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THE UNEXPECTED REAL ESTATE BROKER COMMISSION

Many older home owners decide to downsize and move into smaller quarters. They then become not only buyers of a new property, but also sellers of the old homestead. While looking at smaller homes or condominiums, they may meet the seller's real estate broker who has a listing contract on the property they are considering. That broker might offer his or her services to sell the potential purchaser's home. The broker will ask for a listing contract on the old home to be sold. Since most buyers need the equity in the existing home to close the deal, the sale of the home, which should be defined as a closing, not just an accepted offer to purchase, is almost always a condition to buying the new property. This is a fairly normal situation, but there is one problem which lurks in the background.

For any number of reasons, the purchaser may not close on the new property and may then decide to remain in the home. That does not end the matter; however, because the existing home is still subject to the listing contract signed earlier in the transaction. If the broker procures a qualified buyer who submits an offer meeting the price requirements under the listing contract, the broker has earned his or her commission. The home need not be sold, but the listing contract requires the payment of the "earned commission" upon procurement of such a buyer. What started out as a cost saving transaction becomes an unexpected expense; one which could have been eliminated.

In order to avoid this situation, the purchaser/seller should include a provision in the standard Wisconsin listing contract which provides that, if the purchase of the new property fails to close for any reason, the home owner has the right to terminate the listing contract on the existing home and take it off the market. There are issues relating to individuals who have been shown the home before the listing contract is terminated and who subsequently submit an offer, but that instance can also be addressed to negate a commission being earned. In any event, once the listing contract is over, there will be no more open houses nor additional potential buyers who could trigger the payment of a commission notwithstanding the fact that the home is not sold.

Because a broker will, in all likelihood, resist such terms being added to the standard form, people in the market to both buy and sell would be well advised to seek the advice of an experienced real estate attorney in negotiating the terms of the listing contract.