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**Maylie & Grayson** is a full service law firm providing representation to real estate brokerages, licensees, Realtor® associations, developers, builders, lenders and investors, providing services in all aspects of real estate including transaction review, land use planning, licensing, mediation, arbitration and court matters throughout Oregon and Washington.

### **FSBO and Limited Service Representation**

In FSBO transactions, home owners elect not to engage the services of a real estate licensee to sell their home. In other instances, sellers may enter into a limited service contract as an alternative to full representation, whereby a licensee agrees to list the property while the seller handles offers, negotiations, and fee agreements on their own.

In such scenarios, there are a number of issues that licensees must consider when representing a buyer. First and foremost, these transactions present the potential for undisclosed or unintended dual agency representation. Additionally, commission arrangements may require that an agreement be reached with the seller. In any case, it is important to remember that FSBO and limited service transactions present a number of issues to licensees.

FSBO sellers are not always familiar with many details involved in selling a home. Accordingly, they often seek assistance from a buyer's broker with issues that arise in the course of a transaction. Buyer's brokers should be aware that providing advice or assistance to an unrepresented seller can create the potential for misunderstandings about the nature of a licensee's representation. As a result, claims relating to undisclosed or unintended dual agency representation can arise. For this reason, it is important to provide an appropriate agency disclosure to the seller.

However, this does not mean that buyer's brokers should refrain completely from furnishing information to a FSBO seller. Oregon Revised Statute 696, Sections 805 - 815, outline the affirmative duties owed by licensees to all principals and the principals' brokers in a transaction. Among these obligations are to "deal honestly and in good faith," to "exercise reasonable care and diligence," and to "disclose material facts known by the (broker) and not apparent or readily ascertainable to a party."

For example, if representing a buyer of a FSBO property built before 1978, it would be prudent to provide a lead-based paint disclosure form to the seller. However, it may not be advisable to provide advice about the disclosure as it relates to the FSBO property or assist the seller in filling out the form. The same would apply to a property disclosure.

Misunderstandings as to the nature of a licensee's representation often arise out of arrangements for compensation. In most FSBO transactions, there is no pre-existing agreement for the seller to pay a commission. In some limited service listings, the buyer's broker is instructed to make commission arrangements directly with the seller. Accordingly, a written agreement as to the amount and terms of compensation should be executed by the seller in order to ensure that a commission is paid or enforceable in the event of a dispute.

Frequently, licensees have dealt with FSBO transactions as "one-party listings," whereby limited representation is provided to both parties to ensure, among other things, that compensation is addressed. While there is nothing improper about this approach, there are inherent risks involved with providing disclosed limited agency representation.

An alternative method of addressing compensation is to provide single agency representation to the buyer. This approach requires the use of a written compensation agreement with the seller. Such an agreement should include a disclosure that no agency relationship exists between the seller and licensee.

Draft forms of Non-Agency Compensation Agreements and Single Party Representation Addenda are provided by the OAR to its members. Brokers may wish to consult their principal broker and/or legal counsel to adapt these forms to their own needs and specifications. Examples of adaptations include provisions for dispute resolution and other issues typically addressed in Listing and Sale Agreements.

### **Conclusion**

When involved in FSBO or limited representation transactions, a buyer's broker should disclose and clarify issues with the seller relating to representation and compensation. Additionally, brokerages may wish to consider developing general procedures for participation in such transactions.

This column contains general information only and must not be construed as legal advice. Questions may be submitted directly to Maylie & Grayson by fax at (503) 775-1765, by email at [joelgrayson@mayliegrayson.com](mailto:joelgrayson@mayliegrayson.com) or by mail at 7959 SE Foster Road, Portland, Oregon 97206.