ILLINOIS STATE BAR ASSOCIATION

MAY 2017 VOL 62 NO. 10

Real Property

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

Avoiding liabilities when working alongside real estate agents

BY COLLEEN L. SAHLAS

There are pros and cons to working alongside real estate agents when representing your client. A good agent can set realistic expectations for the client and educate them about the process. They can negotiate and fill in initial contractual terms, negotiate inspection issues, iron-out party relations, recommend reputable contractors, inform about market conditions and property sale history, coordinate property access, assist in fulfilling municipal requirements, prepare a comparative market analysis, and provide "hand-holding" for the client.

But some agents may lack specific knowledge or skills, get caught up in emotion, or make mistakes like anyone else. An agent may misinform the client about real estate procedure or incorrectly complete the boilerplate contract. Fearing loss of commission, an agent may persuade a client to stick with a deal against the client's best interest. Agents can overstep their authority, leak information, draft vague addendums, add drama or distractions to the process, or even compete with the attorney for the driver's seat. **And you as the attorney could be held responsible if you do not address or attempt to mitigate the damage that could result.**

10 common scenarios in which you must act to protect your client:

1. When an agent drafts a contract amendment.

Real estate agents are prohibited by law from drafting contract amendments or any other documents subsequent to the contract. The Chicago Bar Association v. Quinlan and Tyson, Inc. 34 Ill.2d 117, 1966. They are only permitted to fill in blank lines in a standard, customary contract whose boilerplate provisions have been drafted by an attorney. *Id.*

Many real estate agents are not even aware that they are committing the unauthorized practice of law by drafting amendments and Riders. Utilize the attorney approval provision to revise the agent's sketchy language.

2. When an agent gives legal advice to your client.

Overzealous agents may try to chime in along with you at closing while you are explaining legal instruments to the client.

Or, agents sometimes attempt to give legal advice to a client to persuade a client or gain control over a situation. On one occasion, an agent was frustrated with my client and was trying to talk her out of canceling the deal. The agent told my client that if she cancelled, she would not be entitled to the return of her earnest money, which was patently wrong.

When an agent gives legal advice, they are committing the unauthorized practice of law. In *The Chicago Bar Association v. Quinlan and Tyson, Inc.* 34 Ill.2d 117, 1966, the Illinois Supreme Court stated, ". . . The opinion of this court . . . prohibits explanation by the brokers of the provisions of the contract . . . " and stated further that, "it requires a lawyer's advice . . . ."

Advise your client that only attorneys have the legal knowledge, skill and authority to interpret and advise about legal matters.

3. When an agent does not correctly fill in the boilerplate contract.

The attorney modification provision is your opportunity to correct and complete what the agent may have overlooked or inaccurately written, for example:

A. **When an agent does not complete blank lines in the contract.** At times, an agent may leave pertinent mortgage contingency terms incomplete such as the interest rate, the type of loan, the

loan amount, and the number of years of the loan. These must be completed in attorney approval. Often, in the Multi-Board 6.1 contract, agents will leave blank lines at: line 20 regarding additional earnest money, lines 36 and 38 for personal property included or excluded, line 40 for any personal property which Seller does not warrant, and paragraph 30 listing riders or amendments. In attorney approval, state that these are either stricken or state, "none," so they are no longer open for negotiation.

B. **When an agent writes, "common," to describe the lot size for condominiums** (a meaningless description). Via attorney approval, strike and replace it with, "as per survey attached to the Declaration of Condominium," or the actual square footage.

C. **When an agent misrepresents the type of parking space for a condominium** (i.e. whether it is deeded fee simple, or is a limited common element or an assigned common element). If you represent the Seller, utilize the attorney approval to clarify that the type of parking to be conveyed will be as per the Declaration and By-laws and title commitment, and if it differs from that listed in the contract, then the Declaration and By-laws and title commitment shall prevail.

D. **When an agent writes the word, "owner of record," to describe the seller.** In attorney modification, identify the seller by name in order that the buyer has a contract with the Seller who signed the contract and not an ambiguous, unidentified party.

E. **When an agent does not properly complete the home sale contingency provision.** In a recent contract, a Buyer's agent completed the home sale contingency with completely false information, representing that Buyer was already under contract for the sale of their home. During attorney approval, we discovered the Buyer's home was not yet even listed with a broker, much less under contract.

Additionally, in the Multi-Board 6.1 contract, many agents will complete paragraphs 32a and 32b and leave paragraphs 32c and 32d blank. The latter paragraphs must also be completed to reflect the parties' agreement as to the number of hours for the kickout clause and additional earnest money required, if any.

