6. Checking out the zoning. A title search tells a buyer and seller nothing at all about the zoning of the property and any possible changes in zoning. Does the zoning allow a two family house? What about the deck the buyer plans to build? For direct and efficient responses to questions like these, you need an attorney.

7. Reviewing the survey. Finally, a buyer and his or her lender may need a survey map of the property. An attorney knows how to review a survey, and identify possible future problems it may disclose. For example, your neighbor's fence or driveway may cross over the property line, or yours may cross over onto their property. A garage may have been built on a municipal street. Should you accept title subject to these problems? Will a lender give you a mortgage? These are issues that attorneys deal with and resolve every day.

8. Dealing with property condition disclosure and warranties. A New York law that took effect in 2002 requires the sellers to deliver a Property Condition Disclosure Statement to the buyers – or allow a $500 credit at closing. Both buyers and sellers need an attorney's help in determining how to respond to this law. A seller might, for example, prefer not to disclose, but needs an attorney's advice to make that decision. In a transaction involving a newly built house, the buyer will be entitled to certain automatic warranties under the New York General Business Law. An attorney can help the buyer understand those warranties and decide whether to ask for more. An attorney can help a buyer decide what inspections to perform and who should perform them. Home inspectors (other than architects or engineers) are required to be licensed and must provide a written inspection report within five business days after the inspection, clearly identifying the systems and components observed.

9. Conducting the closing. The closing represents the "moment of truth" in any house purchase. Shortly before closing, the seller's attorney prepares the deed and other closing papers. The lender or title company prepares a closing statement, showing all the money that changes hands at the closing. A buyer's attorney will check the closing documents, and both parties' attorneys can explain those documents to their clients as well as the closing costs their clients need to pay. At closing, the parties sign the transfer and related documents and the buyer pays the remaining purchase price, often from the proceeds of a mortgage loan. Title then passes from seller to buyer.

The closing process can seem confusing and complex, to both buyer and seller. Those attending the closing often include the buyer and seller, their attorneys, the title closer (representative of the title company), the attorney for the lending institution and one or more real estate brokers. Documents need to be recorded. Transfer taxes need to be paid. Insurance and similar arrangements must be made. Last-minute disputes may arise about delivery of possession and personal property or calculation of various costs, such a: fuel and taxes. Here an attorney's advice and guidance are essential.

10. Condominiums, cooperatives and HOAs. Many single family residence transactions do not involve a transfer of outright ownership of real estate, but instead a transfer of an interest in a condominium, cooperative, or homeowners' association. New York law treats initial sales of these forms of ownership as "securities," usually requiring disclosure in an "offering plan." All sales require special documents that are complicated and justify an attorney's review. Those documents may include condominium declarations, proprietary leases, and by-laws. These ownership structures also create tax issues that an attorney should explain.

Throughout the purchase and sale process, the interests of buyers and sellers directly conflict. A broker generally serves only the seller. A lender has its own agenda. The attorneys for buyer and seller have no such conflicting loyalties. Each serves only their own client's best interests.

An attorney's advice and guidance are essential from the time you decide to sell or buy a house until the actual closing – and even after the closing if any issues or questions arise.

THAT'S WHY YOU NEED AN ATTORNEY.

This pamphlet, based on New York law, is intended to inform, not advise. No one should try to interpret or apply any law without an attorney's help. Produced by the New York State Bar Association in cooperation with the Real Property Law Section.

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The Attorney's Role in Home Purchase Transactions

THE ATTORNEY'S ROLE IN BUYING OR SELLING A HOUSE

Do I need an attorney to buy or sell a house? I can buy a car or 100 shares of stock without an attorney. Why not a one or two family house?

Buying a house

Buying a house may be the most significant and largest purchase you will make. It also involves the law of real property, which is unique and raises issues and problems that are not obvious. An attorney knows how to deal with these issues and problems. An attorney also usually has more experience in dealing with them than any other service providers for the transaction. This applies both to a sale of a house and to a purchase.

A typical purchase and sale of a house begins when the seller signs a brokerage contract with a real estate agent, usually in writing. When the broker finds a potential buyer, negotiations are conducted through the broker, most often acting as an intermediary. Once buyer and seller reach an informal agreement, they enter into a formal written agreement. Upstate, a real estate agent often prepares the offer or contract, subject to the approval of the parties' attorneys; downstate, the seller's attorney usually prepares the contract. The buyer then seeks – and usually obtains — a mortgage loan commitment. Title must be searched to satisfy both the buyer and his or her lender. Finally, the seller transfers the property to the buyer and the buyer pays the purchase price as the contract requires. It seems simple and uncomplicated. Without an attorney, though, the consequences of buying a house unwisely may be worse than purchasing a car that turns out to be a lemon, or making a stock investment that was unwise.

Another pamphlet, "Buying & Selling Real Estate," explains the contract terms and closing process in more detail.

