

You must assume that anything said to the licensee will be communicated to the buyer who is the licensee's client.

Since there are several legal documents involved in the sale of real estate, you may wish to work with an attorney to draft or interpret these documents.

FORMS

A real estate transaction requires a variety of forms. You, as the seller, should be aware of the more commonly used forms in order to understand and protect your interests. If you have any doubts or concerns regarding any form, you should seek legal advice.

The first form presented to a potential seller is the *Real Estate Relationships Disclosure*. This is a form that describes agency and brokerage relationships available to the seller.

At the first substantive contact with you, the licensee is required by law to disclose, in writing, the types of agency and brokerage relationships available. An example of substantive contact would be your reasons for selling your home in which you may divulge any confidential personal or financial information, which if disclosed to a buyer, could harm your bargaining position.

The real estate relationships disclosure form is **NEITHER** a contract, **NOR** an addendum to a contract. By signing the form, you acknowledge that the licensee has discussed the types of brokerage services offered by the responsible broker. You will also acknowledge receipt of this consumer guide. If you decide not to be represented in the transaction, you will be asked to sign that acknowledgement as well. The licensee must provide a written copy of the disclosure to you.

If you and the real estate licensee consent to work together, you will need to enter into a written agreement with the licensee. The type of relationship agreed to determines the type of agreement used. The written agreement made between you and the real estate licensee is a legally binding contract, so please seek legal advice if you do not understand it thoroughly.

An **agency agreement-owner** or **listing agreement** is a written contract between you and a responsible broker whereby you become a client of the broker and the real estate licensee you selected. This agreement employs the licensee to sell real estate on your terms within a given time, for which service you agree on the amount and method of compensation to be paid. In many instances, the compensation will be deducted from your proceeds of the sale. Keep in mind that the brokerage fee is negotiable when you are entering into a listing agreement.

The agreement further explains agency relationships in a real estate transaction and allows you to instruct your agent to act solely as your agent or a limited agent. If the responsible broker offers appointed agency, you may elect to choose that option. If you agree to limited and/or appointed agency, your agent is allowed to show your property to buyers who have buyer agency agreements with the responsible broker. If you select strictly seller representation, the broker and the broker's associates cannot show any properties to buyers who they have agreed to represent. Be aware that this option could limit the marketing of your property.

If you do not want the real estate licensee to act in a fiduciary capacity, you may enter into a **transaction broker agreement**, if the responsible broker offers this option. An example of this would be if you and a buyer have already reached an agreement and just want the broker to execute the paperwork. A transaction broker cannot advocate, nor negotiate for either party.

You will need to be aware of other forms used in a real estate transaction. These forms will be described throughout the remainder of this brochure.

DETERMINING THE LISTING PRICE

You may already have a price in mind, but unless you have studied the market, you might erroneously price your property above or below market value. One of the most vital services your agent can render is that of offering his or her expertise to aid you in determining a marketable price for your property.

Whenever a listing is taken on a parcel of real property, it is appropriate for your agent to prepare an **estimated closing statement**.

Based upon the listed price and financing arrangements assumed in the listing agreement, this statement will show you what your estimated net proceeds could be when the sale of your home becomes final.

MARKETING YOUR PROPERTY

Once you have selected and employed a real estate broker, the problem of marketing your property becomes largely that of your agent. Your agent's skill and knowledge in this area will substantiate why you chose a real estate professional to handle your sale.

Most likely your agent will utilize the local newspaper media, as well as real estate publications as marketing tools. Your agent may also encourage you to allow an ***open house*** to be held which will show your home to the public during established hours.

If your broker belongs to the Multiple Listing Service, you may wish to select that option on the listing agreement. By selecting this option, you are enabling your broker to allow licensees representing buyers the right to show your property to their clients. By utilizing this service, your property is exposed to more potential buyers. If you sell your property to one of these buyers, your broker will divide the commission with the broker of the buyer's agent as required by the Multiple Listing Service. Not all communities in South Dakota have this service, so check with your agent on its availability.

SELLER DISCLOSURE FORMS

If your home falls under the disclosure requirements of property condition and/or lead-based paint disclosure, you will be presented with either one or both of these disclosure forms.

