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Keep litigious proclivities out of real estate transactions

BY COLLEEN L. SAHLAS

A litigator's strategies may be effective in litigation, but in a residential real estate deal they can backfire, be destructive, and even jeopardize your client's contractual rights.

There's no doubt the work you do *most* of the time will influence the work you do *some* of the time. If you handle real estate transactions but the greater part of your legal practice involves litigation, you may have to be vigilant to keep your litigious proclivities out of your real estate transactions.

Here are eight litigious proclivities to avoid in your residential real estate practice:

1. Drafting attorney approval letters as though they were responsive pleadings or settlement agreements

On a recent deal, opposing counsel and I had each sent our attorney approval and inspection letters to one another, then replied in turn to each other's letters, and again responded to the reply letters. To my surprise, opposing counsel then took our numerous correspondences and compiled them into a single, *nine (9) page letter* with a final response. Since his legal practice consisted mainly of litigation, it was not a surprise that the 9 page letter was formatted like a settlement agreement. I dreaded the thought of having to comb through it and compare it to our 6 prior correspondences. Besides being redundant, onerous to read, and time consuming to draft, this was unnecessary. It invited errors and discrepancies which, if agreed to, would have superseded all prior correspondences. The K.I.S.S. method applies here - keep it simple (and succinct).

2. Stonewalling, stalling, or protracting communications in real estate deals

Stonewalling is a choice technique among litigators because it requires no time, effort or problem solving skills and it avoids direct confrontation. It allows an attorney to avoid disclosing unfavorable or damaging information and buy time to try to resolve an issue, or put off fulfilling an obligation or duty.

Stonewalling is a complete shut down in communication and consequently, it can put the deal into perpetual limbo or bring it to a standstill.

Of greater concern is that stonewalling could be deemed a breach of contract. There are 2 boilerplate, contractual terms which stonewalling potentially breaches: the "time is of the essence," clause and the covenant of good faith and fair dealing.

First, the "time is of the essence," clause, calls for strict performance of dates as opposed to performance within a reasonable time even after the date specified. Barron's Law Dictionary defines "time is of the essence," as: "a term used in contracts that fixes time of performance as a vital term of the contract, the breach of which may operate as a as a discharge of the entire contract . . . . that the performance by one party at a time specified in the contract . . . is essential in order to enable him to require performance from the other party."

Second, stonewalling could be deemed a breach of the implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing applies to every real estate transaction in Illinois absent express disavowal. This covenant is expressly stated in the Multi-Board 6.1 contract at paragraph 29. "Bad faith" is described by the Court in *Hentze v. Unverfehrt* (1992), 237 Ill App 3d 606, 611, 604 NE2d 36 as "opportunistic advantage-taking or lack of cooperation depriving the other contracting party of his reasonable expectations." 604 NE2d 5. When you stonewall opposing counsel by failing to communicate information essential to the transaction, such as the Buyer's financing status, or other salient terms of the contract, your actions could be construed as, "opportunistic advantage-taking or lack of cooperation depriving the other contracting party of his reasonable expectations."

3. Being adversarial and combative rather than collaborative

A. Unlike litigants, real estate Buyers and Sellers are not adverse parties

The parties in a real estate deal have agreed to covenants and made promises to each other - they are not suing for broken promises and damage done. Everyone has the same goal: getting the deal closed.

B. Generally speaking, real estate deals should be a joyful time in the lives of your clients

Buying a new home is a dream come true for many people. In your legal practice, house closings could be a refreshingly positive change from your adversarial, litigation practice.

C. The litigator's role and the real estate attorney's roles are vastly different

Litigation *ends* when agreement is reached. Conversely, a real estate deal *commences* when agreement is reached. Hence, the primary role of the litigator is to argue the case until settlement occurs or a trial verdict is rendered. By contrast, the attorney's role in real estate transaction is to assist the client in performing the promises in the contract while preserving the client's rights, mitigating the client's risks, obtaining information to advise the client of their contractual obligations and options, and acting in the client's best interest (which is usually to finalize the sale).

D. Use problem solving skills in lieu of making rigid demands.

Rather than staunchly adopting polarizing positions and combative arguments, attempt to employ creative problem solving, collaborative methods and seek a win-win outcome. John William Davis is quoted as saying, "True, we [lawyers] build no bridges. We raise no towers. We construct no engines. We paint no pictures . . . . There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state."

4. Protracting attorney approval or inspection negotiations

A. Don't use the Attorney approval clause to reinvent the wheel

Typically, a real estate attorney is hired after the agents have hashed out major terms and a sales agreement is signed. This is a tremendous advantage: you're not starting from scratch with negotiations. Moreover, the Multi-Board 6.1 contract is comprehensive and hard to improve upon. That's not to say a lengthy attorney approval letter is excessive, however. Utilize the attorney approval to correct the agent's drafting errors, to incorporate overlooked verbal agreements, and to draft case-specific, protective language.

