

Joel Grayson, an attorney licensed since 1971, is a recognized authority in real estate law, litigation, a published author, and has been a frequent lecturer and continuing education instructor and mediator to the real estate industry, as well as a contributor to newspapers, television and radio. Mr. Grayson practices in Oregon and Washington.

Janet L. Grayson is a member of the firm's real estate and litigation group, participates in continuing education instruction to brokers, and is a published author.

Maylie & Grayson is a full service law firm providing representation to real estate brokerages, licensees, local Realtor® organizations, 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.

Selling Your Own Property

For obvious reasons, many brokers choose to list and sell their own properties. Most commonly, brokers engage in this practice in order to save themselves a commission. Why list with someone else when the seller is already a broker? Why pay a commission to someone else when you will be looking over the other broker's shoulder throughout the transaction? Brokers also list and sell their own properties because they know their properties best. Who better to sell properties than the broker-owners themselves? This article will outline issues brokers may wish to consider when listing and selling their own properties.

Who Does a Broker Represent?

In selling their own properties, brokers are representing themselves. However, under Oregon Revised Statutes Chapter 696, real estate licensees owe duties to all parties to a transaction, regardless of who they represent. These duties are quite expansive, and include dealing honestly and in good faith, presenting all written offers in a timely manner, and disclosing all material facts.

When brokers sell their own properties, they are keenly motivated to fulfill these duties to themselves. However, if a broker is financially interested in the transaction, will the broker fulfill all duties under ORS 696 to the buyer and the buyer's agent?

Maintaining a clear division of roles in a transaction will assist broker-sellers in fulfilling their statutory duties to potential buyers and their brokers. Most importantly, broker-sellers must disclose in writing that they are Oregon real estate licensees, which is frequently accomplished in an addendum to the sale agreement.

Dual Agency: Can one head wear two hats?

In speaking with many brokers about selling their own properties, we are often asked how brokers can adequately represent both themselves and potential buyers. Our answer: they should not. In addition to owing duties to all parties to a transaction, brokers also owe specific duties to buyers they represent, including exercising reasonable care and diligence, maintaining

confidentiality, being loyal by not taking action that is adverse or detrimental to the buyer's interests, and disclosing any conflicts of interest. Brokers cannot entirely fulfill these duties to buyers when selling their own properties. For example, brokers cannot maintain confidentiality for the buyers because they cannot keep secrets from themselves. Further, by human nature, broker-sellers may place personal interests above those of buyers.

For instance, suppose Sally is a real estate licensee who decides to sell her own property in order to save herself from paying a commission to someone else. Buyer Bob attends an open house at Sally's property. Sally ultimately ends up representing both herself and Bob as a disclosed limited agent and prepares Bob's offer. In speaking with Bob, Sally determines that Bob is pre-qualified for a more expensive home, and that he can certainly afford to pay more than what he is offering. In addition, it is clear to Sally that Bob is insistent upon buying her house. Based on this information, Sally rejects Bob's offer, and counters at a much higher amount, as she knows that Bob can afford the higher amount. In so acting, Sally has breached several duties owed to Bob. First, Sally has breached her duty of confidentiality to Bob. Second, Sally has not been loyal to Bob because she acted adversely to his best interests. Accordingly, Sally may have a problem in this transaction if Bob decides to take action against her by either filing for mediation or arbitration under the sale agreement, or by filing a complaint with the Oregon Real Estate Agency.

Although brokers may be involved in situations less blatant than Sally's, it seems clear that broker-sellers will encounter difficulties acting as disclosed limited agents in sales of their own properties due to the difficulty in fulfilling their statutory duties to buyers.

Double Liability as Seller and Broker

When selling their own properties, brokers may also be exposed to double liability. When transactions go awry, complaints are often made both against the parties to transactions and against their brokers. As both a broker and a seller, individuals can face liability for both roles. As a broker, the individual should, but may not, have fulfilled all statutory duties to other parties and brokers in the transaction. Accordingly, the broker may be held liable for breaching his affirmative obligations to the buyer. In addition, the broker may be held liable for negligent or fraudulent misrepresentation, or for violating Oregon's Unlawful Trade Practices Act.

On the other hand, as a seller, the broker may have breached representations made in the sale agreement, or may not have disclosed all known material defects. Accordingly, the broker may be held liable for misrepresentation.

Errors & Omissions Insurance Coverage

An additional consideration when selling your own property involves whether your errors and omissions insurance policy provides such coverage. If a claim is made against a broker-seller, and no coverage is in place or an exclusion to the policy exists for such activity, the broker-seller may be faced with having to hire and pay for her own attorney. The cost of litigating claims can be quite substantial, and a lack of coverage will only increase a broker's financial exposure.

Furthermore, because brokerages are also named in claims involving their brokers, the brokerage will require legal counsel as well. If no insurance coverage is in place, the brokerage may request that the broker indemnify and hold the brokerage harmless from any damages as well as attorney fees incurred in defending against a claim. Consequently, the broker may be forced to assume litigation costs and damages for two parties – herself and the brokerage.

Accordingly, it is important that brokers determine whether their errors and omissions insurance policies provide coverage for brokers selling their own properties. Furthermore, brokers are advised to consult their principal brokers, as well as review their company policy manuals and independent contractor agreements to determine how these matters will be addressed. If no coverage is available, brokers may wish to make arrangements with a broker friend or their principal broker to list their properties.

What About Selling a Family Member's Property?

Although no legal authority specifically addresses listing and selling a relative's property, you may wish to consider the above issues in determining your role in the transaction. If listing a spouse's, sibling's, child's, or other relative's property, it would be prudent to disclose the relationship to all parties to the transaction. You may ask "at what point does this disclosure become unnecessary?" If the relationship is such that your duties to other parties may be compromised, the relationship must be disclosed. The other parties to the transaction may not be concerned about the relationship, but that decision is better left to them.

Another issue that arises in representing family members in a transaction is whether you can act as a disclosed limited agent in a transaction. If representing both sides of a transaction, ORS 696 states that a broker has a duty to disclose any existing or contemplated conflicts of interest to the parties.

Conclusion

Although many brokers sell their own properties, both to save money and because they know their properties best, it is important to keep in mind that issues may arise in such situations. Most importantly, brokers should not act as dual agents when they are also sellers in the transaction. In addition, brokers may benefit from researching whether selling their own properties will be covered under their errors and omissions policies. If no coverage is available, the commission savings may be outweighed by the risk of having to pay for the defense of a claim.

Prior to listing and selling their own properties, brokers should consult their principal brokers, review their company policy manuals and independent contractor agreements, and ascertain whether such activities are covered under their errors & omissions liability insurance policy. At the end of the day, brokers may avoid many complications by acting solely as sellers, and not practicing licensed professional real estate activities in selling their own properties. Asking a colleague to list and sell your property on your behalf will serve to avoid many of the

above issues. Perhaps you can one day repay the favor to that colleague by agreeing to do the same for her.

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 or by mail at 7959 SE Foster Road, Portland, Oregon 97206.

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