5%) Co-Broker fee is not evenly split but instead three percent (3%) goes to the Buyer's agent and two (2%) percent to the listing agent. Commission percentages are negotiable, but fighting for a discount on your listing may not be as significant as having your house properly priced, marketed and positioned to sell quickly.

## 7. INSPECTIONS OF THE PROPERTY

One rule of thumb is to identify the fact that most Buyers are going to have an inspection done on your property. Unless you have a brand-new home or have maintained your home in pristine condition, most houses will have general areas of repair or slight damage that needs to be addressed. It is also important to note that many Buyers do not have a budget for post-closing repairs. The consensus is that most Buyers acquire a new home at the top of their budget. Many Buyers with financing don't have excess funds to do several thousand dollars' worth of repairs.

You can increase the universe of Buyers by avoiding a situation in which a Buyer has to expend monies on post-closing repairs to the tune of thousands of dollars, even if you reduce the purchase price by a comparable or larger amount. One suggestion is to be proactive and affect repairs to your home so that any prospective inspection will reflect that the home is properly maintained and no significant issues exist at the property that could become the headache of the Buyer. This has both a monetary and subjective benefit.

Keep in mind that our general rule of thumb from experience is that most Buyers deduct two dollars for every one dollar of repairs they believe they have to make. Even when using the “AS-IS” contract for sale/purchase, a Buyer can submit an offer, cancel the offer within the inspection period and then negotiate or “re-trade” the price based upon issues that the Buyer has located in the inspection. Thus, it is far better for the property to reflect a well-maintained condition and good first impression before the property is marketed in order to avoid such potential price reductions.

We stress the importance to both the Seller and the Buyer of the inspection. The Seller should afford the Buyer adequate time to inspect the property. The standard FAR/BAR AS-IS Real Estate contract provides fifteen (15) days for an inspection period. Given the significant uptick in sales as well as construction activity, home inspectors are kept very busy in Southwest Florida, we are suggesting that fifteen (15) days is the *minimum* amount of time. We also suggest that a twenty (20) day time period be allocated to the Buyer for the Buyer to do each and every test the Buyer deems appropriate by their secured qualified inspector.

We recommend hiring a qualified home inspector. This inspector should be a licensed and insured home inspector under Florida Statute 468, and should hold either a general contractor’s license or certified building contractor’s license. The reason for this is that there may be issues that arise in the inspection that require the expertise of a knowledgeable, licensed contractor to render an expert opinion. Further, if litigation ever ensues in regard to the contract, in such event, a qualified general contractor/certified building contractor would clearly have more expertise and have their testimony accepted on construction practices better than a home inspector without such licenses.

We have litigated numerous cases in which unqualified home inspectors failed to perform adequate inspections in areas such as water intrusion or other structural defects. Such defects would have been noted by a proper home inspection done by a qualified contractor with a general contractor’s license.

Our firm recommends two (2) highly qualified, licensed, insured and bonded home inspectors who also hold general contractor licenses. We have used these two inspectors for many years.

We also recommend that if there's any doubt that a radon gas test or an air quality test is needed, the answer should always be to “*order the test!*” Our firm has had numerous instances in which parties are of the assumption that no radon gas test would be required, but then they later find out that there are significant levels of radon gas in the home. In addition, we also have had clients who failed to obtain air-quality tests thinking that they were not needed because they didn’t see any visible mold in the home or assume there is no mold or water damage issues. These clients hired our firm because they were sadly mistaken and discovered that there was mold and resultant poor air quality in the home. We then have to start litigating against the Seller to prove that the Seller had actual knowledge of the water damage and resultant mold under the Johnson vs. Davis standard (see also the Jensen vs. Bailey case requiring “*actual knowledge by the Seller of the defect to be disclosed*”).

However, many of these types of issues can be eliminated by spending a little extra money for the proper testing. We highly recommend and have available the names of qualified testing agencies who can assist our clients.

