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# Setting Expectations Mitigates Buyer/ Seller Discord



from The Voice - 3rd Quarter  
by NMAssocofREALTORS



Ashley Strauss-Martin NMAR General Counsel

In the of real estate, contracts are essential, but they are hardly entertaining to read and the NMAR's 15+ page Purchase Agreement ("PA") is no exception. In my perfect world, every broker is sitting down with "their" respective buyer or seller and walking them through the PA, explaining what each paragraph means and how it applies. Realistically, in this wonderful age of technology, PAs are often sent off to the customer or client via email or DocuSign with the note from the broker that says something like, "Please review thoroughly and contact me if you have any questions". Buyers and sellers generally lose interest after spotting the purchase price, loan type and closing date and figure that you, their broker, will fill them in on anything they REALLY need to do or know. Because of this, buyers and sellers are often taken by surprise when certain things happen per the PA. This surprise can often result in the customer/client feeling frustrated – frustrated with the process, frustrated with the other party to the transaction and sometimes even frustrated with you. This frustration often leads to your customer/ client acting unreasonably and perhaps in direct conflict with the clear language of the PA. Having run the NMAR Legal Hotline for over 14 years and having discussed numerous earnest money dispute issues with brokers, I have come to learn the top issues that cause buyers and sellers the most grief when they first learn how the PA "works". Unfortunately, the first time is rarely when they are making or accepting the offer; the first time is most often when the issue arises, sometimes weeks or months into the PA, which for obvious reasons, compounds the party's irritation. Early education on these points is key to mitigating your client/customer's frustration and achieving a more reasonable response.

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Before I get into the PA, I want to take a minute to address the Cover Pages to the PA, and specifically, Broker Duties. There is a significant difference in how a broker functions when working as an agent versus how they function when working as a transaction broker. The fiduciary duties owed as an agent only partially resemble the duties owed as a transaction broker, both in scope and with regards to whom those duties are owed. Again, my hope is that all brokers are explaining this to their clients/customers and going over ALL the Broker Duties in some detail, but if this is not occurring, this Broker Duty is one of the more important broker obligations that needs to be emphasized with the client/customer. A broker has a separate and independent obligation, aside from the seller's obligation under the law or the PA, to disclose adverse material facts known about the property and/or the transaction. It's also important that your customer/client understands that this Broker Duty is owed to ALL parties in the transaction. Therefore, if you find yourself in a situation with your buyer or seller where they do not wish to disclose something that you believe must be disclosed, you can circle back to the Broker Duty conversation you had in the very beginning of your relationship. The buyer or seller, as the

case may be, may then be less resistant to you disclosing the information. Again, they knew about your obligation from the beginning, so your requirement to disclose is no "surprise."

Now, on to the PA – NMAR Form 2104.

#### TOP 5 PURCHASE AGREEMENT ISSUES THAT CAUSE SELLERS ANGST:

1. PARA. 4 - TIME OFF MARKET FEE (TOM): Explain the TOM Fee to the seller and upon termination because a contingency was not satisfied (inspection, financing, appraisal, etc.), you will never again have to hear "It's not fair that the buyer gets to walk and receive a return of their Earnest Money and I get nothing, when my property has been off the market for weeks/months." Yes, seller, that's the way the PA works, if a contingency is not satisfied, the buyers can "walk" and they get a full refund of their Earnest Money (but see No. 1 of Buyer's PA Issues below).
2. PARA. 8 - BUYER SALE CONTINGENCY: If the seller doesn't use Form 2503, the seller cannot continue to market the property for purposes of giving the buyer 48 hours' notice to "remove" the contingency. The seller can only take back-up contracts and wait for the date in Para. 8 to arrive. Form 2503 is a seller-friendly form.
3. PARA. 9 - APPRAISAL: The seller is not entitled to a copy of the appraisal even if the seller has agreed to pay for the appraisal. If the seller wants a copy of the appraisal, the seller needs to counter the offer and add such language.
4. PARA 10 - FUNDING DATE/SELLER OCCUPANCY AND KEYS: Unless otherwise provided for, the buyers gets keys to their house even if the seller is going to occupy after closing. A hard pill to swallow for those

sellers who still think of the home as their own, but that's the way the PA works. 5. PARA. 22 - INSPECTIONS:

A. "Buyer's Own Observations" is a reason for the buyer to terminate. Buyers are not required to produce a report to Terminate (but IF buyer's have a report, they must produce it upon written request from the seller). Buyers have a number of options to terminate the PA during the inspection period.

Para. 22(H)(i).

B. Just because the buyer asked the seller for repairs and the seller does not wish to do any repairs, does NOT give the seller the right to terminate the

PA. The PA is clear regarding the seller's options (Para. 22(H)(i)(b)).

C. When the buyer makes objections, if the seller does not give the buyer EVERYTHING the buyer asks for, the buyer then has the option of terminating. And if the buyer decides to terminate, the buyer is under no obligation to allow the seller to reconsider their initial response to the buyer's

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