CONVEYANCING AND MODERN LAND TRANSACTIONS

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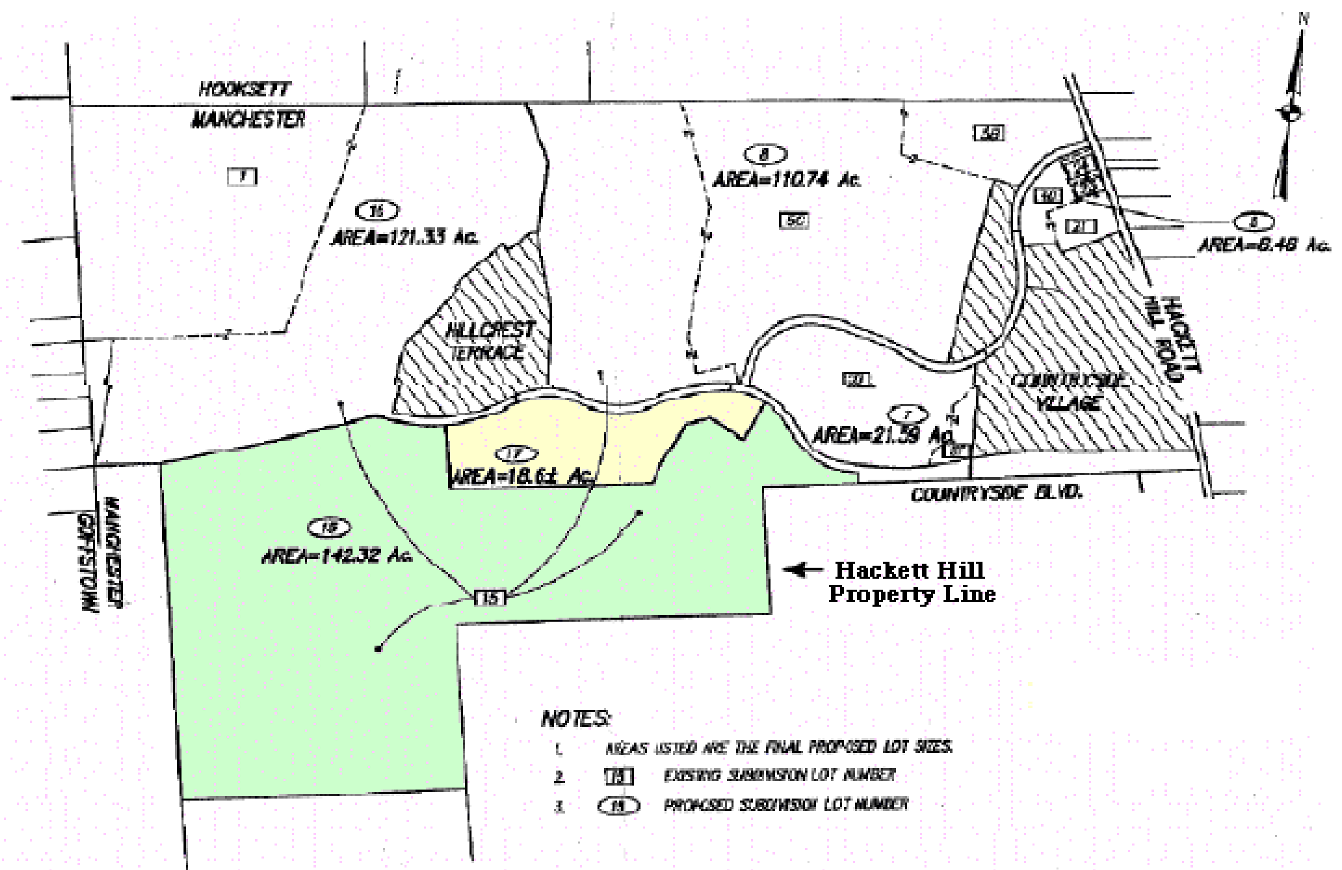

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Table of Contents

Please note that this document is bookmarked for ease of reading.

Week 1

1. **The Attorneys' Roles in Real Estate Transactions**

    - AN OVERVIEW OF THE ATTORNEY'S ROLE IN RESIDENTIAL REAL ESTATE TRANSACTIONS, Richard Keshian, Esq. **2**

  - **The Brokerage Agreement between Seller and Broker and The Massachusetts Offer to Purchase.** **24**

    - PRELIMINARY ACQUISITION DOCUMENTS —BROKERS' AGREEMENTS AND OFFERS TO PURCHASE **24**

    - McCarthy v. Tobin (1999) **35**

This Week's Reading

Reading

- **The Attorneys' Roles in Real Estate Transactions**

Massachusetts Continuing Legal Education, Inc.

2022
Massachusetts Basic Practice Manual
Chapter 3

AN OVERVIEW OF THE ATTORNEY'S ROLE IN RESIDENTIAL REAL ESTATE TRANSACTIONS [FNa1]

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§ 3.1 INITIAL CLIENT CONTACT

In your first contact with a client or a potential client, be it over the telephone or in person, be sure to identify and clearly explain your full range of services and charges. Most clients involved in a purchase or sale of a residential home have limited experience with such transactions. For many, it may be their first encounter with a purchase of real estate. Others may have purchased their home decades earlier and are now faced with a sale of their home and downsizing to a more accessible home for their needs. Still others may be involved with a transfer from the area because of employment.

Consequently, the client needs to understand the process and how you will undertake the representation. Clients, like all purchasers of services, may have a limited understanding of what is involved with the purchase or sale of a residence. It is the attorney's role to explain the process and outline the steps involved for the benefit of the client's understanding. (See Mass. R. Prof. C. 1.4 comment [5], which states in part, "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.") Be prepared to discuss fees with the client during your initial conversation.

Practice Note

> In your first encounter with a potential client, it is fair to assume that the client may have consulted other attorneys before contacting you in order to compare fees and services. This is the initial point where you will have the opportunity to distinguish yourself by your explanation of the process and your expertise. Thus, it is important that your explanation of the process serves also to justify your fee and how it is calculated.
>
> It is important that you carefully comply with Mass. R. Prof. C. 1.5(b)(1), which states in part, "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation." During this first contact it is important to explain how your services differ from what other attorneys provide. Absent such an explanation, the client may choose an attorney solely based on cost.

Practice Note

> Once you have been retained, prepare an engagement letter that not only outlines your fee schedule but also clearly defines the range of your services. (The Real Estate Bar Association for Massachusetts (REBA) provides written fee agreements for representing a seller or buyer.) Since many clients are not aware of what is *excluded* from your range of services, it is good practice to outline

services for which an additional fee might be required (e.g., a zoning opinion or protracted negotiations over inspection results). See § 3.1.3 and § 3.1.4, below.

§ 3.1.1 The Seller Client

If a seller client comes to you before signing a listing agreement with a broker, it is imperative that you review the agreement and make any necessary changes before it is executed. Many listing agreements contain provisions that require the payment of a commission if a buyer is found "ready, willing, and able," even if the sale is not consummated. In the event of a default by the buyer, the listing agreement may provide for the division of the retained deposit on a fifty-fifty basis between the seller and the broker. Other areas of concern might be the length of the exclusive listing and the length of the additional time for which a commission is owed when a sale is made privately to a prospect that the broker previously brought to the home. See also § 3.2.1, Agreements with Brokers, below. Negotiating a listing agreement should be contemplated in your engagement letter.

If a seller client retains you after executing an exclusive listing agreement, you can offset the terms of the listing agreement by inserting changes in the purchase and sale agreement, primarily in the clause dealing with the payment of a commission (Paragraph 18 of the Greater Boston Real Estate Board standard form purchase and sale agreement (GBREB agreement)). In such a case, a change restricting the payment of a commission unless and until a sale has been completed will be required to protect the client. However, this change will not be effective against the broker unless the broker becomes a party to the agreement. For this as well as other reasons, many brokers refuse to sign purchase and sale agreements.

Practice Note

> You should advise your client about the consequences of a broker's refusal to execute the purchase and sale agreement, pointing out the possibility that, based on the terminology of the listing agreement, a broker's commission will be due even though a sale is not consummated. Additionally, the broker's failure to execute the agreement may throw into contention several clauses in the standard GBREB agreement dealing with the deposit escrow.

Practice Note

> Where the broker refuses to sign a purchase and sale agreement (you should not be surprised if this happens), prepare a letter to be signed by the broker indicating that the broker will abide by the applicable escrow obligations. Alternatively, preparing the signature line restricting the broker's liability and responsibility under the agreement to those clauses dealing with the payment of commission and the escrow responsibilities of the broker may be sufficient for a broker to execute the agreement.

More and more sellers seek to sell their homes without the services of a broker. In such cases, the client may look to you for strategic and practical advice on how to conduct an open house, prepare an offer, accept a deposit, and negotiate any inspection issues. Be prepared to be "all things" to the seller client who chooses not to retain a broker. See Checklist 3.1 for a purchase and sale checklist to use when representing a seller of a residence or a residential condominium unit. You may consider excluding from your representation the proffering of any advice regarding the valuation of the property.

§ 3.1.2 The Buyer Client

An attorney who is consulted by a buyer client before an offer has been executed will have the opportunity to review the offer with the client. The attorney should pay close attention to details that are important to the buyer, such as the following:

- the date by which the offer must be accepted,
- the date by which a purchase and sale agreement is to be signed by the parties,
- the date for the completion of inspections,
- the date the buyer is required to apply for mortgage financing,
- the expiration date of the financing contingency, and
- the date for closing the transaction.