You will need to complete and sign the ***sellers property condition disclosure statement*** which will be furnished to the buyer ***before the buyer makes a written offer***. Some sellers are reluctant to sign the property condition disclosure because they think they might be committing themselves to a contract. By signing the property condition disclosure, you are simply verifying that the information contained in the form is true to the best of your knowledge.

The *lead-based paint disclosure form* is regulated by the U.S. Department of Housing and Urban Development (HUD). You must complete this form if your home was constructed before 1978.

It is very important that you answer all disclosure forms truthfully. If not, and the buyer finds a defect not disclosed by you or you have failed to complete the lead-based paint form, the buyer and/or HUD may have solid grounds to pursue legal action. Your agent can discuss the legal ramifications of not complying with disclosure requirement with you in further detail.

OFFER TO PURCHASE

Once an interested buyer is found, a written offer to purchase your property will be prepared. Your agent will explain to you the process of receiving and reviewing offers. Do not be surprised if you are presented with offers which differ dramatically from your listed asking price. Your agent is required by law to present all written offers to you for your consideration.

It is not uncommon for a buyer's agent to present the buyer's offer to you and your agent. When a buyer's agent presents the offer to you and your agent, be careful not to say anything that could harm your negotiating position. After presentation, the buyer's agent will leave and you will have an opportunity to discuss the offer with your agent.

Some items included in the offer to purchase:

- Names of the buyer(s) and seller(s)
- The price offered
- Method of payment, including earnest money deposit, amount of the cash down payment and details as to how the remainder of the purchase price will be financed (It is common procedure for the buyer to pay a cash deposit (*earnest money*) to bind the buyer and show the seller that this is a sincere offer by the buyer. The earnest money is usually held by a broker in a real estate trust account, and is deposited by the next legal banking day after the offer is accepted. If the sale closes, the earnest money is applied to the total price of the property.

- Personal property (appliances, curtains, etc.) staying with the property is generally sold by bill of sale
- The description (address and the legal description) of the property
- Time period to arrange financing
- Title insurance (Title insurance protects the buyer against title defects. It covers the whole term of possession of the property, not just until the owner takes possession. The lending agency often requires title insurance to be taken out to insure its interest in the property.)
- Closing and possession dates
- Type of financing
- Date and time of the signatures of the buyer(s) and seller(s)
- A list of the contingencies, which are conditions that must be fulfilled before the sale can take place

When you receive one or more offers to purchase your home, it is in your own best interest to give considerable time and attention to reviewing each offer carefully. Your agent will assist you in understanding the terms and conditions contained in the offer and if working on your behalf as a seller's or appointed agent, will provide you with any advice you request. You are under no obligation to accept any one offer over another.

Before you decide, you may wish to have your agent prepare a revised estimate of the net cash proceeds you would receive at closing, based on the sale price and financing arrangements stated in the offer.

Once an offer has been presented to you, you have three options: accept an offer exactly as it stands, make a counteroffer or reject the offer.

Accepting an offer as it stands — If you decide that you would like to accept an offer, be sure you know the precise meaning of each term in the written offer before you sign the document. Once you sign the offer agreeing to its terms, and your acceptance has been conveyed to the buyer, it becomes a legally binding contract.

Legally binding means both you and the buyer will be bound by the terms of the contract and must perform your respective obligations as stated. Your performance can be enforced in a court of law.

If you are uncertain about any of the clauses contained in the offer, you may wish to seek legal counsel before signing the contract. However, keep the expiration date of the offer in mind if you decide to postpone acceptance.

Making a counteroffer — Sellers don't always agree to some of the terms the buyer is proposing. If you wish to change anything at all in the offer, you will need to make a counteroffer. A ***counteroffer*** is a new offer made in response to an offer received by the buyer. This will change or alter the offer to purchase. When the buyer receives your counteroffer, he or she may decide to make another counteroffer back to you. The process of counteroffers may continue until an agreement is reached or it becomes obvious that you and the buyer are unable to come to a meeting of the minds. If negotiations continue for a considerable amount of time, the buyer may find a new property or you may decide to accept another offer.

