Avoiding Liabilities When Working Alongside Real Estate Agents

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There are pros and cons to working alongside real estate agents when representing a client. A good agent can set realistic expectations for the client and educate him about the process. Agents can negotiate and fill in initial contractual terms, negotiate inspection issues, iron out party relations, recommend reputable contractors, inform a client 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 there may be drawbacks. Some agents may lack specific knowledge or skills, get caught up in emotion, or make mistakes. An agent may misinform the client about real estate procedure or incorrectly complete the boilerplate contract. Fearing the loss of a 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 addenda, add drama or distractions to the process, or even compete with the attorney for the driver's seat. And the attorney could be held responsible for failing to address or attempt to mitigate the damage that could result.

This article identifies 11 common scenarios in which the lawyer must act to protect the client.

When an Agent Drafts the Contract

States take varying positions regarding a real estate agent's authority to draft real estate contracts. In many states, real estate agents are prohibited by law from drafting contracts or any other documents subsequent to the contract. See, e.g., *The Chicago Bar Association v. Quinlan and Tyson, Inc.*, 214 N.E.2d 771 (Ill. 1966). Agents may be permitted to fill in blank lines in a standard, customary contract that has been drafted by an attorney, id., but that permission may not extend to contract amendments. See, e.g., *Hogan v. Monroe*, 684 P.2d 757, 760 (Wash. Ct. App. 1984) (real estate agent's drafting of addendum to earnest money contract was the practice of law).

Other states give real estate agents greater authority to draft real estate contracts beyond the use of simple, boilerplate forms. See, e.g., *New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards*, 461 A.2d 1112, 1114 (N.J. 1983), supplemented by 467 A.2d 577 (1983) (permitting real estate brokers to draft contracts if the contract contains a prominent clause informing the parties of their right, through

counsel, to cancel it within three days); *Cowern v. Nelson*, 290 N.W. 795 (Minn. 1940) (upholding statute permitting parties to a real estate transaction, or their agents, to draft contracts or other papers incident to the transaction).

Although the real estate agent may have authority in some states to draft contracts, it does not mean the agent will actually draft such documents accurately. The agent's final writing may be at best a flimsy outline of the actual agreement and at worst a legal disaster for the client. Lawyers understand that legal documents drafted by a layman will often be vague or contradictory, lack essential or specific contract terms (who, what, when, where, and why), lack legal consideration, fail to meet other legal requirements or properly use legal terminology, fail to take into consideration local laws or rules, or any parole evidence rule, result in detrimental outcomes, or be altogether unenforceable. In short, the risk of poor legal outcomes increases, and there is even a more pressing need for a lawyer's review of those documents.

If available, the lawyer should use the attorney approval or modification provisions to revise the agent's sketchy language. If the contract does not include such a provision, then the attorney might look for a right to rescind. In New Jersey, for example, parties to the contract prepared by a real estate agent can obtain attorneys and may cancel the contract within three days after the contract has been signed. *In re Opinion No. 26*, 654 A.2d 1344 (N.J. 1995).

When an Agent Does Not Correctly Fill in the Boilerplate Contract

The attorney modification provision or review period is the lawyer's opportunity to correct and complete what an agent may have overlooked or inaccurately written. For example:

When an agent does not complete blank lines in the contract **.** At times, an agent may leave pertinent terms incomplete, such as whether additional earnest money is required; identification of the exact mortgage contingency terms such as the interest rate, the type of loan, the loan amount, and the number of years of the loan; whether personal property is included or excluded; and cross-references to riders or amendments that should be part and parcel of the contract. The lawyer can use an attorney approval authority to address these incomplete terms or blank lines in the contract. If terms are inapplicable, then the lawyer should strike or state "none," so they are no longer open for negotiation.

When an agent incorrectly describes the lot size of a condominium. One of the authors, Sahlas, has fre-quently encountered real estate agents' use of the vague term "common" to describe the lot size of a con-dominium. This word fails to quantify a lot size and contradicts the basic principle that every parcel of real estate is unique. Through the attorney approval process, the attorney can strike and replace the vague term with "as per survey attached to the declaration of condominium" or else write in the actual square footage.