In many cases, the broker may have selected unrealistic dates for these milestones. It is your responsibility to determine whether your client can accept the dates as is, or whether they must be modified through negotiation with the listing broker or the seller's attorney. Consultation with the buyer's mortgage lender and home inspector may be necessary to determine the feasibility of satisfying the contingency timelines. Often, counsel for the seller will agree that the dates require modification and that they should be amended to reflect market conditions. For example, if the mortgage contingency date will expire in fifteen days but most lenders require at least thirty days to process a loan application, an adjustment is required to avoid unnecessary notices and later negotiations to revise the date.

In many instances, only a few days are provided for the completion of the buyer's home inspection. Consider the availability of a home inspector, the need for additional time to review the inspector's report, the need to await the results of tests that may not be available until the inspection period has passed, or additional time that might be required to negotiate the disposition of deficiencies uncovered by the inspection. For example, an inspection for the presence of radon requires collection canisters to be placed in strategic locations in the home and collected after forty-eight hours for submission to a laboratory for analysis. It may be days after the inspection contingency has expired before the results are available. Unless there is an accommodation for such a situation in the inspection contingency clause, the buyer

may be prevented from asserting a deficiency on account of high levels of radon gas found in the laboratory analysis.

Practice Note

> Carefully review the additional clauses inserted by the broker or the seller's attorney. In many cases these clauses favor the seller. For example, many inspection clauses restrict the buyer's flexibility in negotiating for repair or credit for deficiencies by imposing a dollar amount as a floor before the buyer may exercise a right. Another common inspection clause indicates that the inspection must reveal *serious structural or mechanical* problems in order for the buyer to invoke the benefits of the clause. Consequently, a collection of deficiencies that might require an expenditure of a large sum of money for their correction may not rise to the level of a "serious structural or mechanical problem."

Often, the buyer is given little opportunity to seek legal advice before presenting an offer to the seller. The state of the current local real estate market, especially in the Greater Boston area, is such that sellers have the leverage to insist that buyers either make offers through brokers right away or face possible elimination from the bidding process, thus losing the opportunity to purchase a particular home. Advise your client that the legal necessity for professional review of the offer outweighs the emotional needs of acquiring the home.

Practice Note

> Waivers of home inspections and mortgage contingencies in offers is a recent phenomenon brought about by the "hot" real estate market in many parts of Massachusetts. Many buyers elect to waive home inspections, mortgage contingencies, or both in order to make their offer more appealing to sellers. A buyer may consider these waivers as necessary in order to have an offer accepted but may not realize the level of risk being taken. It is up to you to advise the client of all the possible risks, such as loss of a deposit or ending up with the "home from hell."
>
> Document all advice given to your client by notes to the file and by letters or emails to the client to minimize the possibility of a claim against the attorney for failure to properly advise the client. Doing so will provide you with appropriate back-up of your advice or your actions in the event that the buyer claims, "You didn't tell me about [the issue or problem]. You didn't protect me!"

In situations where the buyer client has already executed an offer and the offer has been accepted, the attorney still has the option for negotiating more-favorable terms with the seller's attorney—at least initially. However, the seller's attorney has the negotiating upper hand, on the basis that the offer was accepted embodying the terms in the agreement. Nevertheless, it is incumbent upon the attorney to make clear to the buyer client the various implications of the accepted offer and to attempt to

negotiate more-favorable terms in the purchase and sale agreement.

See Checklists 3.2 and 3.3 for checklists for buyers of residences and residential condominiums.

§ 3.1.3 Attorney Fees

It is important to discuss your fee schedule with the client at the outset of any client engagement. Such discussion should include not only the method of fee computation (fixed fee, hourly rate, or some other method, such as part fixed fee for certain services and part hourly rate for other services) but also your billing practice and payment expectations. This will help avoid any misunderstanding on the part of the client once payment is due.

Your range of services should also form an important part of this conversation. Be sure to confirm the fee arrangement and the range of services in writing to eliminate any question of which services you were required to perform and what you were to be paid for those services. *See* Mass. R. Prof. C. 1.5(b) (mandating that such information be communicated in writing, with limited exceptions: “the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation ... “).

Practice Note

> Whether you represent buyers or sellers, when discussing fees in your engagement letter, indicate that any balances due will be charged at closing and included on the settlement statement or deducted from the proceeds of the sale.

§ 3.1.4 The Importance of Communication

At the commencement of the engagement, be sure to submit an engagement letter to your client outlining your services and fees. It is also important to inform your client what services you are *not* engaged to do. For example, it is important to inform the buyer client that you are not going to perform a zoning analysis unless specifically requested to do so. Unless you have made it quite clear to the buyer client that zoning issues are beyond the scope of your representation, the postclosing discovery that zoning will restrict the buyer’s future plans could lead to a malpractice claim.

When representing a seller, be sure to inform your client of your range of services. Do not leave matters to speculation or assume that your client knows what is customary in residential transactions. Remember that your client may be unsophisticated regarding real estate transactions, regardless of how many business transactions your client may have previously completed. Your client will be looking to you for your knowledge and expertise.

When representing a buyer, it is important to determine whether you will also be serving as settlement agent for the closing. If the buyer is pursuing mortgage financing, you may be called on to serve as settlement agent on behalf of the lender, and you should disclose your legal fee accordingly. If private financing is involved, you should account for either the drafting or the review of private financing documents as part of your engagement letter.

If you assume that you will not be searching the title or providing a zoning opinion for your buyer client, spell it out in your written communication with the client. If a problem occurs because an easement was not disclosed to the client or if a zoning violation is uncovered after the closing, your communication will serve as your disclosure of your range of services.

Checklists 3.4 and 3.5 set forth the suggested contents for initial letters to be sent to seller clients and buyer clients, respectively.

One of the criticisms most often leveled against attorneys relates to communication. American Bar Association studies have clearly and consistently pointed out that clients are intimidated by the legal process and by attorneys on the one hand and enraged by attorneys' failure to communicate promptly on the other.

Make sure that your client receives copies of every document coming to your attention as well as all related documents and communications leaving your office. With the wide usage of email, scanning, and faxing, it is easy to communicate with your client to provide updates or changes in a quick, efficient, and informal manner.

Return all telephone calls promptly, not only to your client, but to all of the parties involved in the transaction. What better way is there to develop a client base through referrals than to demonstrate that you are not only competent and accessible but also "on top of the client's case" at all times?

Practice Note

> If you establish communication with the other party's counsel, the brokers, and the lender or the lender's counsel, and keep your client informed of such contacts, you will be able to provide high-quality service to your client. You will also gain a reputation for being accessible and prepared—two key qualities that may result in a sense of professionalism, lead to further referrals, and be an asset to your transactions with other members of the conveyancing community. With email communications becoming the norm, it is very easy to copy your client on all communications relative to the transaction, but remember that emails can be forwarded to other parties as well.

It is important for you and your staff to have a tracking system that allows you to

efficiently locate files and review the status of each party's transactions. You should always maintain a calendar of contingency and closing dates so that you are not placing your client at risk for nonperformance of any of the purchase and sale agreement's provisions. All malpractice carriers want to know how each attorney keeps calendared activities, such as the date by which an agreement is to be signed, when the financing contingency date expires, and proposed closing dates.

Prepare and maintain a checklist that will serve as the first page of your file and will tell you or any staff member in your office about the status of the file at any particular time. Create your own standard checklists for a buyer's transaction and a seller's transaction that will allow you to respond to critical dates and inquiries. In addition, use the calendar system on your computer as a reminder to make calls or determine whether specific matters have been accomplished. Such a checklist, kept current through closing and postclosing matters, will serve you well should a matter regarding the transaction arise several months or years after the closing that might require you to retrieve the file and respond to any issues the caller may need resolved.

At a minimum, include the following on the checklist:

- the property's address;
- the brokers' names, email addresses, and telephone numbers;
- the name, address, email address, and telephone and fax numbers of the other
- party's attorney;
- the name, address, email address, and telephone and fax numbers of the lender's
- representative, if applicable;
- the name, address, email address, and telephone and fax numbers of the lender's attorney, if applicable;
- the full names of all buyers and sellers;
- how the buyers will hold title, e.g., as tenants by the entirety, joint tenants with rights of survivorship, or tenants in common;
- in cases involving sellers, the names of lenders, addresses, contact telephone numbers, and account numbers for outstanding loans;
- inspection and financing dates;
- results of inspections and how the results were resolved;
- commitment terms;
- time, date, and place of closing;
- whether the client wants you to attend the closing; and
- postclosing matters, such as copies of deeds and other instruments and the recording of discharges of mortgages.

Practice Note

Sellers may not wish to or cannot attend the closing and will ask that you attend

in the seller's place. Be sure to have the seller execute the deed as well as provide you with a power of attorney that allows you to execute documents in the seller's name, make minor corrections to the deed, and collect the seller's funds. (See Real Estate Bar Association for Massachusetts (REBA) Form 11.) Bring photocopies of the seller's driver's license and the seller's Social Security number. Since you will be signing documents for the seller that may contain representations of the seller (e.g., whether UFFI has been installed; whether 1099s need to be issued; mechanics' lien affidavit) it is incumbent to have the seller indicate how those and other forms typical in a residential transaction should be completed. (See REBA Form 11 A.)

