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## legal update



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# Planning For Smooth Transitions Of Possession - Do We Need A Post-Closing Possession Agreement?

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During this very busy season of residential closings, one issue that regularly arises is the need for some Sellers to retain post-closing possession of their house. Proactive planning on the part of the listing real estate agent may go a long way in avoiding some common pitfalls which may accompany such a need.

When a listing agent first becomes aware that a particular sale is stacked up in a series of "domino" purchase and sale transactions, then it is the perfect time for the agent and the Seller to consider whether they should then request the right to retain post-closing possession of the Seller's home for a short period of time to provide some breathing room in the sometimes tight move-in timeframes. If this request is a part of the back and forth discussions and negotiation of the terms of the Purchase and Sale Contract, then the parties are much more apt to take this accommodation into consideration when they are making their future moving plans as just "part of the deal that was struck." During such contract negotiations the agents are better aware of the timing issues that may arise and may be able to creatively and successfully address such problems bearing in mind the particular time constraints of the other parties involved in the "domino" transactions.

On the other hand, it is less than ideal when a Seller's attorney is asked to make a request for post-closing possession using the vehicle of the attorney approval letter. As you are well aware, the introduction of a new condition to the Contract in an attorney approval letter would probably be interpreted as a counteroffer being made by the Seller. In some cases this is not an insurmountable problem and can be properly "tied up" by having both Seller and Buyer execute a copy of the Seller's attorney approval letter in order to ratify the revised terms of the Contract and to document that there is, in fact, the required "meeting of the minds" between the parties which is an element of every enforceable contract. However, in this sometimes very hot marketplace, we are often hesitant to re-open the negotiation stage of the transaction and do not wish to risk a party rejecting the request contained in a counteroffer. If the terms of the counteroffer are not accepted, then a party may be able to claim that they are no longer bound by the terms of the Contract and walk away from a deal that everyone previously considered to be a firm deal. It is easy to see that such a situation might create some unhappy circumstances with people asking why the issue of post-closing possession was not addressed earlier in the process.

When negotiating the terms of retained possession, it is important to clarify the crucial points of the arrangement. It is most clear and unambiguous when the appropriate portion of the Purchase and Sale Contract endorsed by the Greater Rochester Association of Realtors and the Monroe County Bar Association (Section 6) is completed to indicate that the parties will be required to enter into the standard form of possession agreement recommended by the Real Estate Section of the Monroe County Bar Association. This standard form agreement is available on the MCBA website ([www.mcba.org](http://www.mcba.org)). Of course, this form is only the specimen form that needs customization by the attorneys in each and every case to incorporate the particular facts of any transaction. The Contract (and then later the possession agreement) should state the maximum time period permitted for the Seller to retain possession (often 2-3 calendar days) and should also require that an appropriate security deposit (typically \$250-\$500) be held until the Seller vacates and delivers the property to the Buyer in broom clean condition. Any security deposit is usually held in escrow in the Buyer's attorney's trust account. The standard possession agreement requires that the Seller continue to carry fire insurance with extended coverage endorsement, together with liability coverage naming the Buyer as an additional insured, until the Seller has turned over the property in accordance with the terms of the possession agreement. The parties may agree that the Seller is required to pay a sum certain for the per diem "rental" amount, but it is more usual to require the Seller to pay the Buyer's PITI (principal, interest, taxes and insurance) which will not be able to be calculated until the closing, when the Buyer's mortgage terms and payment amounts are determined. A Buyer who has agreed to allow the Seller to retain possession is entitled to have a key to the house delivered to the Buyer at closing because the legal ownership of the property does transfer at closing even though possession is delayed.

Experience has shown again and again that the more successful arrangements concerning post-closing possession are those that have been negotiated early in the process and to the detail necessary to avoid misunderstandings at the time of closing and moving. We will all be better off if we can cooperate with one another and plan ahead to avoid issues, including the irate telephone call from a Buyer who is faced with additional expenses because their moving van is sitting in the driveway of their new house but who cannot gain entry because the Seller has not yet vacated!