

COLUMBUS REALTORS®'

- WHITE PAPER -

CONTRACT CLAUSES

*Approved for use in Columbus REALTORS®
Standard Real Estate Forms*

*Created by Columbus Realtors Standard Forms Committee
Approved by Jack Burtch, Columbus Realtors Legal Counsel
Approved by Columbus Realtors Board of Directors
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REAL ESTATE CLAUSES

The Columbus REALTORS®, with the guidance and assistance of its legal counsel, has prepared a compilation of form real estate clauses which may be appropriate for certain real estate transactions. This compilation of draft clauses is being made available to Columbus REALTORS® members to assist them in conducting negotiations for the purchase, sale, exchange, rental or leasing of real estate. Its primary purpose is to suggest to real estate practitioners what subjects may need to be considered in connection with the typical real estate transaction. It should be viewed as simply another tool that real estate brokers and salespersons can use when discussing real estate transfers with customers and clients. It must not be used as a substitute for the recommendation that customers and clients seek legal advice with respect to real estate contracts, and therefore, it is provided subject to the conditions and qualifications below.

Agreements to Transfer Interests in Real Estate Must be in Writing to be Enforceable in the State of Ohio.

The Statute of Frauds, found in O.R.C. §1335.01 *et. seq.*, provides that a transfer of an interest in real estate is valid and enforceable only if there is a written contract, memorandum or note covering the significant elements of the transaction. There may be rare exceptions to this general rule, but all real estate brokers and salespersons know that the terms of a real estate transfer must be reduced to writing to be enforceable.

Article 9 of the Code of Ethics and Standards of Practice of the National Association of REALTORS® provides:

REALTORS®, for the protection of all parties, shall assure whenever possible that agreements shall be in writing, and shall be in clear and understandable language expressing the specific terms, conditions, obligations and commitments of the parties. A copy of each agreement shall be furnished to each party upon their signing or initialing.

Therefore, the goal of real estate brokers and salespersons is to bring clients and customers together pursuant to the terms of written agreements for the transfer of interests in real estate.

However, a contract for the transfer of an interest in real estate is a legal document, and the drafting of legal documents, by law, falls uniquely within the province of the legal profession. For this reason, CBR members must be careful in making use of the attached compilation of real estate clauses, always recognizing the fine line between the practice of law and the practice of real estate.

Ohio Law Prohibits Real Estate Licensees From Engaging in the Practice of Law.

The Ohio real estate licensing laws specifically prohibit real estate licensees from performing any service for another constituting the practice of law. O.R.C. § 4735.02 which states in part that “Nothing contained in this chapter [real estate licensing laws] shall be construed as authorizing a real estate broker or salesperson to perform any service constituting the practice of law.” Therefore, a real estate licensee who engages in the unauthorized practice of law is subject to disciplinary action which can include the suspension or revocation of one’s license to engage in the practice of real estate.

Furthermore, the general provisions of Ohio law prohibit anyone from engaging in the practice of law unless they are properly licensed as attorneys. Representing one’s self to be an attorney, when not properly licensed, is a misdemeanor of the first degree and can subject an individual to imprisonment for up to six months and a fine of up to \$1,000.

The practice of law is regulated by the Ohio Supreme Court. Existing case law clearly provides that a real estate licensee is not engaging in the practice of law if he merely assists clients and customers in filling in the blanks on form real estate contracts. In fact, real estate brokers and salespersons regularly and customarily assist clients and customers in filling out form real estate contracts without any fear of a charge that they are engaging in the unauthorized practice of law. However, the farther the real estate licensee moves from filling in the blanks on form real estate contracts to creating legal language, particularly complex legal language, the closer the real estate licensee moves to a potential charge that he is engaging in the unauthorized practice of law. Therefore, it is always prudent for a real estate licensee to recommend that his client or customer consult an attorney in connection with the finalization of any purchase or lease document.

Some may argue that the selection of form clauses for inclusion in a legal document constitutes the practice of law. Selecting clauses to be included in a legal document arguably goes beyond simply filling in the blanks on a form contract even though the clauses that are selected are form clauses that have been prepared and/or reviewed by legal counsel. A case can be made that selecting form real estate clauses from a compilation of real estate clauses that have been drafted, reviewed and approved by an attorney, constitutes the practice of law because the selection requires the exercise of legal judgment. However, the law in this area is not black and white; it is a fine shade of grey that depends upon the underlying facts in a particular transaction. The more sophisticated the decision-making process with respect to the final legal document, the more likely the court will conclude that the real estate licensee engaged in the unauthorized practice of law.

The Compilation of Real Estate Clauses can Only be used as an Additional Tool to Assist a Real Estate Licensee in Negotiating the Transfers of Interest in Real Estate.

For the reasons set forth above, it is important that the attached compilation of real estate clauses is used properly by Columbus REALTORS® members. Clients and customers must always be advised that the selection of these clauses for inclusion in any legal document, as well as the specific language in each clause, should be subject to review by legal counsel retained by the client or customer. The client or customer must understand that real estate licensees are not authorized to give legal advice and that the decision as to which clauses should be included in the form contracts ultimately rests with the client or customer who should discuss this matter with his or her legal counsel. The true value of the compilation of forms is to serve as a checklist of subjects that should be considered and dealt with by the client or customer who is considering the purchase, sale, lease or exchange of real estate.