§ 3.1.5 Gathering the Information You Will Need

The need for continual attention to the transaction cannot be overemphasized. Maintaining logs and checklists will help you organize each file. See § 3.1.4, above, for typical matters to include on a file checklist. You should also gather the following information:

- whether the client has signed or accepted an offer to purchase (obtain a copy if your client has signed an offer or acceptance);
- by what date the client needs to execute a purchase and sale agreement;
- if the buyer client has applied for financing, the name or names of the lender or lenders and what type of financing the client applied for, e.g., conventional, FHA, VA, or first-time home buyer;
- what type of property the client is purchasing or selling, e.g., multifamily, new construction, or property in need of repairs or rehabilitation;
- what appliances and personal property, if any, are included in the transaction;
- any other special considerations that might apply to the client, such as relocation to or from the area, or the purchase or sale of property from an estate; and
- whether the land in question may have been former railroad property.

If you will be representing more than one client (i.e., more than one buyer or seller), you must establish which client will be your primary contact. Additionally, in any transaction involving multiple clients, you must be continually aware of possible conflicts of interest. You should advise your clients regarding the possibility that a conflict may arise if the objectives of each client differ after the engagement (e.g., one client wants to buy and the other client wants to back out of the agreement). You should also advise your clients that it may not be possible to maintain confidentiality with respect to information received from either client. *See generally* Massachusetts Bar Association Committee on Professional Ethics Op. No. 90-3 (June 15, 1990) (decided under the Canons of Ethics and Disciplinary Rules in effect through December 31, 1997) ("Unless otherwise agreed, multiple representations waive the

confidentiality obligation between the borrower and the lender, and both clients should be so advised. A lawyer who acquires knowledge about either client relevant to the transaction, such as uncertain financial condition or source of funds, misstatements, omissions or errors in the mortgage application or documents to be signed at closing, is required to disclose it to the other client.”).

Conflicts may also arise if you are asked to represent the lender as well as the buyer in a given transaction. Because your client (either the lender or the buyer, or multiple buyers or multiple sellers) may ask you about conflicts of interest, it is important for you to detail (preferably in writing) for each client which services you will be performing for the lender and which services you will be providing to the buyer. Failure to make such disclosures could lead to very uncomfortable situations if information comes to you from the buyer that may affect the lender’s commitment to loan the money for the purchase. For example, you might represent the lender and the buyer. Your client, the buyer, informs you that they have been laid off from work but still wants to proceed with the purchase. This information should be communicated to your client, the lender.

§ 3.2 THE ROLE OF THE BROKER

A real estate broker involved in the transaction will typically “drive the process” by arranging the home inspection and making sure the agreement has been signed. The broker will often transport the agreement to the parties for their signatures to expedite the completion of the contract. Many brokers now use different forms of “e-signing” which allows buyers and sellers the comfort of “executing” the agreement on their computers. If issues arise regarding the condition of the property, as may result after an independent professional property inspection by an expert hired by the buyer, the broker can help to resolve such issues. Although the physical condition of the property is not a legal issue and attorneys typically do not view the property, brokers are very familiar with not only the condition of the property being sold but also the typical aspects of similar properties in the area. They may know what adjustments would be appropriate to satisfy both parties in a sale.

Practice Note

> Under Massachusetts law, brokers and salespersons may act as “dual agents,” representing both prospective buyers and prospective sellers. *See* G.L. c. 112, § 87AAA3/4; *see also* 254 C.M.R. § 3.00(13). The law requires informed written consent, obtained using a form prescribed by the Massachusetts Board of Registration of Real Estate Brokers and Salespersons.

Although a property owner can sell property without the assistance of a professional broker, most sellers employ one. A real estate broker has more resources to find a group of potential buyers than the seller, such as by employing the multiple listing service (MLS) and databases to assist sellers in establishing a reasonable listing price

for their property. Usually, the seller enters into a contract with the broker under which the broker agrees to use reasonable efforts to find a “ready, willing, and able” buyer, and in turn the seller agrees to pay the broker a fee for this service when such a buyer has been presented and the closing takes place. The broker’s fee is usually a set dollar amount or a percentage of the purchase price obtained for the property.

§ 3.2.1 Agreements with Brokers

There are two types of listing agreements that are most often used to establish the conditions under which the broker is entitled to a fee or a commission from the seller. The first and more common listing agreement is an agreement for the exclusive right to sell. Under this type of agreement, the seller cannot reserve the right to sell the property without the assistance of the broker and therefore cannot avoid paying the broker’s fee, even if the buyer is procured solely through the efforts of the seller and has not been introduced to the property by the broker. This type of agreement has a specific duration, and the broker is entitled to a fee if the property is sold through the efforts of anyone—especially the seller— during this period or if the property is sold within a set number of days after the expiration of the period to a buyer who was introduced to the property by the broker. The second type of agreement is an agreement for exclusive agency. Under this type of agreement, the seller reserves the right to sell the property to a buyer who was not introduced to the property by the broker; in that event, the seller does not have to pay a broker’s fee. As a practical matter, the latter form of agreement is rarely used by the broker community.

Both types of agreements set forth the marketing methods that may be used by the broker to sell the property, over and above simply showing the property to potential buyers. For example, most properties are posted on the MLS, which alerts other brokers to the fact that the property has been listed for sale with a particular broker, who is known as the “listing broker.” A broker from any other agency who participates in the transaction by introducing a buyer to a property posted on the MLS is known as the “selling broker.”

The listing broker and the selling broker will enter into an agreement as to what portion of the listing broker’s fee will be paid to the selling broker for their efforts in procuring a buyer for the property.

§ 3.2.2 The Selling Broker

The selling broker (or a listing broker who also acts as the selling broker) typically works with the buyer, showing the property as well as often recommending attorneys and mortgage lenders with whom the broker usually works. Each buyer must be given a “mandatory agency disclosure” regarding the agency relationship of the broker to the parties and its implications.

The selling broker can also help the buyer narrow down housing requirements and desires and determine an appropriate price range of properties for the buyer to view. The selling broker may assist the buyer in submitting an offer to the seller, but because the selling broker's duty of loyalty is to the seller (they must submit any and all offers to the seller), the selling broker cannot assist the buyer in any way that would be adverse to their client's interests.

§ 3.2.3 The Buyer's Broker

The buyer may decide to engage the services of a buyer's broker to represent their interests in the transaction, including negotiations with the seller. This buyer's broker may be compensated by either the buyer or the listing broker as a type of "subagent." Because a selling broker and a buyer's broker have different clients to whom they owe the duty of loyalty, each is able to provide different services to a buyer. These services differ from those that the listing broker provides to the seller. For example, the buyer's broker may work more closely with the buyer to determine what type of property and which communities would best fit within the client's personal and financial considerations. The buyer's broker also may become more involved in helping the client evaluate properties, formulating an offer to present to the seller through the listing broker and negotiating a final purchase price and other terms to be included in the final contract, such as items that should be included in the sale or repairs that should be made to the property prior to closing.

§ 3.2.4 The Listing Broker

The listing broker is responsible for relaying offers to the seller and explaining any terms or conditions that may be included in them. Brokers who are agents of the seller are obligated to communicate each offer on the property to the seller.

Practice Note

> The broker is subject to all fair housing and nondiscrimination laws and cannot discriminate either in showing the property to potential buyers or in transmitting offers to the seller.

The listing broker provides various other services to the seller, which may include the following:

- helping the seller establish market value and a reasonable asking price for the property;
- discussing exclusions from the sale to be included in the MLS listing;
- explaining aspects of the selling process to the seller (such as showing the property, advertising, featuring attractive aspects of the property, and considering whether to conduct an open house);
- placing the property on the MLS (as is required of the listing broker) and

handling inquiries about the property from other brokers;
- obtaining copies of the Title 5 inspection for the buyer;
- providing copies of condominium documents, including but not limited to, the master deed, the declaration of trust, budgets, financial statements, and association minutes;
- assisting the seller in negotiating the terms of the offer with the buyer;
- helping to "prequalify" a potential buyer by evaluating the buyer's ability to obtain the financing necessary to purchase the property;
- holding the initial, binding deposit after acceptance of an offer;
- acting (in many cases) as the escrow agent holding the deposit after the signing of a purchase and sale agreement; and
- ensuring that the appropriate lead paint disclosures are signed by the potential buyer.

In certain communities, it is customary for the listing broker to prepare the first draft of the purchase and sale agreement and then submit it to the parties for review and negotiation by their respective attorneys. Whether it is this preliminary draft or an offer to purchase that is submitted to the attorneys, the brokers will follow up, as stated above, to be sure that a final agreement is signed on or before the date specified in the offer.

Practice Note

> If possible, it is good practice for the attorney representing a seller to prepare the first draft of the purchase and sale agreement. When reaching out to the listing broker, make it clear that you wish to prepare the first draft of the purchase and sale agreement. The broker's draft agreement merely fills in blank spaces and it is more difficult to prepare your provisions interspersed with the broker's draft. Notify the broker that you will prepare the draft once the offer is accepted. It is important to note that the agreement should be submitted in draft form to the client for his, her, or their review, together with commentary so that the client has an understanding of the "legal mumbo-jumbo" in the agreement. Devise a letter which explains key provisions to the client and invite the client to discuss provisions the client does not understand.

There are other services that the listing broker customarily provides for the seller after the agreement is signed. The broker typically arranges a date for the local fire department to inspect the property for compliance with smoke and carbon monoxide detector requirements and to issue a certificate of compliance. The broker may also provide access to the bank's appraiser for a view of the property and, if necessary, to the buyer for a walk-through inspection prior to the final preclosing. The broker may also arrange final utility readings prior to the closing, including water and sewer charges, fuel oil readings, and electricity or gas usage, in cases where these utilities are provided by the city or town.