## **8. ISSUES ARISING DURING INSPECTION PERIODS AND CONTRACT NEGOTIATIONS**

We previously discussed the overarching duty of the Seller to disclose known material defects and the correct approach with a Buyer doing a full investigation of the subject property. If issues do arise during an inspection and with use of an AS-IS contract, much of the drama and tension can be relieved. For example, if the Seller is confronted with the Buyer's objections to the property, the Seller can indicate that the Buyer either can cancel the contract or the Seller can negotiate a new contract with an agreed-upon set off for the claimed repairs.

Likewise, the Buyer with an AS-IS contract is not under pressure to close a transaction if it finds objectionable issues at the property. In this situation, a Buyer can either timely cancel the contract and recover the deposit or timely cancel the contract but indicate that the Buyer is willing to enter into an addendum to revive the contract but gain concessions due to the nature and extent of the repairs, potentially by an offset in the price or with the Seller contributing cash at closing towards identified repairs.

The big issue that arises is that Sellers might, in certain circumstances, not want to afford the Buyer adequate time to inspect the property. This creates distrust, tension and exasperation. Most people who are uncertain about a purchase will generally cancel. There is a better way to protect all the parties' interests, which is to utilize full and fair opportunity to inspect the property with full transparency and keep open communications in regard to any issues existing at the property. Anything less than that leads to distrust, dissatisfaction, the potential failure to close or worse yet, litigation.

## **9. JOHNSON VS. DAVIS DISCLOSURES**

If you are selling your home, it is highly recommended to have your own inspection done by hiring a qualified independent inspector. This will allow you to determine if there are any defects in your home that are not "*readily observable*" and which would be relevant to the Buyer's decision in purchasing property.

Since 1985, and based upon the Florida Supreme Court case Johnson v. Davis, Sellers of residential units (one to four units) have a duty to disclose all known material defects which are not readily observable but which would be material to Buyer making his/her purchase decision. This is also a contractual provision generally contained in the contract and often times also will be a specific written statement contained in the Seller's disclosure statement. Accordingly, it would be important for the Seller to be made aware of all known material defects existing at their particular unit to either:

- a. correct those defects; or
- b. bring those defects to the attention of the Buyer.

This is the duty of disclosure imposed under Florida Law. *Caveat Emptor* ("Buyer Beware") in Florida is no longer a standard acceptable in Florida as to residential transactions even if using the FARBAR As-Is contract. It is far better to have this information ahead of time than to be confronted with it by a Buyer who may cancel the contract after their own inspection or, alternatively, cancel and re-trade the price.

## **10. SETTING PRICES AND TERMS**

A. Cash Purchases and Financing Contingencies:

For both Seller and Buyer, the ideal situation is a cash purchase. This means no mortgage financing contingencies and no uncertainties with getting the contract closed. Southwest Florida has a significantly high percentage of closings that are completed with cash and no financing. This has an impact upon a prospective Buyer submitting an offer contingent on financing and being confronted with a competing Buyer who submits an offer without such financing contingencies. In certain cases, a lower-priced cash offer might be accepted by Buyer versus higher-priced financing contingent contract.

One way Sellers and Buyers can alleviate the issue with Seller financing contingency is for the Seller to require proof of funds and the Buyer to provide mortgage pre-approval. This is a benefit to the Seller, since it gives the Seller more confidence in the Buyer's ability to close and consummate the transaction. For the Buyer, this approach also avoids the uncertainty of spending time and effort and potentially inspection fees looking at a house at a price point that the Buyer cannot obtain financing on. The Buyer should make an offer contingent upon an appraisal for the contract price. Otherwise, the Buyer may be approved for financing but fall short of the required loan-to-value percentage necessary if the appraisal is less than the contract price.

B. Purchase Money Financing and the Application of the Federal Dodd Frank Act:

Sometimes Buyers need "purchase money financing" since they won't be able to qualify for an institutional loan on the purchase. Seller/Purchase money financing is where the Seller carries the financing on the home rather than the Buyer obtaining financing from a third-party lender.