When an agent misrepresents the type of parking space for a condominium (i.e., whether it is deeded fee simple, is a limited common element, or is an assigned common element). If an attorney represents the seller, the attorney can use the attorney approval process to clarify that the type of parking to be conveyed will be as per the declaration and bylaws and title commitment and, if it differs from that listed in the contract, then the declaration and bylaws and title commitment will prevail.

When an agent fails to specifically name a party to the contract. For example, many agents will write "owner of record" to describe the seller and omit the seller's name. Under the statute of frauds, the parties to a contract must be identifiable, which generally requires including the names or a description of the parties. *Kohlbrecher v. Guettermann*, 329 N.E. 246, 250 (Ill. 1928). Thus, the agent's failure to include the parties' names could create ambiguity that puts the validity of the contract at risk. In *Goldman v. Olmstead*, 414 S.W.3d 346 (Tex. App. 2013), the Goldmans asserted (among other things) that the contract failed to identify the sellers and, accordingly, it failed under the statute of frauds. The Texas Court of Appeals ultimately found that the contract named the sellers in the notice provision and their initials and signatures identified them and that this was sufficient information to identify the seller. Id. at 355. Nevertheless, the case exemplifies the point that an attorney could have avoided putting the client at risk of loss or litigation by simply adding the parties' names to the contract.

The agent's failure to clearly identify the seller may also stem from the agent's self-interests. On this point, *Farahani v. Bastanipour*, 553 B.R. 111 (Bankr. N.D. Ill. 2016), is particularly instructive. In *Farahani*, the real estate agent took advantage of her client's trust and did everything possible to prevent the buyer from knowing the seller's identity. Id. at 115. Significantly, the contract described the seller only as "the owner of record" and the seller's "printed and signed names [were] illegible." Id. At closing, the buyer finally found out that the seller was the real estate agent. Id. at 116.

When an agent does not properly complete a home sale contingency provision. In a recent experience of one of the authors, Sahlas, a buyer's agent completed the home sale contingency in the contract with completely false information, representing that the buyer was already under contract for the sale of the buyer's home. During the attorney approval process, the attorney discovered the buyer's home was not yet even listed with a broker, much less under contract. In reviewing this type of contingency, the attorney should ensure that the agent has provided the following information: an accurate identification of the subject real property upon which the home sale contingency relies; whether the property is listed for sale with a real estate agent; whether it is under contract for sale (and if it is, the contingency and contract closing dates); whether such sales contract itself has a home sale contingency; the number of hours for the kick out clause; and whether any additional earnest money is required.

When an agent does not write the subject property address on each page of the contract . Some states require each page of the agreement to have the subject property address identified on it. Attorneys can use the attorney approval provision, if available, to address this issue.

When an agent fails to accurately modify a financing clause. As an example, Illinois's Multi-Board Resi-dential Real Estate Contract 6.1 has a mortgage contingency provision stating that "Paragraph 36 a) OR Paragraph 36 b) MUST BE USED" when the contract is not contingent on financing. Agents often over-look this extra step; they will strike the mortgage contingency paragraph and write in "cash" but fail to strike or complete the required paragraph 36.

When an Agent Gives Legal Advice to the Client

Overzealous agents may try to chime in while an attorney is explaining legal instruments to the client at closing. Or agents might 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 the client of one of the authors of this article, Sahlas, and was trying to talk her out of canceling the deal. The agent told the client that if she cancelled, she would not be entitled to the return of her earnest money, which was patently incorrect.

In most states, a real estate agent who gives legal advice is engaging in the unauthorized practice of law. The Indiana Supreme Court stated that the "core element of practicing law is the giving of legal advice to a client[.]" *Miller v. Vance*, 463 N.E.2d 250, 251 (Ind. 1984); cf. *Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. Sturgeon*, 635 N.W.2d 679, 684 (Iowa 2001) (concluding that "non-attorney bankruptcy specialist" engaged in the practice of law by rendering advice to his clients, as well as preparing and filing bankruptcy documents). But see *Morley v. J. Pagel Realty & Ins.*, 550 P.2d 1104, 1108 (Ariz. 1976) (stating that real estate agents have not only the right to prepare any and all instruments incident to the sale of real property but also "the responsibility and duty of explaining to the persons involved the implications of these documents").