Practice Note

> The listing broker should also be enlisted to obtain final readings for fuel oil (if the home is heated by oil) and final water and sewer charges. Encourage the client to contact the listing broker for the purpose of obtaining final readings of all utilities that are not adjusted at the closing (usually, telephone, cable, electric, and gas) and contacting each utility to provide the necessary information as well as the name(s) of the buyer(s) for future billing purposes.

Practice Note

> Keep in mind that the certificate issued by the fire department for smoke and carbon monoxide detectors are only "good" for sixty days. Log the end date in case the closing date has to be extended. A new certificate may be required if it is outdated which may further delay the closing if a new certificate must be obtained.

Practice Note

> If the property being sold is a condominium unit, the listing broker should also attend to obtaining a 6(d) certificate and the certificate of insurance required by the buyer's lender.

§ 3.3 SELLING WITHOUT THE SERVICES OF A BROKER

In today's economy, many sellers seek to maximize their net return by attempting to sell their property themselves, without the assistance of a broker. As stated above, the seller may look to you to provide some of the assistance the broker would ordinarily provide. You should exercise care in just how much practical or strategic advice you give, if any. Certainly, you can provide your client with a prepared blank offer and instructions on how to complete it if you are not available. The selling client should be advised to maintain a written record of the people who have attended open houses or have visited the house. You should also advise the client on the handling of the deposit check and what it means to accept it. The client should be reminded that the deposit should be held in escrow and that it is not supposed to be available to a seller until the closing.

Practice Note

> Steer clear of appearing to advise the opposite party in the transaction. It is easy to get lured into providing legal advice to sellers who are representing themselves when you hear, "Can I just ask you a quick question?"

If your selling client later decides that a broker would be a better business choice, request a list of the people who have already viewed the property for purchase. This list should be referenced in the listing agreement with the broker with the understanding that a reduced commission will be paid on the sale to any party introduced to the property by the seller's own efforts.

Practice Note

> If the selling client has not engaged a broker, the seller is responsible for obtaining the required final utility readings and smoke and carbon monoxide detector certificate. You should instruct your client to make these arrangements well in advance of the closing so that there is not a last-minute scramble to arrange for appointments with the municipal authorities. (It is rare for a seller to have the right number of detectors in the correct locations.) Encourage your client to utilize the services of the broker for assistance in these matters. See the Practice Notes above.

§ 3.4 THE MORTGAGE FINANCING CONTINGENCY CLAUSE

The well-prepared buyer, before beginning the journey leading to an offer, has obtained information regarding the price range of the proposed purchase as well as the mortgage amount that the buyer can obtain. Many sophisticated buyers have already arranged for preliminary mortgage financing, commonly referred to as mortgage preapproval or prequalification. How much the buyer can borrow establishes the price range for buying a new home. Additionally, most brokers advise their seller clients to not entertain offers without a preapproval letter to establish financial qualifications of the offeror (buyer).

Practice Note

> Be sure to counsel the buyer that this preapproval letter is not a commitment but merely an indication that a loan of the specified amount might be made if all investigations prove favorable.

Most often, a buyer applies for traditional financing through a mortgage broker or bank representative, although some buyers obtain financing through the Internet, from the seller, or from other private financing sources. Both the offer and the purchase and sale agreement typically contain a mortgage contingency clause, which states the date by which the buyer must apply for mortgage financing and the date by which the seller or the seller's representative must be notified that the buyer wishes to terminate the agreement due to the inability to secure mortgage financing. The particular terms of this contingency, such as what constitutes a commitment for financing, should be negotiated as part of the purchase and sale agreement.

Practice Note

> Buyers should consult with their lender prior to establishing a timeframe for financing. Once the financing contingency date has been established, it is extremely important that both you and your buyer client keep close track of the contingency deadline. If the date goes by and the buyer is unable to secure mortgage financing, the buyer is obligated to proceed with the transaction or risk losing the deposit as liquidated damages.

Practice Note

> Be sure to advise your seller clients about the ramifications of the mortgage contingency clause. Your client may not have the sophistication to understand that the deposit may have to be returned if the buyer cannot obtain financing within the time set forth in the clause. Be sure to point out the options to the seller if the buyer requests an extension or desires to withdraw from the agreement. Seller's counsel might consider a requirement in the contingency clause that the buyer is required to produce a letter of rejection.

Because of today's hot market in the greater Boston area, many cautious buyers lose out on the home of their choice because their offers contain contingencies for mortgage financing and for home inspections. As a consequence, many current buyers "throw caution to the winds" and waive home inspections and mortgage contingencies with the hope of making an offer more attractive to a seller. Some buyers who have private financing or are buying for cash delete the financing contingency clause from the agreement. Be sure to point out to your buyer client the risks involved if the expected financing does not materialize and there is no mortgage contingency clause in the purchase and sale agreement. This advice should be given in writing to the client by letter or email so that it is memorialized in case the buyer loses the deposit because financing did not materialize or a situation occurs where the sale takes place and major deficiencies are discovered.

If the financing date has arrived and a commitment has not yet been obtained, buyer's counsel should request an extension of the contingency date in either the offer or the purchase and sale agreement to allow the lender more time to issue a commitment letter or to meet certain conditions that are under the lender's control, such as obtaining mortgage insurance or additional appraisal data, while still protecting the buyer's interests. Alternatively, if it is clear that the buyer cannot obtain the necessary financing, a notice to that effect should be prepared and delivered to the seller by the method required in the offer or the purchase and sale agreement. If no method is identified, then recommend to your client that certified mail notices be mailed to the seller with copies hand delivered to the listing broker and the attorney representing the seller.

The buyer may seek your advice as to which mortgage lender or officer the buyer should apply to and may seek similar referrals from the broker who introduced the property. If you are asked for a referral, give your client a number of names to choose from so that the client can decide on one. It is the buyer's responsibility to choose the professional with whom to do business. If you discount your fee for representing both the lender and the buyer, and you give the buyer names of lenders whom you represent, you should disclose this to your client. See § 3.7, below, for a discussion of ethical considerations for counsel.

§ 3.5 OTHER PARTIES INVOLVED IN THE TRANSACTION

There are other parties with whom the buyer client may come into contact during the purchase and financing process, such as a home inspector, who provides the buyer with a report of the physical condition of the property and is typically engaged prior to the signing of the purchase and sale agreement. If you provide your client with the names of professional home inspectors, it is important to explain that you are not making any representations as to the quality of the inspectors' work and are signifying only that you know of them or that the inspectors have represented one or more of your clients in the past.

Other professionals who are involved in the property transaction, but with whom the buyer may not come into direct contact, include the following:

- the appraiser hired by the lender,
- the credit reporting agency,
- the municipal building inspector,
- the surveyor who will prepare a plot plan for the lender's attorney,
- the title examiner hired by the lender's attorney, and
- the tax collector for the town where the property is located.

Finally, lender's counsel will usually contact the seller to provide information on the closing requirements, such as payoff letters, etc. This first contact is permitted, but you should be copied on all correspondence from lender's counsel. When acting as counsel to the buyer or the seller, if you know that the opposite party has an attorney, you cannot contact the party directly without the express permission of that attorney. If you have a question that would be best answered by the actual owner, go through the broker.

§ 3.6 ADDITIONAL PROBLEMS TO RESOLVE PRIOR TO CLOSING

If you are representing a seller, the lender's counsel will look to you to obtain certain information from your client, such as account numbers and servicer information for outstanding mortgages. Be sure to obtain this information from your client early on in the process. A delay in providing current mortgage information to the lender's attorney may result in a delay in the closing. You may also be asked to provide the seller's taxpayer ID number and forwarding address to complete the information to be provided to the IRS under Form 1099 reporting requirements. Be sure to use secure transmissions when providing sensitive information to parties or counsel.

The settlement agent for a property transfer (typically the lender's attorney) is required to submit 1099S forms to the IRS each year for each transfer of real estate. In addition, the lender's attorney will look to the seller's attorney to resolve any problems that come to light as a result of the plot plan tape survey, the municipal lien certificate, or the title examination.

If a problem cannot be resolved in time for the closing to take place by the date set out in the purchase and sale agreement, it is the responsibility of the seller's attorney to give notice to the buyer and to the buyer's attorney under the appropriate provisions of the purchase and sale agreement. Ordering loan payoffs has become more complicated. In many instances, particularly for equity lines, the seller must sign a request for payoff and a termination of the equity line.

Such problems may include the following:

- back taxes or other municipal charges showing as "due" when the seller has in fact paid these bills,
- property that does not conform with zoning requirements or additions built without a permit,
- improvements on the real estate that encroach into easement areas,
- undischarged, but presumably paid, mortgages of the current or prior owners,
- improperly probated estates in the chain of title, and
- other problems in the chain of title or matters of record that adversely affect title to or use and enjoyment of the property.

It is essential for you to immediately address any problems that are brought to your attention. Some problems can be resolved by a simple telephone call, but others will require a great deal of research and time to resolve. Remember that in any real estate agreement, time is of the essence. If a problem will take a great deal of time to resolve and this contingency was not addressed in your original fee agreement with the seller, you should address it as soon as it arises. A new fee agreement may be required to deal with unexpected or unanticipated issues.