In certain situations, Sellers may be willing to carry purchase money financing. If such is the case, it's absolutely essential that the Seller retain qualified, legal counsel to assist in preparing purchase money financing terms that should be included in the contract documents, as well as, identify the requirements under the Dodd-Frank Act for Seller financing, since there are some significant restrictions in Seller financing under Federal law.

While there are exceptions available to the Buyer, the Buyer needs a sophisticated law firm like the Law Office of Kevin F. Jursinski and Associates, to advise them of the issues involving Seller financing if that's the course that a Seller would like to take. Keep in mind that, oftentimes, a property can be sold at a higher price or can be sold to unqualified Buyers by utilizing Seller financing but there are attendant risks involved and resolutions that need to be addressed (see Dodd-Frank Act Update: Seller Financing Restrictions & Exemptions article on our website: <https://www.kfjlaw.com/wp-content/uploads/sites/2868/2016/03/Update-as-to-the-Dodd-Frank-Act-Seller-Financing-Restrictions.pdf>).

C. Earnest Money Deposit:

Earnest Money Deposit is the good faith deposit and consideration by the Buyer to the Seller for acceptance of the Buyer's offer. The Earnest Money Deposit should be held in escrow by a licensed attorney in his/her trust account or an established title company. Our law firm highly recommends utilizing experienced and qualified attorneys who have practiced in the area and have a reputation of honesty and responsibility. In addition, there are title companies that are owned and operated by qualified real estate attorneys and, in such cases, the client is utilizing a title company but getting the benefits of the attorneys that own and operate the title company.

Failing to qualify the type of title company can lead to issues. We recently have seen evidence of a local title company in Cape Coral going out of business and not only failing to honor its obligations at a closing, but in fact failing to pay the real estate Broker commission, taxes and other expenses of a closing, all of which were received by the title company but converted to the title company's own use. We also seen closings that have taken place in which fraud occurs from a title agent failing to pay off a mortgage.

Sellers should never accept and a Buyer should never allow a Seller to hold the contract deposit outside of escrow. Always have the contract deposit put in escrow, preferably with a Florida attorney, into a Florida Attorney's trust account. The Seller needs to be careful of scam cashier's check deposits with demand for return on the cashier's check that is worthless.

The Buyer may want to provide that the deposit is made upon acceptance of the Contract by the Seller. The larger the deposit, the greater the risk for the Buyer, but a solid deposit also demonstrates strength and sincerity of the Buyer and may also enhance the view by the Seller of the contract by having a substantial deposit. Generally, a deposit ranging from one percent (1%) to five percent (5%) of the purchase price is adequate and acceptable on most contracts.

The Seller needs to be cautious of a Buyer/manipulator who puts a nominal amount down and simply does so to tie up the property to assign or flip the contract.

## **11. CONTRACT FORM TO USE**

In Southwest Florida, there are generally four contracts being utilized for the purchase of a home.

- A. FAR/BAR (Florida Board of Realtors and Florida Bar) Contract with prospective repair costs and wood destroying organisms (termite damage) provisions.
- B. FAR/BAR AS-IS Contract provides for the home to be sold in the current condition without any obligation whatsoever on behalf of the Seller to make repairs, but with a specific provision for the Buyer to do a complete inspection within a reasonable period of time and with the Buyer's sole and absolute discretion to cancel the contract.
- C. FAR (Florida Association of Realtors) Contract is generally more favored by Brokers and not favored by attorneys. This contract contains provisions that are more Broker/Agent friendly. It includes the splitting of deposits in the event of a contract breach, the absolute waiver of any obligations of the parties to rely upon the Agents involved and the elimination of the recovery of prevailing party attorney fees.
- D. NABOR (Naples Area Board of Realtors) Contract is similar to the FAR/BAR contract. The main difference is that this contract is generally used only in Collier County, has the "time is of the essence" provision only pertaining to the closing date which creates issues with time periods within the contract and also provides for title insurance to be secured and paid for by the Buyer rather than the Seller.