When you make a counteroffer, you are considered to have rejected the offer made by the buyer. If you accept and sign a counteroffer, the offer is considered valid. An offer is not accepted unless it has been signed by and communicated to both parties. **Remember, verbal acceptance will not bind any of the parties to the contract.**

A risk in making a counteroffer is if a buyer should change his or her mind and reject the counteroffer, you do not have the option to return to the original offer and accept it.

Keep in mind that *ALL* offers *AND* counteroffers must be in writing and signed by both parties to be enforceable. The real estate licensee must give a copy of every offer and counteroffer to anyone signing the agreement.

Be sure every offer presented is explained to you item by item before signing so that you understand it fully. Seek legal advice if you have any questions about the documents you are asked to sign.

Rejecting the offer — You are under no obligation to accept any offer or to make a counteroffer. However, if you reject an offer which exactly meets all the terms you agreed to in the listing agreement you signed with your agent, you may be legally obligated to pay your broker's commission plus sales tax. In a situation such as this, the agent's duty to find you a willing and able buyer, as stated in the listing agreement, is performed. Therefore, you have the duty to perform, as expressed in the listing agreement, by paying the commission.

Ultimately the decision to accept, counter or reject an offer is yours.

If the offer is not accepted, or if you refuse to complete the transaction, or if the sale is not completed through no fault of the buyer, the earnest money will be refunded to the buyer. If the buyer does not follow through with the transaction after the offer is accepted by you, the earnest money may be forfeited, in addition to other possible legal remedies. ***By law, if a transaction is not consummated, a broker may not disburse any funds held in the trust account, except pursuant to a written instruction of all parties to the transaction or pursuant to a court order.***

Earnest money disputes are one of the most common types of complaints brought to the attention of the Commission. Unless it can be shown that the broker has acted in a reckless manner by holding or disbursing the earnest money, the Real Estate Commission will not get involved in this type of problem. It is up to the buyer and seller to reach an agreement or get the matter resolved in civil court. If the dispute involves \$12,000 or less, it may be handled in Small Claims Court.

The offer presented to you may contain one or more contingency clauses. A ***contingency*** is a provision placed in the purchase agreement that requires the completion of a certain act or the happening of a particular event before that contract is binding. A contingency must be written clearly and precisely. If you have any questions or doubts about the contingency clauses in the purchase agreement, you should seek legal counsel.

One of the most common contingencies you might encounter on the purchase agreement is one in which the buyer makes the sale conditional upon finding the exact amount and type of financing which will enable the buyer to purchase your home. Another typical contingency is one based on the sale of the buyer's home.

An offer to purchase a home is often contingent upon the results of the *home inspection*. The written purchase agreement must define the timeframe in which the home inspection process should be completed. If the inspection reveals conditions unsatisfactory to the purchaser or unknown to the seller, further negotiation may be needed to determine the appropriate remedies. A buyer and seller may agree in writing that the seller will correct an existing condition, a buyer will accept an existing condition, OR both parties may agree upon a settlement. If a written agreement concerning the results of the inspection report cannot be reached within the specified time, the offer to purchase may be deemed null and void by the buyer.

Make sure that an agreed upon time for contingency to be met is specified in the offer to purchase. If one of the conditions contained in the contingency clause cannot be met after every reasonable effort has been made to do so, the contract ends and there is no legal obligation to complete the sale.

As a seller, you may wish to accept an offer containing a contingency clause yet still leave yourself free to consider other offers, in the event the buyer is unable to remove the contingency. You can do this by having the buyer agree to insert a time clause in the contract. A time clause will permit you to require the buyer to remove all contingencies within a short specified time period. If the buyer does not remove the contingencies within that time, the contract comes to an end and you are free to accept the second offer.

An offer to purchase will reveal how the buyer intends to finance the purchase of your property. If you currently have a mortgage loan on your home, you may be faced with one of two situations:

The buyer wants to pay cash and has no mortgage — This situation will require you to pay off your existing mortgage and there will probably be an interest penalty for doing this. Having to pay an interest penalty will reduce the price you will receive for your home.