The lender's attorney may offer to resolve a title problem for the seller. However, such an offer will undoubtedly create an additional fee to your client. If this offer seems reasonable to you and you believe that the lender's attorney will be able to handle the matter more efficiently and at less cost to your client than you could—perhaps due to the attorney's expertise in handling such matters or ability to access information such as which agency is handling the affairs of a failed bank that has an undischarged lien on the property— explain this to your client. However, remember that the lender's attorney's primary responsibility is to make sure that the mortgage documents are correct and to secure a valid first lien position. The lender's attorney is not necessarily concerned with matters that are between the buyer and the seller and do not affect the lender's interest in the property, such as whether fuel oil adjustments have been properly calculated or whether the property was left in "broom clean" condition.

Practice Note

> Should lender's counsel attempt to cure the problem? Lender's counsel should be aware of several likely problems when undertaking to cure a title problem. For

> one, there may be a sense that lender's counsel has found a problem for which they will then be paid to cure. What if the problem takes longer to cure than anticipated, so much longer, in fact, that the problem will not be cured by the closing date? Has the lender's attorney placed themselves in the untenable position of guaranteeing a cure before closing? Lender's counsel should make clear what the effort will entail, the approximate cost, and the amount of time necessary to find a solution.

Practice Note

> Caution: Is the attorney for the lender also the attorney for the buyer? In such instances, it is not advisable to accept the attorney's offer to resolve title problems for the seller.

If the buyer is not financing the purchase, the buyer's attorney will be responsible for certain tasks that are usually performed by the lender's attorney. These include the following:

- obtaining a title examination, a plot plan, and a municipal lien certificate;
- ensuring that title to the property is clear and marketable;
- making sure that the property conforms to zoning requirements; and
- confirming that all back municipal charges are paid to date and that any current charges are properly accounted for at the closing.

In this case, the buyer's attorney should also obtain payoff figures for the seller's current mortgages and any other liens of record to be paid at the closing and should act as the settlement agent, making the appropriate payments and recording the deed, vesting title in the client at the registry of deeds.

The buyer's attorney and the seller's attorney are responsible for reviewing the seller's closing disclosure and the buyer's closing disclosure to ensure that all variable closing costs are reasonable and accurate, and for explaining these costs to their respective clients. (These forms replaced the HUD-1 or RESPA statement. See the Practice Note below on TRID.) The settlement statement will be provided by the lender's attorney's office. If there is no lender's attorney, the attorney who is acting as settlement agent will prepare the statement.

Practice Note

> The Consumer Financial Protection Bureau (CFPB) integrated the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act. The acronym for the new law, which came into effect on October 3, 2015, is TRID. New disclosures are required as well as the necessity for new forms. But it is important that the attorney for either the buyer or seller know and understand that there are critical deadlines as to when loan estimates and closing disclosures must be delivered to the buyer-borrower. If deadlines are not met, closings can be delayed

for up to seven days. Attorneys representing buyers need to add specific language in the purchase and sale agreement to accommodate the deadlines and to point out that delays might be incurred through no fault of the buyer. Attorneys representing sellers must apprise the seller-client that an unanticipated delay may affect the closing date. If the seller is in the process of purchasing a new home, care must be taken in drafting the seller's purchase agreement, since a delay in the seller's sale may put the seller at risk of losing the deposit on the purchase.

Practice Note

Consider that the timeline to complete a transaction is likely to be closer to sixty days than it is to thirty or even forty-five days.

§ 3.7 ETHICAL CONSIDERATIONS FOR COUNSEL

You may be asked to represent more than one party in the transaction. Representing both the buyer and the seller presents a clear conflict of interest and should not be pursued. Likewise, the same attorney should not represent both the seller and the lender. Representing both the buyer and the lender presents fewer conflict-of-interest issues because both parties share the common goal of vesting good title in the buyer and securing a first lien position for the lender, and neither the buyer nor the lender will want a closing to take place unless:

- there is clear and marketable title;
- the property complies with applicable zoning requirements;
- all municipal charges that could become a lien on the property have been paid;
- all requirements peculiar to the particular kind of property being conveyed have been met, such as having a certificate of occupancy for new construction; and
- deed stamps are in compliance with G.L. c. 64D, § 7 and REBA Ethical Standard No. 1.

A conflict will arise, however, if there is a dispute between your buyer client and your lender client regarding the mortgage process. In this case, you should recommend that both the lender and the buyer be represented by their own counsel. Common sense dictates that you should withdraw as counsel for *both* clients.

§ 3.8 ORGANIZING YOUR PRACTICE

In order to better serve your clients, whether they are buyers, sellers, or lenders, you and your staff should have various methods in place to keep track of the status of each file and important dates involved in each transaction. If you are organized in this way, you will be well prepared and able to intelligently discuss any transaction when you receive a phone call or correspondence regarding it. Also, you will not

jeopardize your client's interests by missing an important date, such as a mortgage contingency date, or by not realizing that you have not received a plot plan that was ordered for a pending closing.

Tracking and organization can be accomplished by using a calendar, a monthly planner, or an equivalent software program. No system will work well for you, however, if you do not make it a habit to check it each day and follow up on what you see. The best reminder may come from your clients themselves. Encourage them to keep track of important dates and to call you with progress reports. If you are representing lenders, be sure that you are familiar with each lender's particular scheduling requirements so that you will be able to schedule a closing in accordance with their lead time specifications.

Practice Note

> Train your staff to take very detailed messages from clients and others regarding any real estate transaction in which you are involved. These messages should include not only the caller's name and phone number, but the name of the client involved, the property's address, and the nature of the call. With this information, you can have the relevant file in front of you when you return the call, and perhaps even have the information available to answer the caller's question right away. Since it is more likely that you will be receiving emails, not phone calls, have a subfolder set up for each client so that you can easily find messages in your inbox.

Although all questions regarding the negotiation of the purchase and sale agreement and questions of law will be directed to you, a well-trained paralegal can handle some calls regarding questions of fact. Delegating these questions can result in more-efficient use of your time. If some questions will be addressed by your paralegal, be sure to give the paralegal's name to your clients so that they will be comfortable asking questions if you are not available or if the inquiry is one that the client thinks the paralegal can handle. Your time can also be used more efficiently if you develop forms, templates, or form-type letters to be used in your real estate practice.

§ 3.9 TITLE INSURANCE

In many cases, especially if you are also representing the lender, your buyer client may ask you about the issuance of title insurance. Be sure to advise your client of the advantages and disadvantages of an owner's policy and also the fact that you will receive a commission from the title insurance company for your services as an agent of the title insurance company. The disclosure should be the subject of an early written explanation.

If you are not representing the lender, your buyer client may seek your advice about whether to purchase an owner's policy of title insurance. Although there are advantages and disadvantages in the acquisition of title insurance by a buyer, be

extremely careful in providing advice to the uninformed buyer. Suppose you advise the client that a savings of several hundred dollars could be achieved by not acquiring an owner's policy of title insurance. Then, sometime later, a title defect is found for which the lender's attorney might have no legal responsibility. Will your client seek resolution of the title defect from you because of your advice? Be sure to provide the best advice available under the circumstances, but leave the ultimate decision up to the client.

Practice Note

> Many title insurance companies offer "enhanced" or "upgraded" title insurance policies for lenders and owners. There may be an additional fee for an upgraded policy. Be careful to advise your buyer client of the additional cost for such policies and the coverage benefits. It may be a malpractice issue if you were careful enough to advise a client to purchase a title insurance policy but failed to advise the client what the additional premium would be for the upgraded policy. Now visualize the title problem for which there is no coverage under the basic policy but coverage would have been available if the client had been advised that an upgraded policy could have been purchased for a few extra dollars. The client's argument, of course, would be that they would surely have purchased the upgraded policy if only you had advised that one was available. The next steps are inevitable.

§ 3.10 CLIENTS WHO ARE BUYING AND SELLING ON THE SAME DAY

Many clients will come to you asking that a closing for a purchase and a sale take place on the same day. At one time in the conveyancing practice, multiple transactions with the same client on the same day were accomplished with relative ease. Many buyers and sellers (or buyers who are also sellers or sellers who are also buyers), as well as many brokers, still consider such transactions routine. Unfortunately, with the requirement of "good funds," the advent of the secondary mortgage market, the increasing use of out-of-state lenders, and TRID requirements, the process of selling and buying on the same day requires considerable planning, and, unfortunately, a good deal of luck. Be extremely clear with your client regarding the dangers of attempting to arrange two transactions on the same day. Typical "what-ifs" are the following:

- What if there is a TRID delay? What if the wired funds do not reach the lender's attorney's account before the scheduled closing?
- What if the buyer (whether it is your client or not) has a change of circumstance that requires the lender to withdraw the commitment?
- What if there is a title issue with one of the properties that makes a postponement necessary?
- What if the lender does not approve the closing disclosures from the sale and/or the purchase?
- What if the seller of one of the properties cannot move out on time?

- What if the buyer of one of the properties is unable to obtain a mortgage commitment, requiring withdrawal from the purchase?
- What if there is a casualty loss or damage to one of the properties before closing?
- What if the registry of deeds is unable to record the first transaction before the end of the day?
- What if your client can sell but cannot purchase?
- What if your client can purchase but cannot sell?

The foregoing "what ifs" represent only a few of the many issues that may arise; they require considerable coordination and thought to overcome. Of course, you may or may not be able to intervene and solve these matters if they do occur, but you should take time and care at the outset of the proposed transactions to explain to your client the potential problems that may arise. Counsel your client to consider alternative options such as bridge financing or financing from relatives, temporary housing, and overnight storage should a problem occur that would require a delay in one or both transactions.