It is not uncommon for an agent to overstep his authority by attempting to give legal advice. To circumvent the overzealous agent, attorneys can advise their clients that only attorneys have the legal knowledge, skill, and authority to interpret and advise about legal matters.

When an Agent Tries to Exert His Advice over the Lawyer's Advice

An agent may try to influence the client against the lawyer. For example, because an agent's commission is at stake if the deal falls apart, an agent may tend to push to keep a deal alive even when the deal is not in the client's best interest. The client may be partial to the agent's advice over the lawyer's for several reasons. First, the general public holds a negative image of attorneys, perceiving them as untrustworthy. Second, buying or selling a home often presents itself as a client's first experience in hiring an attorney; the client is 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 of the common misconception that the agent can handle the entire transaction. Finally, before a lawyer is hired, the client's real estate agent has likely been working with the client for months, even years, and has carried the client 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 be inclined to trust the agent over the attorney.

Here again, attorneys can counteract these tendencies by informing clients 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.

When an Agent Gives Incorrect Procedural Information to the Client

One of the authors, Sahlas, recently represented a seller of residential real estate under a contract that had a home sale contingency. The contingency allowed the seller to continue to market the property and accept a second contract subject to cancellation of the first contract. When an offer came in during the pendency of the contract, the agent instructed the clients not to accept it, stating, "as we all know, the client cannot accept another offer while under contract with another buyer." Rather than recognizing that she was unfamiliar with legal terms of the contract and should have allowed Sahlas, as the lawyer, to direct the clients in this process, the agent gave erroneous advice that was not in the clients' favor and completely undermined the point of the home sale contingency.

In other situations, the agents themselves may not be well-versed in real estate and can mislead the client with incorrect procedure, protocol, time frames, or expectations. It is the attorney's responsibility to correct the misunderstanding.

When an Agent Distracts the Lawyer (and the Client) from Important Legal Issues at Closing or Pressures to Get the Closing Done Quickly

Unlike the agent, the attorney typically has a mountain of work to do at a closing. The buyer's attorney often analyzes hundreds of pages of loan documents, ensures that there is clear title, examines the survey for encroachments or other defects, reviews any association documents, interprets any warranties, calculates the closing figures for accuracy, reviews the ALTA and other title company documents and legal instruments prepared by the seller's attorney, and negotiates any final walk-through issues.

But nearly every closing comes complete with two well-meaning, but often chatty, agents who are attending merely to receive their commission checks. Often arriving late and glad-handing everyone in the room, they typically (and unapologetically) interrupt the attorney trying to explain the legal documents to the client. As a rule, the agents' chit chat creates a social and entertaining atmosphere rather than a productive, businesslike atmosphere. This can break the attorney's concentration while calculating prorations and combing through fine print. It also can detract the client from listening to the attorney, because 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 an attorney to overlook an important issue for which the attorney will be held liable, especially the buyer's attorney. To avoid the distraction, the attorney can leave the room for a few minutes to negotiate with the other attorney in private, to speak with the client about a critical issue, or to review complex documents without disturbances.

Most importantly, attorneys should not feel pressured to get through the documents quickly so everyone can leave and start celebrating a successful closing. Instead, their responsibility is to take the time to ensure the accuracy of all documents and make sure the client has received all credits the client is entitled to and that the seller has paid all required expenses or payoffs as per the contract, including any home warranty.

When an Agent Facilitates a Seller's Completion of a State-Required Real Property Disclosure Form Even Though the Seller Qualifies for an Exception

By statute or common law, many states require sellers to complete a real property disclosure form to disclose and generally describe any condition affecting the seller's property. See, e.g., Residential Real Property Disclosure Act, 765 Ill. Comp. Stat. Ann. § 77/1-99. But there are almost always exceptions to these disclosure requirements. Real estate agents are usually unaware of these exceptions, and many agents routinely have the seller complete the property disclosure. For example, the statutory exceptions may include a seller who is a fiduciary of a decedent's estate or trust and has never resided at the property. See id. § 77/15. Or the exceptions may provide that the seller need not complete the disclosure if the seller is a government entity or a relocation company or transfers of real estate pursuant to court order such as dissolution of marriage. Id. When possible, an attorney should invoke the attorney modification provision in the contract to strike these disclosures in their entirety, disclaim the buyer's reliance upon them and provide that this revocation or disclaimer shall survive the closing.

