

Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

What NOT to include in your attorney modification letters

BY COLLEEN L. SAHLAS

Less is more. That idiom also applies to attorney modification letters. Often we think we are zealously advocating for our clients by bulking up our attorney approval letters. But often those bulked-up letters propose inapplicable terms, superfluous terms, or terms that go over like a lead balloon. Some of those bulked-up letters serve to unintentionally remove boilerplate language upon which our client was relying. Failing to actually read your client's contract, or quickly writing modifications which haven't been thought through or well written can also result in undermining our client's best interests.

Here are my suggestions on what not to include in your attorney modification letters.

1. Avoid proposing modifications redundant to the boilerplate contract. A high percentage of the attorney approval letters from opposing counsel I receive in my real estate practice include attorney modifications which are redundant or superfluous to boilerplate contract language. A fundamental function of the attorney is to read the underlying agreement upon which the entire transaction is based. Before proposing modifications to the contract, first become well versed in the boilerplate language with the most recent version of contracts customarily used in your geographical area. Then,

read your client's actual contract before crafting an attorney modification letter. Modifications I see quite frequently from opposing counsel which are redundant to the Multi-Board 6.1 contract are: requesting that the buyer have the right to cancel the contract if the subject property is located in a flood zone; requesting that Seller represent that they are not aware of any building code violations; requesting that the closing date be amended to include the words, "or sooner as mutually agreed by the parties;" or asking for the buyer to have the right to cancel if the appraisal procured for the buyer's FHA loan results in a value of less than the purchase price (the FHA Amendatory clause already provides for this).

2. Avoid proposing modifications until you've first obtained readily available information, such as whether or not a property has a senior tax exemption or senior freeze exemption. I can't tell you how many times I've had opposing counsel request a tax proration be calculated without the senior exemption when a quick internet search reveals a senior exemption hasn't even been applied to the prior year's tax bill.
3. Avoid proposing modifications which offer little to benefit your client at the risk of killing the deal. It's a cost-

benefit analysis. The Multi-Board 6.1 now includes as a default position that attorney approval letters are sent via 11c, wherein either party can send notice of cancellation if agreement cannot be reached within 10 business days of the date of acceptance. Why risk cancellation over something which isn't a "hill to die on?" Choose your battles.

4. Avoid using vague language indefinitely extending the attorney approval and inspection provisions. Rather, monitor your cases and extend those provisions as necessary to a specific date. For example, one opposing counsel writes, "The attorney approval and inspection provisions shall be extended until we resolve all items." What if opposing counsel takes weeks to reply to your letter? Now your client is trapped in a perpetual attorney approval and inspection period ceasing only when opposing counsel decides to respond. And if the parties cannot "resolve all items," then the attorney approval and inspection periods extend indefinitely and your client has no option to cancel the contract.

If you're guilty of including the above terms in your attorney approval letters simply because you are trying to save time and work from a single template letter, then I suggest you draft several template

attorney approval letters, each tailored for different contracts/types of deals: one for each of the boilerplate contracts customarily used in your geographical area (for example, the Multi-Board 6.1,

the Chicago Board of Realtors Contract, etc.), one for condominiums/townhomes, one for condo conversions, one for new construction, one for short sales, one for Real Estate Owned deals, one for FHA

deals, etc. You won't be re-inventing the wheel each time, you'll remember to include what's necessary and leave out what isn't. ■

**THIS ARTICLE ORIGINALLY APPEARED IN
THE ILLINOIS STATE BAR ASSOCIATION'S
REAL PROPERTY NEWSLETTER, VOL. 62 #2, AUGUST 2016.
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