One of the major issues to consider relates to protection of the deposit. Your client's deposit may be at risk if the purchase is forestalled by an inability to sell the client's present home. You might be able to negotiate a contingency requiring the sale of the present residence as a condition to the purchase of the client's new residence. However, such conditions are rarely looked on with favor by the attorney for the seller because the condition shifts risk from the buyer to the seller.

Practice Note

> The Real Estate Bar Association for Massachusetts (REBA) is an excellent resource for title standards, forms, and ethical standards. Every attorney representing a buyer, seller, or lender should be aware of and acquainted with the quantity of helpful information which is available through this bar association.

MCLE thanks Craig P. Gilmartin and Suzanne A. Stark for their previous contributions to this chapter.

- **The Brokerage Agreement between Seller and Broker and The Massachusetts Offer to Purchase.**

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PRELIMINARY ACQUISITION DOCUMENTS—BROKERS' AGREEMENTS AND OFFERS TO PURCHASE

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§ 1.1 INTRODUCTION

The first, tentative steps in a real estate transaction are the most likely to result in litigation. One reason is that these preliminaries often occur without the benefit of counsel on either side. Thrifty clients may resist going to the trouble and expense of engaging counsel "until we have a deal." Others may be surprised to find themselves in a transaction at all—a buyer making a long-shot, low-ball offer, the seller who is "just testing the waters" and unexpectedly finds a buyer for his or her asking price, or a property owner receiving an unsolicited offer for a property not on the market. Also, the offer stage is a fluid time in a transaction in which the parties may not have all of their cards on the table—for the property on the market, the seller might receive a better offer the next day or the buyer may find that his or her lender, board of directors, or investors are not willing to proceed on the terms being discussed.

Taken together, these factors lead to a situation where insufficient communication, a lack of understanding of the legal consequences, and frustrated expectations, together with large sums of money or unique properties at issue, can easily produce acrimonious disputes.

When do preliminary discussions become a binding agreement? As discussed below, the Statute of Frauds (codified at G.L. c. 259, § 1) requires a contract for the sale of land to be in writing and "signed by the party to be charged therewith." This historic requirement provides some protection against a claim that a casual conversation or even a serious negotiation should be construed as a binding contract. However, even sophisticated parties experienced in real estate who are approaching an agreement and exchanging writings—often in the form of letters titled "Offer To Purchase," "Term Sheet," "Proposal," or "Last and Best Offer"—can slip across the line of offer and acceptance into a legally binding agreement without realizing it until one party changes course abruptly and the other, its expectations dashed, files a complaint.
This chapter will assume the ordinary progression of a commercial real estate transaction and will discuss first the agreement with a broker to list a commercial property for sale and then the preliminary documents exchanged by a prospective buyer and seller, which will generally be referred to as an "offer to purchase" (OTP).

§ 1.2 BROKERAGE AGREEMENTS: DRAFTING ISSUES

Two forms of brokerage agreements—one for a sale and the other for a sale or a lease—are included with this chapter as **Exhibit 1A** and **Exhibit 1B**, respectively. All of the commercial brokerage firms have their own forms, but the issues are the same. Both **Exhibit 1A** and **Exhibit 1B** are derived from forms originally prepared by brokers, so they tend to be probroker.

§ 1.2.1 Exclusivity

In most situations where a brokerage firm is engaged to market a commercial property, it will be devoting substantial resources of both time and money. In order to make such an investment, the brokerage firm will require a so-called exclusive whereby it will receive the agreed-upon commission if the property is sold, whether or not the broker actually produced the sale. If the owner has already identified one or more likely prospects, he or she should attempt to exclude those prospects from the exclusive provision, such that, if the sale is made to one of those prospects, the agreement will not entitle the broker to a commission. Of course, the longer the list of excluded prospects, the more likely it is that the broker will wait and see what transpires with those prospects before devoting time and resources to the property. Even a sale to a prospect that seems obvious in retrospect, such as the sale to an existing tenant, requires the broker to devote resources to the property and earns the broker a commission.

§ 1.2.2 Duration

The broker has an interest in knowing that he or she will have sufficient time to generate leads, to show the property, and to close the sale without losing the listing. The owner has an interest in ending the brokerage relationship and finding another broker if the broker has not been successful in generating leads and showing the property, even if the broker is in full compliance with the agreement. The agreement should state an agreed-upon term, perhaps six months, and can then provide for automatic extension if not then terminated by either party. In addition, an owner with a desirable property may be able to negotiate the right to terminate the agreement upon some advance notice during the agreed-upon term. In any event, the agreement should be terminable for cause at any time.

§ 1.2.3 Commission

The amount of the commission is governed by the market and is negotiable. The agreement should specifically provide that the broker earns a commission only when the sale is closed and the purchaser has paid the consideration for the property. The requirement that the purchaser close and pay the consideration for the commission to be earned is the common law rule in Massachusetts. *Tristram's Landing v. Wait*, 367 Mass. 622 (1975). Before the court's opinion in *Tristram's Landing*, in the absence of a contrary agreement between the parties, the commission was earned when the

broker produced a purchaser that the owner accepted, as evidenced by the execution of a purchase and sale agreement.

Some preprinted purchase and sale agreement forms provide terms for payment of the commission, which may include provision for the broker to receive onehalf of the commission if the purchaser defaults and the owner retains the deposit. Payment of any commission when the purchaser does not perform is not typical in the current market. When there is a separate brokerage agreement, the purchase and sale agreement should refer to a commission payable only ""pursuant to a separate agreement," and any other terms governing payment of the commission should be stricken from the purchase and sale agreement before its execution.

§ 1.2.4 Sale at Seller's Election

The agreement should be clear that the final decision to sell and the terms of the sale are in the sole discretion of the owner. The owner should have no implied obligation to sell the property or even to keep it on the market.

§ 1.2.5 Cobrokers

In many transactions, a prospective purchaser will be working with his or her own broker who will identify the property for the prospective purchaser and show it with the "listing broker." The agreement with the owner typically provides only that the listing broker share its commission with the other broker, leaving it to the two brokers to agree between themselves as to the details of sharing the commission. The agreement can also expressly require the broker to cooperate with cobrokers and, especially in brokerage agreements for leases, may provide for a higher commission to be shared when a cobroker is involved. Given the relatively small number of firms engaged in commercial real estate brokerage in any given market, there are rarely disputes between the brokers as to sharing the commission if it is clear that the cobroker has introduced the buyer to the property in question. If there is a dispute, the brokers will not interfere with the completion of the underlying transaction.

§ 1.2.6 Services to Be Performed

The agreement should specifically state what activities the broker is expected to undertake to market the property. The agreement may require the broker to prepare specific brochures or an offering memorandum. If the owner pays advertising and direct marketing expenses, the broker should be required to prepare a budget for the owner's approval and to adhere to that budget unless the owner otherwise consents. Alternatively, expenditures over a certain amount should require the owner's prior approval. If the owner expects a particular individual to lead the marketing team, the agreement should name that individual and permit substitutions only with the owner's consent. The agreement may also provide for periodic written reports or sales

meetings to assess the effectiveness of the marketing efforts.

§ 1.2.7 Tail

The broker has an interest in protecting his or her work if the agreement is terminated or expires at the end of its term without a sale. Rather than leaving the owner at risk that the broker will claim that he or she introduced a later purchaser to the property by some indirect means—for example, by proof that the purchaser was included in the mailing list for brochures of the property—the agreement should limit the broker's rights to a commission for future sales. One way to measure the seriousness of the broker's efforts as to a prospect is to provide that the broker will receive a commission if the property is sold within a specified period of time after the expiration or termination of the agreement to a prospect that the broker has physically brought to the property for showing and that he or she has included in a report to the owner. Another way to address the issue is to require the broker to furnish a list of "protected prospects" within ten days of the agreement's termination or expiration. In order to prevent the broker from protecting his or her entire mailing list, for example, it is good practice to limit such a list to perhaps ten prospects, which keeps the protected list realistic and does not discourage a new broker from taking up the listing. The broker should be entitled to a commission if there is a sale to a "protected prospect" within a specified time period after the agreement's expiration or termination.

§ 1.3 PURPOSE OF OFFER TO PURCHASE

An OTP permits the principals of a transaction to set out the terms of the transaction—such as purchase price, closing schedule, and contingencies—for negotiation. An owner may try to collect a number of competing offers for comparison. If the parties so desire (see § 1.4, below), an accepted OTP can constitute a binding agreement that can be enforced in equity by specific performance. However, even in instances in which the OTP is binding, it is usually intended to bind the parties only on a temporary basis while a full purchase and sale agreement (P&S) is drafted and negotiated.

§ 1.4 WHAT IS THE INTENT OF THE PARTIES?

In a perfect world, the parties would address directly whether or not an OTP was binding or whether the parties would not be bound until a formal P&S was executed. In practice, however, many OTPs, especially those prepared without counsel, are silent as to whether or not the parties are committed fully to the transaction at the time that the seller accepts the OTP. Sometimes this is because the client wants to try to have it both ways. A seller generally will not want a buyer to change his or her mind and intentionally create unsolvable issues or simply walk during the negotiation of the P&S. On the other hand, some optimistic sellers would prefer not

to irrevocably tie up the property if there are still active prospects. However, a buyer will generally want specific assurances that he or she will not lose the property, because he or she will be devoting money in the form of legal fees in negotiating a P&S and making arrangements for due diligence investigations during the term of the OTP.