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 and, as a result, they may improperly identify the owner of record. For example, in a bond in 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 the property. When representing the seller, the attorney should obtain a title search before the attorney approval period expires to ensure the sellers were properly identified on the contract and the proper signatures were obtained.

When an Agent Usurps the Lawyer's Authority

An agent might consciously or inadvertently take actions that usurp the attorney's authority. For example, when representing a client who was purchasing an R.E.O. deal, one of the authors, Sahlas, discovered that the client's real estate agent actually drafted a Fannie Mae amendment mid-transaction, had the client sign it, and was just about to send it to Fannie Mae. Beware of communications between the agent and the client on Saturday and Sunday, which could turn into complications for the attorney on Monday!

Another example is when an agent communicates or leaks a client's position to the other side without the client's authorization.

Finally, attorneys may encounter an unscrupulous agent. In a recent transaction, the agent for the opposing party sent texts and emails to both one of the authors, Sahlas, and the client's agent, threatening to kill the deal if certain ultimatums were not met by a specific deadline. When contacted, opposing counsel advised that she had no knowledge of the real estate agent's communications, that he was "a rogue agent," and that his ultimatums and deadlines were sent without his client's authorization.

When an Agent Recommends a Course of Action That Would Result in Undue Liability for the Lawyer or the Client

Here are some examples from the experience of one of the authors, Sahlas:

A deal is contingent upon repairs, but the seller (who is an elderly person on a fixed income) lacks funds to make required FHA or municipal repairs to a property prior to closing. The agent may suggest having the buyer (who is often a rehabber or contractor in these situations) repair or pay for those repairs before closing. Naturally, there are liabilities for both seller and buyer if the buyer spends her own time and money making improvements on a property that the buyer does not own. For example, if the deal falls through the buyer cannot not easily recoup the time and money spent on the improvements; the buyer's attempts at "improvements" could result in damages or even violations of building codes; the buyer could injure herself or someone else while on the subject property; or the buyer could file a mechanic's lien or suit for unjust enrichment of the seller's property.

Or an agent might unwisely suggest the buyer take pre-closing possession to accommodate a buyer's particular moving situation, such as avoiding an extended stay, renting storage space, and moving all of the buyer's possessions twice. This is again risky, especially if the buyer's financing were to fall through or the buyer were unable to close for some other reason. The seller is then in a position of having to evict the buyer and repair any damages to the property the buyer may have caused before the seller is 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 may suggest that the attorney act as escrowee for a post-closing escrow (for example, 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 $300 or so for a joint order escrow with the title company. Why should an attorney assume the liability as escrowee, let alone do it without getting paid?

Defining Roles and Liability between Agents and Attorneys in Real Estate

Although it is 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 purchase is a legal transaction, and, in most states, the agents handle only the marketing and sales aspects. Clients do not realize the agent may be authorized to act only as a salesperson, and an attorney may not only be beneficial but may often be critical to handle the legal aspects of a real estate deal.

Second, the agents' and attorneys' functions in a real estate deal 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 supportive, secondary services after the attorney steps in, but the attorney's role is primary and, in many states, 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. In 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, the lawyer's risk of liability in the transaction is far greater than that of the agent. The attorney is like the captain of a ship, but 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 either work miracles or take the blame for the fallout. There's no "team" when extremely unpleasant things occur. Disregard the platitude, "there is no 'I' in 'team.'" There is an "I" in "fiduciary," "practitioner," "representative," "advisor," "risk mitigator," "instrument drafter," "officer of the court," "liability," "professional responsibility," "complaint," and especially "malpractice lawsuit."

Final Thoughts

Working relationships between attorneys and agents in real estate can often be positive and valuable. But it is 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. n