F. **When an agent does not write the subject property address on each page of the contract**. Complete this in attorney review in order that each page of the agreement can be properly identified with the subject property.

G. **When an agent fails to have the parties initial paragraph 36 for a cash deal on the Multi-Board 6.1 contract,** despite the fact that the mortgage contingency states at lines 50-51 on its face that paragraph 36 MUST BE USED: "If this contract IS NOT CONTINGENT ON FINANCING, Optional paragraph 36a or 36b must be used." Address this in attorney review.

4. When an agent tries to exert their advice over yours.

An agent may try to influence the client against your advice. For example, an agent may tend to push to keep a deal alive (remember, the agent's commission is at stake) even when it's in the client's best interest to terminate the deal.

The client may be partial to the agent's advice over yours for several reasons. First, the general public holds has a negative image of attorneys, perceiving them as untrustworthy. Second, buying or selling a home often presents itself as a client's first experience hiring an attorney; thus they are unfamiliar with the attorney-client relationship. Next, sellers and buyers of real estate are often resistant to hiring an attorney in the first place because the common misconception is the agent can handle the entire transaction. Finally, before you are hired, the client's real estate agent has likely been working with them for months, even years, and carried them to the point of a signed sales contract. The client is conditioned to the agent's guidance and the agent is accustomed to calling the shots. Naturally, the client may inclined to trust the agent over the attorney.

Inform your client that an agent cannot give legal advice and only the attorney can advise them about their legal rights, risks, remedies and obligations in the deal.

5. When an agent gives incorrect procedural information to your client.

Recently, a client who had a sale with a home sale contingency clause received a second offer. The agent wrote an email to me and copied the client stating, "as we all know, the client cannot accept another offer while under contract with another buyer." The agent was not familiar with paragraph 33 of the Multi-Board 6.1 contract which allows for a second contract to be executed because it is contingent on the cancellation of the first.

You've come across it, too. The agents themselves may not be well versed in real estate and could mislead the client with incorrect procedure, protocol, time frames or expectations. It is your responsibility to correct the misunderstanding.

6. When an agent distracts you (and your client) from important legal issues at closing, or pressures you to get the closing done quickly.

Unlike the agent, you as the attorney have a mountain of work to do at a closing. The Buyer's attorney must analyze hundreds of pages of loan documents, ensure the client receives a properly waived title commitment, examine the survey for encroachments or other defects, review any association documents, interpret any warranties, assess the closing figures for accuracy, scrutinize the ALTA and other title company documents and legal instruments prepared by the Seller's attorney and wrap up any final walk-through issues.

But nearly every closing comes complete with 2 well-meaning but often chatty agents who are simply there awaiting their commission checks. Often arriving late and glad-handing everyone in the room, they typically (and unapologetically) interrupt you as you are trying to explain the legal documents to your client. As a rule, the agents will continue to engage in unceasing (and sometimes loud) chit chat and create a social and entertaining atmosphere rather than a productive, businesslike atmosphere. This can break your concentration as you

calculate prorations and comb through fine print. And it can detract your client from listening to you, since your mundane explanations of legalese cannot compete with the agents' bubbly conversation and bottle of bubbly they brought to congratulate the client.

Be wary: these distractions could cause you to overlook an important issue for which you'll be held liable, especially if you are the Buyer's attorney. Leave the room for a few minutes to negotiate with the other attorney in private, to speak with your client about a critical issue, or to review complex documents without disturbances.

Don't feel pressured to get through the documents quickly so everyone can leave and start celebrating a successful closing. Instead, take your time and ensure the accuracy of all documents (and make sure your client received all credits they were entitled to, and that Seller paid all required expenses or payoffs as per the contract, including any home warranty).

7. When an agent erroneously has a Seller complete the Statutory Illinois Real Property Disclosures although the Seller qualified for the statutory exception.

The exceptions to the Residential Property Disclosure Act are listed at 765 ILCS 77/15. This often arises in a decedent's estate or trust administration real estate sale. Invoke the attorney modification provision in the contract to strike these disclosures in their entirety and disclaim Buyer's reliance upon them, and provide that this revocation/disclaimer shall survive the closing.

8. When an agent has the contract signed by a party who is not owner of record, or fails to obtain signatures from the actual owners of record.

Agents do not examine title for ownership, thus, they may improperly identify the owner of record. For example, in a bond of lieu of probate, they may not include all the heirs of the estate. Or, the agent may not know that the property is owned in a land trust or living trust, or who has power of direction to convey. If you represent the seller, obtain a title search before the attorney approval expires to ensure the Sellers were properly identified on the contract and the proper signatures were obtained.