Having closed thousands of these contracts and also having been involved in litigation in hundreds of these residential contracts, it is our experience that the most appropriate contract that covers most of the necessary elements is the **FAR/BAR AS-IS Contract**. We find that there are issues with the FAR/BAR, FAR and the NABOR Contracts as they relate to the undertaking of repairs by the Seller since that adds a

significant amount of complexity to the transaction and, based upon some of the caps, it doesn't really afford the Buyer that much more protection. In Collier County, we use the NABOR contract, but we suggest some modifications so as to eliminate repair requirements as well as tighten up the application regarding the “time is of the essence” clause.

We have litigated numerous real estate cases through trial on issues involving the failure of the Seller to disclose all known material defects under the Johnson v Davis theory. We have also litigated disputes involving repairs, or purported repairs, which were to have been done but were not properly completed prior to closing. We suggest to our clients that the “repair by the Seller” component of the contract should be eliminated.

As such, the AS-IS component of the FAR/BAR Contract is attractive. At the same time, however, we do advocate that the Buyers, who are the ones receiving title insurance, have their own attorney review and issue title insurance for the purchase. This ensures that the Buyer’s attorney reviews the title and is satisfied that the Buyer is getting not only insurable but also “marketable title”. There is a difference between the two.

## **12. CONTRACT ADDENDUM**

Contracts should be reviewed by both parties’ attorneys. Real estate agents are allowed to fill in the blanks in the standard contract forms. Real estate agents are *not* allowed to give legal advice. Real estate agents are *not* allowed to draft contracts. Oftentimes, however, the lines are blurred when addendums are prepared. We’ve seen real estate agents take it upon themselves to draft contract extension. In actuality, they don't understand basic contract law and correspondingly, by such lack of knowledge, damage their clients by acting as an attorney.

One recent example is a situation in which a Buyer was not able to secure financing within the time period as outlined in their contract. As such, the Buyer, who did not get the financing, asked for an extension. The Buyer’s real estate agent, not attorney, drafted the contract addendum. In this addendum, the Buyer requested of the Seller an extension of the closing, but the Buyer’s real estate agent failed to request the extension of the financing contingency. The closing was extended, but the Buyers never obtained their financing. Since, the contract addendum did not extend the financing contingency, the Seller demanded that the Buyer forfeit the deposit. Thereafter, a dispute ensued. This could have been easily prevented had the Buyer’s agent not undertaken the responsibility to draft the addendum without an attorney.

This is an example of a real estate agent undertaking the practice of law, which is prohibited and which breaches their statutory duty to use “*skill, care and diligence in the real estate transaction*” by not being diligent and by not referring the client to an attorney. Secondly, this agent’s negligent act of creating a legal addendum that they were not qualified to do in the first place, caused harm to the Buyer.

We work with numerous sophisticated and qualified real estate agents and the more experienced and smarter real estate agents always recognize their limitations in this area.

## **13. USING A REAL ESTATE ATTORNEY TO REPRESENT THE BUYER VERSUS USING A TITLE AGENCY**

Oftentimes, real estate agents advise, in our opinion incorrectly, that Buyers need not utilize a real estate attorney. They often recommend a Buyer utilize a title company when buying or selling a house in

Florida. Florida does allow title companies to close real estate transactions and issue title insurance, but title companies cannot provide the important services that a real state attorney can:

- A. Title companies are **not** representing the Seller or Buyer, even if a title company is issuing title insurance policy to a Buyer;
- B. The title company is interested in issuing a title commitment identifying that the title is insurable, even if that means the Buyer is getting a title that has certain flaws or exceptions. These exceptions, which would be considered a marketable title defect, may not be noted by the Buyer, since the title company may simply write over these exceptions and issue the title policy, notwithstanding issues that might be considered title defects by the Buyer's attorney;
- C. The title company cannot provide the Buyer legal advice under the contract or in any way provide legal advice relating to the impact or effect contract documents.
- D. The attorney fees and representation of the Buyer and cost of title insurance generally are not significantly higher, and sometimes are the same as the fees of a title company, which does not afford **any** of the representation of the Buyer as would the Buyers own attorney.
- E. Oftentimes, the real estate agent refers the Seller or Buyer to a title company for the closing. That title company is actually owned by the real estate broker involved in the sale.