The buyer offers to assume, or take over, your remaining mortgage loan — In this situation, before agreeing to allow the buyer to assume your mortgage loan, you should ensure that

your mortgage lender will release you from any future obligation to repay the monies owing if the buyer defaults on the loan.

If you have no existing mortgage, an offer by the buyer to pay all cash is ideal and, of course, would be your preference. However, the buyer's offer might state that part of the purchase price is to be paid in cash and part is to be paid in payments over a specified period of time at a specified interest rate. In effect, the buyer would be asking you to become the lender.

When you are considering an offer containing a request to finance, think about whether or not you want the responsibility of collecting payment over an extended period of time. If you do feel comfortable with such an arrangement, be sure that you verify the buyer's source of income and credit history before making a decision. Ask your agent or a financial counselor to fully explain the financial significance and the possible consequences of the terms offered.

SELLER BEWARE!

It is strongly recommended that you secure competent advice from a real estate agent or legal counsel before finalizing any real estate contract. This recommendation is much more urgent when a seller is exposed to unusual financing arrangements and techniques proposed by the buyer that could jeopardize you financially.

Be wary of offers which require any of the following:

- no cash paid as a down payment
- offer made without earnest money deposit
- promissory note as earnest money
- an amount of cash being returned to the buyer
- sharing of your equity
- a promissory note without a registered mortgage
- agreeing to withhold the registration of the mortgage
- your securing a new loan before closing terms said to be included, but which are not written in the offer
- concealing information from a lending institution
- certain lease purchase plans
- early possession by the buyer
- buyer's closing costs to be paid by you

CLOSING THE DEAL

Once a buyer and seller have signed the purchase agreement, they are responsible for meeting the conditions of the agreement by the closing deadline. If all goes smoothly, the closing will take place on time.

Closing can take place at the broker's office, the title company, or the lending agency. The procedures usually are not controlled by statute, although certain aspects of the closing may be regulated by laws such as the federal Truth in Lending Act (TILA) or Real Estate Settlement Procedures Act (RESPA). Under the provisions of TILA-RESPA, you will receive a copy of your settlement statement detailing your receipts and disbursements involved in the sale.

You are probably wondering what costs you can expect in the sale of your home. In many cases, if an item is not covered in the terms of the contract, the law will prevail. The offer to purchase can spell out responsibility regarding payment of expenses at settlement. Unless the terms of the contract specify otherwise, you are expected to pay the cost of the transfer taxes, the real estate commission, sales tax on the commission, any attorney fees incurred by you, and a prorated share of the real estate taxes, insurance and utility bills up to the day of the settlement. Title insurance can be paid by either buyer or seller, or the cost shared by both. It is used to furnish evidence of marketable title.

Internal Revenue Service rules require settlement agents to report details of the closing to the IRS using Form 1099-B. Sales or exchanges of residences with four or fewer units must be reported.

Any questions about the settlement statement should be asked of the real estate licensee, the title company representative, or the lending agency representative. Ask these questions ***BEFORE*** you sign.

COMPLAINTS AND PROBLEMS

The South Dakota Real Estate Commission is charged with the responsibility of investigating complaints, which are brought to its attention involving real estate licensees, whereby misconduct is alleged. ***The Commission's jurisdictional authority covers disciplinary action over the license of the licensees involved in the complaint.*** The Commission may not force a licensee or a buyer to specifically perform under the terms of a contract, nor may it award damages. These problems would have to be settled by a court of law in a civil action brought by you. If the dispute involves \$12,000 or less, the matter may be settled in Small Claims Court.

COMPLAINT PROCEDURE

The South Dakota Real Estate Commission furnishes the complaint forms to the person registering the complaint. All complaints must be in writing in order for the Commission to investigate. The complaint must have a clear and concise statement of the facts, with supporting documentation. It is very important to include copies of all the documents in your transaction file. What may seem unimportant to the complainant may actually be a relevant piece of information for the Commission.

When a complaint is filed against a licensee, a copy of the complaint is forwarded to the licensee. The licensee must file an answer on forms furnished by the Commission within 20 days from receipt of the complaint. This answer must be in written affidavit form, be properly certified, and contain the licensee's factual response.