The Appeals Court has quoted with approval the following example of a proviso for the common situation where the parties do not intend to be bound:

> *The purpose of this document is to memorialize certain business points. The parties mutually acknowledge that their agreement is qualified and that they, therefore, contemplate the drafting and execution of a more detailed agreement. They intend to be bound only by the execution of such an agreement and not by this preliminary document.*

Goren v. Royal Invs., Inc., 25 Mass. App. Ct. 137, 143 (1987) (quoted in *Lippman v. Amsdell Holdings I, Inc.*, 73 Mass. App. Ct. 1115 (unpublished opinion, 2009)).

§ 1.4.1 Correspondence

It is counsel's responsibility to make sure that the parties are not bound until they intend to be bound. For that reason, careful practitioners may include the following language in even their most preliminary correspondence:

> *These terms are presented for negotiating only, and nothing contained in this letter or in any subsequent correspondence between the parties or counsel shall be deemed an agreement to purchase or sell the premises unless and until both buyer and seller have executed and delivered a formal [Offer to Purchase] [Purchase & Sale Agreement].*

By including this language in very preliminary correspondence, and including the reference to subsequent correspondence, counsel can establish a record that the parties are not bound until a formal bilateral document is executed, even if each and every communication does not contain a reservation of rights.

§ 1.4.2 Exclusive Negotiation Period

In a complicated commercial transaction, negotiating and drafting a binding OTP may be such a task that the parties decide they would be better off devoting their energies to a final P&S without a preliminary binding agreement. In that instance, the buyer will nonetheless want an assurance that it will not lose the transaction even if a better offer appears while the P&S is negotiated. The seller also has an interest in knowing that it will be free to remarket the property if it is unable to reach a final agreement with the prospective buyer within a finite period.

Attached as **Exhibit 1C** is a form of letter providing for an exclusive negotiation period in which the seller agrees to take the property off the market and to not advertise it or even negotiate to sell it to another party for a period of sixty days. This form leaves some room for dispute in that the parties agree only that they will negotiate "diligently and in good faith," but it does give the parties an opportunity to negotiate and document all of the details of the proposed transaction without the pressure of threatened competing offers. Similar language may also be included in a nonbinding term sheet, such that the terms remain open for negotiation, but that the seller agrees to deal exclusively with the buyer for the agreed-upon time and to keep the terms confidential. See **Exhibit 1D**.

§ 1.5 OFFERS TO PURCHASE: DRAFTING ISSUES

As described above, the purpose of an OTP is to reach agreement on the terms of the proposed transaction, which may involve substantial detail, but without reaching the level of detail necessary for a properly documented P&S. In addition, as discussed above, in most cases the seller will take the property off the market for a period long enough to negotiate a full P&S.

§ 1.5.1 Statute of Frauds

A common trap in this area is for the parties to exchange correspondence that, when taken together, constitute offer and acceptance and a writing sufficient to satisfy the Statute of Frauds even though one party may not yet realize that it is legally bound and that the OTP itself constitutes a legally binding contract. General Laws c 259, § 1, provides that

> [n]o action shall be brought ... upon a contract for the sale of lands ... unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by a party to be charged therewith.

The key point is that the Statute of Frauds does not necessarily require a formal contract signed by the parties. The case law is clear that multiple writings may be read together, even if they do not refer to each other, so long as the writings, when considered as a single instrument, contain the essential terms of the contract and are authenticated by the signature of the party to be charged.

The contract's essential terms to be included in the writing are minimal—identification of the parties and a very general description of the property, along with the execution by the party to be charged, are sufficient. For an extreme example of the minimum requirements of the writing, see *Tzitzon Realty Co., Inc. v. Mustomen*, 352 Mass. 648 (1967), where the court upheld as sufficient a writing that did not specify the purchase price, the time for performance, or describe the land except as

"located on the corner of School Street and Salem Street." The court noted that G.L. c. 259, § 2 provides that the consideration need not be set forth in the writing but may be proved ""by any legal evidence," found that a reasonable time for performance was implied, and permitted the plaintiff to use other evidence of the extent of the premises to be conveyed (a title abstract of the multiple parcels involved given by the defendant to the plaintiff).

A memorandum sufficient to satisfy the statute does not even need to contain the actual handwritten signature of the party to be charged—a telegram has been held to be a signed writing sufficient to satisfy the statute, and a printed signature can also be sufficient. The test is whether the party intended to authenticate the document as his or her act. E-mail, which can be very casual, can satisfy the test. See, for example, *Shattuck v. Klotzbach*, 14 Mass. L. Rptr. 360 (Super. Ct. 2001) and *Feldberg v. Coxall*, 30 Mass. L. Rptr. 150 (Super. Ct. 2012), in which a series of e-mail messages constituted sufficient offer and acceptance and a sufficient memorandum to survive a motion to dismiss. *See also* Theuman, "Satisfaction of Statute of Frauds by E-Mail," 110 *A.L.R.* 5th 277 (2004) and the Uniform Electronic Transactions Act, G.L. c. 110G.

§ 1.5.2 *McCarthy v. Tobin*: Offers to Purchase Contemplating a Later Purchase and Sale Agreement

Virtually all OTPs provide that the parties will negotiate and execute a full P&S after execution of the OTP, usually by a specified date. The question is whether the parties expect execution of the P&S to be a formality or whether failure to complete and execute a P&S excuses performance by either the seller, the buyer, or both. As discussed in § 1.5.1, above, most OTPs are silent on the issue.

However, a client who executes an OTP and then seeks to sabotage a deal by not proceeding with a P&S or by introducing material new terms in the P&S does so at his or her peril. The case of *McCarthy v. Tobin*, 429 Mass. 84 (1999) is the leading case in Massachusetts for the proposition that an OTP, standing alone, can be a binding contract and will be enforced if it adequately describes the business terms and a court finds that the parties intended that the subsequent execution of a final written agreement would not alter the substance of the agreed-upon transaction.

The facts in *McCarthy* involved the sale of a condominium unit in which the parties agreed to use the standard form P&S recommended by the Greater Boston Real Estate Board with fairly standard changes made in a rider. The court stated that the controlling fact in determining whether a legally binding contract existed was the intention of the parties. While the defendant argued that the language contemplating the execution of a later agreement gave rise to an inference that the parties had not intended to be bound, the court found that if "[t]he parties have agreed upon all material terms, it may be inferred that the purpose of a final document which the

parties agree to execute is to serve as polished memorandum of an already binding contract." *McCarthy v. Tobin*, 429 Mass. 84, 88 (1999).

The holding in *McCarthy* has been routinely applied to real estate disputes, and there have been few appellate decisions on the issue since it was decided. However, the court will scrutinize the OTP to determine that it contains all the material terms required of a contract for the purchase and sale of real estate. See *Freidman v. Bonds*, 81 Mass. App. Ct. 1115 (2012) (parties' lack of agreement at the time the OTP was executed evidenced by imperfect negotiation of material term); *Corkery v. Scofield*, 69 Mass. App. Ct. 1114 (2007) (agreement at issue did not include material terms such as closing date or location); *Walsh v. Morrissey*, 63 Mass. App. Ct. 916 (2005) (addition of complex addendum with significant elements brought case outside purview of *McCarthy*).

While a commercial transaction is more likely than a condominium unit sale to have significant issues negotiated at the P&S stage, it is clear from *McCarthy* that it is the safest course for the parties to clearly state their intention one way or the other—do they intend to be bound, is there to be no binding agreement until the P&S is executed, or is the owner simply to negotiate exclusively with the prospective purchaser for a specified period of time until the P&S is executed?

§ 1.5.3 Contents of Offers to Purchase

In a commercial transaction, the level of detail in the OTP is controlled by the parties' preference and the complexity of the transaction. In most cases, the parties will prefer to keep the OTP simple and devote their time and effort to negotiating a final P&S, and the OTP can specify those details that will remain to be resolved as part of negotiating the P&S. While some practitioners prefer to negotiate key clauses in the OTP in order to include them verbatim in the P&S, if the OTP goes through multiple drafts to polish and negotiate, days will pass without the OTP accomplishing its purpose of taking the property off the market. In addition, unless a clear intent is expressed to the contrary, the closer that the OTP becomes to a "mini P&S," the more likely a court will determine that the final agreement is a mere formality. *See McCarthy v. Tobin*, 429 Mass. 84 (1999). For this reason, if a transaction is too complicated to be expressed adequately in a simple OTP, the parties may be well advised to enter into an agreement to take the property off the market (see § 1.4.2, above) and proceed directly to negotiate a P&S.

An "Offer to Purchase Real Estate" should contain the following minimum elements:

- ***Description of the Property***. This need not include a legal description; it may simply be a street address at the OTP stage. However, it is advisable to include as much basic information as is available so that there will not be a misunderstanding as to the property to be conveyed. In a commercial

transaction, the description could include the floor area of the building, the number of parking spaces, and the acreage of the land to be conveyed.

- ***Purchase Price***.

- ***Deposit***. If known, the OTP should also set forth the escrow agent, whether interest will be paid on the deposit and to which party, and any special conditions for the deposit.

- ***Title Requirement***. For example, "good marketable record title to the property free of encumbrances except as approved in writing by Buyer."

- ***Closing Date***. If applicable, the OTP should state that "time is of the essence."

- ***As-Is Sale***. The seller will likely want to insert an "as-is" provision, if applicable.