As indicated above, there are exceptions to using a title company when the title company is owned and controlled by qualified real estate attorneys.

Keep in mind, the Buyer's attorney is interested in the Buyer obtaining **marketable and insurable title** and having all their rights protected pursuant to the real estate contract and in accordance with those contract terms. A title company does not have that same legal duty and obligation.

Many times, real estate agents also incorrectly advise the Buyer that if the Buyer pays for title insurance, that will then add thousands of dollars to the cost of the purchase for the Buyer. This is not true if properly done. Example: A Buyer who assumes the obligation for acquiring and paying for its own title can offset this against the purchase price and demonstrate to the Seller that the Seller is still netting out the same amount of money with this lower priced contract but with the Seller saving on the cost of the title work

Using a little bit of knowledge, simple mathematics and disclosure to the Seller will reflect that the Seller is getting same amount of money, but the Buyer is protecting itself by having his/her own attorney issue the title insurance commitment and policy.

#### **14. REAL ESTATE CLOSING: REVIEW OF TITLE COMMITMENT**

The final step to a real estate closing is to properly review the title commitment. As indicated above, this should be done with the Buyer's attorney, and this attorney should be the one preparing the real estate closing. The title commitment is the insurance commitment indicating what will be insured and will not be insured.

Schedule B1 of the title insurance commitment identifies those requirements that need to be undertaken by the closing agent in order to issue the title policy. Those all need be checked off the closing and the

Buyer needs to verify that they've all been met and performed, preferably by having the Buyer's attorney handle all those issues.

Schedule B2 is a list of title items that are going to be exceptions to the policy. That is exactly what the policy will not ensure and which will be exceptions to clear, marketable title for the Buyer.

As such, the Buyer needs to assure and most likely should address the fact that its title commitment is marked up at closing to remove all standard exceptions to the title policy (adverse possession by third parties, survey issues, boundary disputes, encroachments and other matters) and take title subject only to normal and customary title insurance exceptions. Buyers are advised to secure a survey affidavit so that they can have full coverage for any boundary line or encroachment disputes that arise under the contract.

## **15. CLOSING**

The closing should be positive experience for Buyer, Seller, Listing Agent and Buyer's Agent. The closing should not be the time when disputes arise as to construction issues, amounts paid, deposits to be released, etc. All these should be resolved well ahead of time with all parties having access to the draft title commitment and draft closing statement well prior to the closing.

## **16. TAKING TITLE**

Our law firm has authored a significant article on how parties should take title to real estate in Florida. The link is:

<https://www.kfjlaw.com/wp-content/uploads/sites/2868/2016/03/Use-of-Business-Entities-and-Acquisition-of-Real-Estate-Investments-10.14.15.pdf>

Generally, on homestead property, it is acceptable for the property to be taken in the personal name of the Buyer. It's always preferable in Florida that the property be taken, if husband-and-wife, in that format and identification of marital status of the parties in the closing documentation itself. For specific benefits for "Tenants by the Entireties", please read the article listed above where it is more fully identified.

## **17. HOA and CONDO FEES, SPECIAL ASSESSMENTS and GOVERNMENT LIENS**

These contract provisions must be read and the terms identified with particularity. There has been a great deal of litigation and there are closing issues that arise over disputes as to obligations of payments of association fees, special assessments, government liens and the obligation to pay by Seller or Buyer and the proration of these charges. Again, a thorough review of these provisions should be made by legal counsel to avoid issues.

## **18. HOMESTEAD and OTHER EXEMPTIONS\***

Florida offers a number of exemptions to property owners which are designed to reduce real property taxes for those owners who qualify. They include:

- **HOMESTEAD EXEMPTION:** This is a Florida constitutional benefit of up to a \$50,000 exemption removed from the assessed value of your property. It is granted to those applicants who possess title to real property and are bona fide Florida residents living in the dwelling and making it their permanent home on January 1. Documentation that proves you were a resident at the homestead property on such date is required.