The licensee's response is filed with the Commission. A copy of the licensee's answer is forwarded to the person registering the complaint, and the Commission's staff investigates the matter. Priority of investigation is normally based on the date of receipt of the complaint.

The complaint, answer, and investigative report are submitted to the Real Estate Commission for its review. The Commission may dismiss a complaint that lacks merit, is frivolous, or does not constitute grounds for disciplinary action. If the Commission determines there has been a violation of license law or administrative rule, they make take

disciplinary action against the licensee. Disciplinary action may take the form of a letter of reprimand, suspension or revocation of license, additional education, monetary penalty, or a combination thereof.

REAL ESTATE RECOVERY FUND

The Real Estate Recovery Fund was established by the South Dakota Legislature to provide compensation to a consumer who has been intentionally harmed by the improper and dishonest conduct of a real estate licensee.

To be eligible to receive a payment from the Recovery Fund, a consumer must have already obtained a civil judgment against the real estate licensee and have tried and failed to collect on the judgment.

A consumer must file a verified application in the circuit court, sixth circuit, Hughes County, for an order directing payment out of the real estate recovery fund of the amount of actual and direct loss in the transaction up to \$15,000.

It is important to understand that a claim made against the recovery fund is paid by the SD Real Estate Commission **ONLY** as a result of a court order. Consumers are strongly advised to seek legal counsel for assistance with this process.

DISCRIMINATION

The South Dakota Human Relations Act, Federal Fair Housing Act, and Fair Housing Act Amendments prohibit discrimination in housing.

It is unlawful for:

- (1) an owner (or representative of an owner) to refuse to sell, rent or lease any property; to treat people differently in the terms or conditions of any sale, rental or lease; to ask questions, make records, print signs or advertise in a manner that discriminates on the basis of race, color, creed, religion, sex, ancestry, disability, familial status or national origin.

- (2) Any person, bank, mortgage company, insurance company or other financial institution to discriminate in the lending of money to buy, build or repair property.

EXEMPTIONS

State law exempts dwellings with no more than two families if the owner lives in one of the units. Federal law applies to dwellings with four or more units.

Familial status exempts housing units where state and federal programs are specifically for the elderly; 100% of occupants are over 62; or if facilities and services are designed and advertised for the elderly and 80% of the units have at least one person over 55.

After 1991, all new apartment units must be constructed to allow ground floor access and access to common use areas by the disabled, unless terrain is prohibitive. If a person feels they have been discriminated against because of membership in a protected category, they should contact the South Dakota Division of Human Rights.

REFERRAL GUIDE

SD Attorney General's Office

Website: atg.sd.gov

Telephone: 605-773-3215

Environmental Protection Agency

Website: www.epa.gov

Telephone: 800-227-8917

Federal Emergency Management Agency

Website: www.fema.gov

Telephone: 800-621-3362

South Dakota Methamphetamine Awareness and Prevention

Website: www.onmeth.com

Telephone: 800-920-4343

Legislative Research Council (SD Codified Laws and Administrative Rules)

Website: sdlegislature.gov Email: lrc@sdlegislature.gov

Telephone: 605-773-3251

South Dakota Department of Environment and Natural Resources
Website: danr.sd.gov Email: danrmail@state.sd.us
Telephone: 605-773-3151

South Dakota Division of Human Rights
Website: dlr.sd.gov/humanrights
Telephone: 605-773-3681

South Dakota Housing Development Authority
Website: www.sdhda.org Email: info@sdhda.org
Telephone: 605 773-3181

U.S. Department of Housing and Urban Development
Website: www.hud.gov
Telephone: 202-708-1112

South Dakota Appraiser Certification Program
Website: dlr.sd.gov/appraisers
Telephone: 605-773-3803

The material presented in this brochure is intended to assist buyers and sellers in making wise decisions regarding a residential real estate transaction in South Dakota. The South Dakota Real Estate Commission can be contacted at:

South Dakota Real Estate Commission
221 W Capitol Ave Ste 101 Pierre SD 57501

605-773-3600 dlr.sd.gov/realestate dlr.realestate@state.sd.us