9. When an agent usurps your authority

An agent might usurp the attorney's authority. For example, when representing one of my clients who was purchasing an R.E.O. deal, the client's agent actually drafted a Fannie Mae amendment mid-transaction, had the client sign it and was just about to send it to Fannie Mae before I discovered what was going on. (Beware of communications between the agent and the client from Saturday-Sunday which could turn into complications for you on a Monday).

Another example is when an agent might communicate or leak your client's position to the other side without your client's authorization.

Finally, you may encounter an unscrupulous agent. While representing a client last year, the agent for the opposing party sent texts and emails to myself and my client's agent, threatening to kill the deal if certain ultimatums weren't met by a specific deadline. When I contacted opposing counsel, she advised she had no knowledge of his communications, that he was "a rogue agent," and his ultimatums and deadlines were sent without his client's authorization.

10. When an agent recommends an idea which would result in undue liability on you and/or your client. Here are some examples from my own experience

A seller (e.g. an elderly person on a fixed income) may lack funds to make required FHA repairs or municipal repairs to a property prior to closing, and the deal is contingent upon repairs. The agent may suggest having the buyer (who is often a rehabber or contractor in these situations) repair or pay for those repairs prior to closing. Naturally, there are liabilities for seller and buyer if buyer were to spend their own time and money making improvements on a property that buyer does not own, such as: if the deal fell through then buyer could not recoup the time and money spent on the improvements, or buyer's attempts at "improvements" could result in damages or even violations of building codes, or buyer could injure themselves or someone else while on the subject property.

Or, to accommodate a Buyer's particular moving situation, i.e. to avoid an extended stay, or avoid renting storage space and moving all of Buyer's possessions twice, an agent might unwisely suggest the Buyer take pre-closing possession. Again, this is risky especially if the Buyer's financing were to fall through or Buyer was unable to close for some other reason. Seller is then in a position of having to "evict" Buyer and repair any damages to the property the Buyer may have caused before Seller would be able to put the property back on the market. Additionally, there may be a dispute over earnest money which could delay efforts to market the property again.

Finally, an agent might suggest you act as escrowee for a post-closing escrow (e.g. for property tax re-prorations, upcoming special assessments, or post-closing possession), in order to "save" the client from having to pay the not-so-onerous fee of $200 or so for a joint order escrow with the title company. But acting as an escrowee can be fraught with liability according to attorney and author Michael J. Rooney who discusses the "trials and travails" of acting as escrowee in his Real estate ethics corner article in the ISBA Real Property Newsletter from December, 2012, vol. 58 no. 5. So why should you assume the liability as escrowee let alone do it without getting paid?

Defining Roles and Liability between Agents and Attorneys in Real Estate

While it's congenial to tell real estate clients that agents and attorneys are "all on the same team," it is misleading. First, the agent's and the attorney's roles are not equal. A real estate sale/purchase is a legal transaction, and the agents handle only the marketing and sales aspects. Clients do not realize the agent is merely a salesperson and an attorney is necessary to handle the legal aspects of a real estate deal (at least in the greater Chicago Metro area).

Second, the agents' and attorneys' functions in real estate actually run

consecutively, not concurrently. First, the agent markets the property and brings a deal together. After contract execution, the agent's primary function is completed while the attorney's is just commencing (and typically is not completed until closing). Agents continue to offer ancillary services after the attorney steps in, but the attorney's role is essential from contract signing through closing.

Third, the attorney must act in the best interest of the client and has a fiduciary duty to the client; by contrast, the agent does not have these duties. To the contrary, the very fact that the agent is paid a commission only if the deal goes through is an inherent conflict of interest.

Fourth, your risk of liability in the transaction is far greater than that of the agent. The attorney is like a captain of a ship, while the real estate agent is like the travel agent who sold the cruise line tickets. Once the tickets are sold and passengers are aboard the ship, the captain takes charge of the course and assumes all liability.

Fifth, when the deal goes sour, everyone expects the attorney to work the miracles or take the blame for the fallout. There's no "team" when extremely unpleasant things occur. So disregard the platitude, "there is no 'I' in 'team,'" because there is an "I" in: "Fiduciary," "Practitioner," "Representative," "Advisor," "Risk Mitigator," "Instrument Drafter," "Officer of the Court," "Liability," "Professional Responsibility," "(ARDC) Complaint," and especially, "Malpractice Lawsuit."

Final Thoughts

Working relationships between attorneys and agents in real estate can often be positive and valuable. But it's critical to understand and address the roles between agents and attorneys, define the boundaries, and be wary of potential liabilities that could result from working alongside them. So, Skipper, put on your sea captain's hat, grab the ship's wheel, and be prepared for stormy seas. ■