- **SENIOR EXEMPTION:** All residents of Lee County, 65 years of age or older as of January 1, whose annual adjusted gross household income does not exceed mandated income limitation may qualify. Income limits are adjusted annually (Senior Instructions and download forms). (2012 adjusted gross income limit: \$27,590).
- **\$500 WIDOW/WIDOWER'S EXEMPTION:** To file for Widow or Widower's Exemption, you must be a widow or widower prior to January 1st of the tax year and provide proof of your spouse's death. Divorced persons do not qualify for this exemption.
- **\$500 DISABILITY EXEMPTION:** Veteran / Non-Veteran – Florida residents who provide proof of total and permanent disability or proof of legal blindness may qualify. Certification from two professionally unrelated Florida physicians or a statement from the Division of Blind Services is required. Income verification is not required. (Physician's Certification of Disability forms are available in our office or can be downloaded the form: DR-416 Form).
- **SURVIVING SPOUSE OF FIRST RESPONDER WHO DIED IN THE LINE OF DUTY EXEMPTION:** Any real estate that is owned and used as a homestead by the surviving spouse of a first responder who died in the line of duty while employed by the state or any political subdivision of the state, including authorities and special districts, and for whom a letter from the state or appropriate political subdivision of the state, or other authority or special district, has been issued which legally recognizes and certifies that the first responder died in the line of duty while employed as a first responder is exempt from taxation if the first responder and his or her surviving spouse were permanent residents of this state on January 1 of the year in which the first responder died.
- **VETERAN \$5,000 DISABILITY EXEMPTION –** An honorably discharged ex-service member designated as 10 % through 99% disabled due to war-time or by service connected misfortune may qualify. The surviving spouse of the veteran may also qualify to receive this exemption. (Provide documentation from VA indicating percentage of service connected disability).
- **VETERAN – TOTAL AND PERMANENT DISABILITY EXEMPTION –** An honorably discharged veteran with total and permanent service-connected disability may qualify for total exemption of ad-valorem taxes. (Provide documentation from VA stating service-connected total and permanent disability).
- **VETERAN EXEMPTIONS –** Additional exemptions available to qualifying veterans over age 65 and to qualifying deployed military personnel – contact our office for more information.
- **TOTAL EXEMPTION OF HOMESTEAD PROPERTY FROM AD VALOREM TAXATION -** Section 196.101, F.S. provides that real estate owned by quadriplegic is exempt from taxation – there is no income limitation for quadriplegics. Paraplegic, hemiplegic, or other totally and permanently disabled persons, who must use a wheel-chair for mobility, or are legally blind and produce certification of that fact shall be exempt from ad valorem taxation - Income limitation applies – proof of gross income is required and or other official certification of disability is required.

Please note that while this article was being prepared for publication, there was no result of the vote on the November, 2018, ballot as to modifications of real estate taxation by Amendment Number 2 on the ballot.

## 19. SUMMARY

A real estate transaction is oftentimes the biggest investment a person makes in his/her lifetime. Prior to entering into a contract for sale or purchase of real estate, the Seller or Buyer should consider all of the factors involved and retain a qualified real estate attorney to guide them through the process and protect their legal rights up to, through and after the closing.

The key points as to why a Seller and Buyer should choose to hire a real estate attorney or a title company owned and operated by qualified real estate attorney rather than a title company that does not have qualified attorneys reviewing the daily real estate closings are:

- A. An attorney provides representation of the Seller or Buyer through the entire closing process where a title company does not represent anyone.
- B. An attorney can provide legal advice on each and every aspect of the real estate contract and the closing where a title company, by law, cannot provide any legal advice.
- C. An attorney is responsible to its client for representation as to the contract and closing as opposed to the title company which is responsible only to close the contract and issue title.
- D. The costs of an attorney representing the client and issuing title is generally about the same as a title company, so why not select a qualified real estate attorney to represent your interests.

We trust that this guide, put together by two Florida Board-Certified Real Estate Attorneys, assists you in enjoying the process of selling your home or buying your new dream home with the least amount of stress and the most enjoyment possible.

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- Kara Jursinski Murphy, LL.M., B.C.S.

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