B. When you belabor negotiations, you are unwittingly granting the opposing party extended time to cancel the deal

Meanwhile, time is ticking away and deadlines approach: buyer must file a loan application, order an appraisal, file an intent to proceed with the lender, and obtain a written mortgage commitment, while seller must order title and survey. Many of those obligations have a non-refundable price tag attached if the deal falls apart. So button up negotiations early on to solidify the deal and avoid your client's potential loss of monies spent on a failed transaction.

Some may argue the risk of cancellation doesn't exist if the parties invoked the Multi-Board 6.1 contract at paragraph 11d, since that provision does not afford either party the right to cancel if agreement cannot be reached in attorney review. However, most savvy attorneys wanting to get their client out of a deal will invoke the right to cancel pursuant to the inspection provision in lieu of paragraph 11d, anyway.

When you procrastinate in responding to opposing counsel's letter, you are putting your client's deal in jeopardy. You put the control in opposing party's hands. This is a major risk to your client, particularly if it's in their best interest to keep the deal together. Instead, expedite negotiations and communications to solidify the deal and snuff out the opposing party's right to cancel.

5. Majoring on the minors

Winston Churchill said, "You will never reach your destination if you stop and throw stones at every dog that barks."

You are not acting in your client's best interest when you push trivial matters. The Encyclopedia Britannica defines the law of diminishing returns as an "economic law stating that if one input in the production of a commodity is increased while all other inputs are held fixed, a point will eventually be reached at which additions of the input yield progressively smaller, or diminishing, increases in output." Simply put, the overall return on the investment increases at a declining rate. The same is true when advocating for your client on minor issues: it will produce a diminishing return.

In a recent transaction, opposing counsel pushed for his client's right to cancel the deal through the closing date if the property was deemed to be in a flood zone. This was unnecessary for numerous reasons: first, the buyer's lender would have obtained a flood certification prior to the closing date, and second, Counsel could have instead requested an extension of the date when and if more time was needed. Harping on secondary issues amounts to the tail wagging the dog.

6. Withholding information pertinent to the deal

Many attorneys request financing extensions but are ignorant of the actual loan application status or whether or not their client has timely applied or delayed the process (i.e. timely submitting the loan application and intent to proceed, ordering the appraisal, timely submitting documents required by the lender, etc.).

But other attorneys are aware their client has delayed the loan process and try to cover it up. They fail to tell you their client has changed lenders one week before the closing, or that their client won't meet the underwriting conditions unless they borrow from or liquidate a 401k. They offer vague answers to specific questions about what is causing the delay, or which loan approval conditions remain. They stonewall to avoid revealing any negative information about their client.

The Multi-Board 6.1 contract allows (at

paragraphs 8a and 8b) the Buyer to timely terminate the contract and receive the return of earnest money if the Buyer cannot provide evidence from a lending institution confirming either: a) Buyer's Intent to Proceed; or b) Buyer's written Mortgage commitment. The contract language further stipulates that, "A Party causing delay in the loan approval process shall not have the right to terminate under either of the preceding paragraphs," (emphasis added).

If your client is causing delay in the loan approval process and you are mechanically churning out extension letters to buy time, you could be assisting your client in the breach of contract and could jeopardize their ability to cancel and receive the return of their earnest money.

7. Disregarding contractual limitations and making arbitrary demands

An example I see far too often is attorneys who disregard the "as is" provision and request a credit in lieu of repairs or a reduction in purchase price. No boilerplate contract allows for this, hence the phrase, "as is." The "as is" in any boilerplate contract, including the Multi-Board 6.1 contract, limits the buyer to 2 options: either proceed with the deal and or cancel—that's it. The option to request repair credits is specifically stricken in the "as is" provision in the Multi-Board 6.1 contract; tell your client to choose from the "take it or leave it," options which the contract provides.

I regularly see attorneys send inspection letter demands for excessive credits without any supportive criteria. For example, one buyer's attorney (who regularly defends DUI cases), sent an inspection letter to my selling client requesting a $15,000 credit to repair a "defective garage," stating the buyer's truck was too large to fit inside. The garage was not defective; the truck was too large. That is not a property condition defect, it's a personal predicament. Once upon a time, attorneys did not make ludicrous inspection requests. Instead, they advised their clients of the contractual limitations as to what inspection items can be raised: the major defects, not routine maintenance items, and not items which were "at the end of their useful life" but still in operating condition they requested a credit from the Seller.

Instead of raising an entire laundry list of inspection defects in the report summary, advise your clients to pick their battles and warn them that asking for the entire list will probably insult the other party and go over like a lead balloon. Since keeping the deal together is often in your client's best interest, caution your clients against pushing the envelope with negotiations or asking for overinflated credits without supportive estimates.

Disregarding contractual limitations and making arbitrary demands could be deemed as acting in bad faith and a breach of the implied covenant of good faith and fair dealing (discussed earlier).

8. Derisive tactics

Any playground bully is capable of cheap tactics such as intimidation, bullying, manipulation, insults and derision. It takes a skilled and seasoned lawyer to carefully analyze, problem solve and argue the merits of a case.

In short, real estate transactions should be transactional, not litigious. Abraham Lincoln said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. . . . As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough. Never stir up litigation. A worse man can scarcely be found than one who does this."■

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