What are some of the reasons why you need an attorney for a house purchase or sale?

1. Dealing with the Broker. If a seller proceeds without advice of an attorney, the seller may sign a brokerage agreement that creates legal problems and fails to deal with some crucial legal issues. The seller may even become liable to pay a brokerage commission if a sale does not occur, or to pay more than one brokerage commission. Does the agreement let the seller negotiate on his or her own behalf? How does it deal with multiple listings? What are the broker's rights if the seller withdraws the property from the market, or can't deliver good title? And how long should any exclusive listing last? A seller needs the advice and guidance of an attorney in understanding these issues and signing any brokerage agreement. Even for a so-called "standard form", the seller must understand its terms and insist on revising them, if necessary. An attorney can also help assure that the agreement is properly signed.

2. Dealing with tax consequences and other issues. Even though an attorney may not be needed in negotiating the basic deal terms, both buyer and seller will often need to consult with an attorney to answer important questions regarding the tax consequences of the purchase or sale. Those consequences may be crucially important to a seller. For example, what are the income tax consequences of a sale, particularly if the seller has a large profit. Will the seller be able to exclude any capital gains from his or her taxable income? This can require compliance with some very technical tax law requirements that an attorney can explain. How does the purchaser satisfy his or her obligation to assure that a foreign seller has arranged to pay taxes on the sale?

Aside from the tax consequences, buyer and seller may have questions about setting the closing date (and who can extend it and for how long), the date when the buyer can move in, the required physical condition of the property, arranging for an inspection, and what personal property is included in the sale. These and many other questions are better resolved in contract negotiations – with an attorney's help – than by trying to resolve disputes after the parties have signed a contract that paid insufficient attention to these and many similar matters.

3. Dealing with the contract of sale. The formal written contract to buy and sell a house is the single most important piece of paper in the transaction. Its importance can not be overstated. Although a printed form makes a useful starting point, the buyer and seller need an attorney to explain what it says – and what it means taking into account governing legal principles. An attorney can also make changes and additions for a particular transaction to reflect the understanding of the parties in a way that will prevent surprises if the matter ever ends up in court. A written contract may need to address many issues. For example, how should the buyer(s) take title: individually, as tenants in common, joint tenants or tenants by the entirety? What happens if someone dies before title is transferred? The answers to these questions require an attorney's training and knowledge.

A contract raises numerous other legal questions that the parties need to consider, including the following. If the property was altered or the seller built an addition, does the property still comply with the building code? If the buyer has plans for further alterations, will the municipality allow them? What if a buyer has the property inspected, and the inspection discloses termites, asbestos, radon or lead-based paint? What if the property is near a hazardous waste dump site? What are the legal consequences if the closing does not take place as scheduled and what happens to the deposit? Will an attorney or broker hold the deposit in escrow under appropriately worded escrow instructions? How must the buyer pay the purchase price? If the buyer can't obtain a mortgage loan, can the seller keep the buyer's deposit? The contract must answer each of these questions and dozens more – and each answer can be written in a way that favors one party or the other.

4. Arranging for financing. Most house buyers finance 80% or more of their purchase price with a mortgage loan from a lending institution. The contract should say, very carefully, that the buyer's obligations to close are conditioned on the buyer's obtaining a mortgage loan commitment. Printed contract forms often don't cover this issue adequately unless tailored a bit to the particular transaction. In addition, many types of mortgages are now available. The complexities of fixed rates and adjustable rate mortgages – and some of their terms — require the knowledge of an attorney familiar with current mortgage lending practices. Mortgage loan commitments and mortgage loan documents are also complex. A buyer needs an attorney to review and explain the promissory note and other loan documents. Buyers should know when and whether they can prepay their mortgages; how much it might cost them; what happens if they make a late payment; how the lender calculates interest; how much insurance the lender requires; how real estate tax payments will be calculated and handled; and answers to a myriad of other questions that may arise. Although buyers typically cannot negotiate residential loan documents, buyers do need an attorney's help to understand those documents and their consequences.

5. Searching and insuring title. After the parties sign their contract, the buyer needs to know the state of the seller's title to the property, and whether it meets the contract requirements. Generally, a buyer's attorney orders a title search from an abstract or title insurance company. In some areas of New York, though, buyers and their lenders do not obtain title insurance. Instead, an attorney will review title and render an opinion of title in place of a title insurance policy. If you are in an area where buyers customarily obtain title insurance, who will review the title search and explain the title exceptions and other issues the search might disclose? How will you understand what the title policy doesn't cover, and the implications? Does the deed correctly describe the real property you are buying? Are there problems with adjoining owners or prior owners? Did a prior owner agree to any easements, covenants, or restrictions that create problems? Will you be able to build a swimming pool or tennis court? Conduct a business in a spare room? Sell the property without any legal issues or problems? Can a utility company build a high-power transmitter in your back yard? An attorney's guidance and advice can help answer these questions and prevent costly surprises and mistakes.