- ***Brokers***. A warranty that no party has dealt with any broker other than those included in the warranty and an indemnity, as well as provision for payment of the commission.

- ***Date for Acceptance of Offer***. This will be the outside date for acceptance of the OTP.

- ***Access to the Property***. If the transaction is required to move quickly, the buyer may agree to commence its due diligence before executing the P&S. In such an event, the OTP or a subsequent separate agreement should provide for entry to the property, suitable indemnity and insurance, and, possibly, some provision for sharing the cost of the inspections and providing the reports to the seller if the buyer terminates the transaction based on the inspection results prior to executing the P&S.

- ***Contingencies***. The parties will want to agree at this stage in the transaction on any terms that will permit the buyer to withdraw from the transaction and receive a return of the deposit. Ideally, the schedule of the transaction will be known at the OTP stage, so the OTP should include outside dates for termination of the transaction for a contingency. The more common contingencies follow:

    - ***Title and Survey***. In the absence of an agreement setting a deadline for objections to title and matters, such as encroachments, that would be shown on the survey, the buyer may raise an objection to title up to the time of closing. The schedule for sign-off on title and survey will

depend in part on whether the buyer will be able to obtain an update of an existing survey or whether a new survey must be commissioned.

- ***Physical Due Diligence***. In the case of an existing building, this may include a mechanical and engineering inspection, a review of building plans and specifications, and a determination that the property complies with the Americans with Disabilities Act.

- ***Environmental Assessment***. This may include a so-called Phase I site assessment and, if necessary, a Phase II site assessment, as well as an assessment of any buildings for the presence of asbestos, mold, or conditions contributing to "sick building syndrome."
- ***Financial Due Diligence***. In the case of an operating building, the buyer may seek a separate due diligence period for review of leases, the operating history of the building, and any service contracts that will survive the closing.

- ***Permitting***. In the case of vacant land or land to be redeveloped, the OTP may include a contingency for permitting a specific project, and the due diligence may include a geotechnical assessment and borings.

- ***Financing Contingency***. The seller will want any financing contingency to be specific as to the amount of financing required.

- Finally, a statement of the intent of the parties as to the effect of the OTP should be included. See, for example, the proviso in § 1.4, above.

§ 1.6 CONCLUSION

Brokerage agreements are rarely difficult to negotiate, but it is important to make sure the parties have, in fact, considered and reached agreement on issues beyond the amount of the commission.

OTP's are a matter of a particular client's style and preference for how much detail the parties need to agree to before they are comfortable spending money to negotiate a formal purchase and sale agreement and commence preliminary due diligence with respect to the property and financing. The most important roles of the attorney at this point in a transaction are to push for clarity, to ensure that the parties are not bound until they intend to be, and to consider whether some elements (i.e., confidentiality and an exclusive negotiating period) should be binding on the parties to assist in the discussion of the business terms.

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McCarthy v. Tobin
429 Mass. 84, 706 N.E.2d 629
Supreme Judicial Court of Massachusetts,
Suffolk.
John J. McCarthy, Jr.
v.
Ann G. Tobin; Robert Diminico & another, [FN1] interveners.

FN1. Juliann DiMinico.

Argued Dec. 7, 1998.
Decided March 2, 1999.

ABRAMS, J.

The facts, which are undisputed, are as follows. On August 9, 1995, McCarthy executed an offer to purchase real estate on a pre-printed form generated by the Greater Boston Real Estate Board. The OTP contained, among other provisions, a description of the property, the price to be paid, deposit requirements, limited title requirements, and the time and place for closing. The OTP also included several provisions that are the basis of this dispute. The OTP required that the parties "shall, on or before 5 P.M. August 16, 1995, execute the applicable Standard Form Purchase and Sale Agreement recommended by the Greater Boston Real Estate Board ... which, when executed, shall be the agreement between the parties hereto." In the section containing additional terms and conditions, a typewritten insertion states, "Subject to a Purchase and Sale Agreement satisfactory to Buyer and Seller." The OTP provided, "Time is of the essence hereof." Finally, an unnumbered paragraph immediately above the signature line states: "NOTICE: This is a legal document that creates binding obligations. If not understood, consult an attorney." Tobin signed the OTP on August 11, 1995.

On August 16, 1995, sometime after 5 P.M., Tobin's lawyer sent a first draft of the purchase and sale agreement by facsimile transmission to McCarthy's lawyer. On August 21, McCarthy's lawyer sent a letter by facsimile transmission containing his comments and proposing several changes to Tobin's lawyer. The changes laid out the requirements for good title; imposed on Tobin the risk of casualty to the premises before sale; solicited indemnification, for title insurance purposes, regarding mechanics' liens, parties in possession, and hazardous materials; and sought an acknowledgment that the premises' systems were operational. The next day, the two lawyers discussed the proposed revisions. They did not discuss an extension of the deadline for signing the purchase and sale agreement, and Tobin's lawyer did not object to the fact that the deadline had already passed. On August 23, Tobin's lawyer sent a second draft of the agreement to McCarthy's lawyer. On August 25, a Friday,

McCarthy's lawyer informed Tobin's lawyer that the agreement was acceptable, McCarthy would sign it, and it would be delivered the following Monday. On Saturday, August 26, McCarthy signed the purchase and sale agreement. On the same day, Tobin accepted the DiMinicos' offer to purchase the property.

On August 28, McCarthy delivered the executed agreement and a deposit to Tobin's broker. The next day, Tobin's lawyer told McCarthy's lawyer that the agreement was late and that Tobin had already accepted the DiMinicos' offer. In September, 1995, Tobin and the DiMinicos executed a purchase and sale agreement. Before the deal closed, McCarthy filed this action for specific performance and damages.

1. *Firm offer.* The primary issue is whether the OTP executed by McCarthy and Tobin was a binding contract. Tobin and the DiMinicos argue that it was not because of the provision requiring the execution of a purchase and sale agreement. McCarthy urges that he and Tobin intended to be bound by the OTP and that execution of the purchase and sale agreement was merely a formality.

McCarthy argues that the OTP adequately described the property to be sold and the price to be paid. The remaining terms covered by the purchase and sale agreement were subsidiary matters which did not preclude the formation of a binding contract. We agree.

The controlling fact is the intention of the parties. Tobin argues that language contemplating the execution of a final written agreement gives rise to a strong inference that she and McCarthy have not agreed to all material aspects of a transaction and thus that they do not intend to be bound. "If, however, the parties have agreed upon all material terms, it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract."

Although the provisions of the purchase and sale agreement can be the subject of negotiation, "norms exist for their customary resolution." "If parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding."

The interveners argue that McCarthy departed from the customary resolution of any open issues, and therefore manifested his intent not to be bound, by requesting several additions to the purchase and sale agreement. We agree with the Appeals Court, however, that McCarthy's revisions were "ministerial and nonessential terms of the bargain

The inference that the OTP was binding is bolstered by the notice printed on the form. McCarthy and Tobin were alerted to the fact that the OTP "create[d] binding obligations." The question is what those obligations were. The DiMinicos argue that

the OTP merely obligated the parties to negotiate the purchase and sale agreement in good faith. We disagree. The OTP employs familiar contractual language. It states that McCarthy "hereby offer[s] to buy" the property, and Tobin's signature indicates that "[t]his Offer is hereby accepted." The OTP also details the amount to be paid and when, describes the property bought, and specifies for how long the offer was open. This was a firm offer, the acceptance of which bound Tobin to sell and McCarthy to buy the subject property. We conclude that the OTP reflects the parties' intention to be bound.

Waiver. Even though the purchase and sale agreement was not necessary to bind the parties, its execution was required by the OTP. The agreement is unambiguous in this regard and thus must be enforced. Courts hold parties to deadlines they have imposed on themselves when they agree that time is of the essence. The DiMinicos argue that McCarthy violated his obligations by failing to execute the purchase and sale agreement by the August 16 deadline.

The August 16 date is a condition subsequent. Without an executed purchase and sale agreement by that date, the OTP provides that the parties' obligations to each other are extinguished. Conditions, however, may be waived

We are persuaded that Tobin waived the August 16 deadline. Tobin's lawyer, acting as her agent, voluntarily undertook the task of drafting the purchase and sale agreement. He did not produce the first draft until it was impossible for McCarthy to sign it before the deadline. He also did not object to the passage of the deadline in the telephone calls and facsimile transmissions that followed. Instead, he continued to deal with McCarthy's lawyer in an effort to craft a mutually satisfactory agreement. In the only express communication concerning the execution of the agreement, Tobin's lawyer implied that a date later than August 16 was satisfactory. Words and conduct attributable to Tobin signified her waiver of the August 16 deadline. Once there was a waiver, time was no longer of the essence. McCarthy's subsequent tender of the signed agreement and a deposit was timely and within reason. We conclude that there is no issue of material fact and that McCarthy was entitled to a judgment as a matter of law.

3. *Specific performance.* On remand, the issue of the appropriate remedy will arise. A judge generally has considerable discretion with respect to granting specific performance, but it is usually granted in disputes involving the conveyance of land. "It is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land." It is therefore proper to allow McCarthy specific relief.

McCarthy's right to specific performance is unaltered by Tobin's execution of a purchase and sale agreement with the DiMinicos. McCarthy filed this action prior to

the execution of that agreement. The DiMinicos had actual notice of McCarthy's claim to the property and assumed the risk of a result favorable to McCarthy.

The judgment is vacated. The case is remanded to the Superior Court for the entry of a judgment in favor of McCarthy's claim for specific performance.

So ordered.