

Joel Grayson, an attorney licensed since 1971, is a recognized authority in real estate law, litigation, a published author, and has been a frequent lecturer and continuing education instructor and mediator to the real estate industry, as well as a contributor to newspapers, television and radio. Mr. Grayson practices in Oregon and Washington.

Janet L. Grayson is a member of the firm's real estate and litigation group, participates in continuing education instruction to brokers, and is a published author.

Maylie & Grayson is a full service law firm providing representation to real estate brokerages, licensees, Realtor® associations, developers, builders, lenders and investors, providing services in all aspects of real estate including transaction review, land use planning, licensing, mediation, arbitration and court matters throughout Oregon and Washington.

Disputes and Unhappy Clients

The real estate market is in a state of flux. In our experience, as the market softens or declines, the number of claims against real estate brokers tends to increase. This increase can be attributed to a general discord on the part of buyers and sellers – buyers may regret their purchases, and sellers may not receive full listing price for their properties. As buyers and sellers become unhappy, they may look for scapegoats, and typically real estate brokers are the last ones standing. In addition, they are often considered to have “deep pockets” as a result of their errors and omissions insurance coverage. In light of the market's recent national trend, it is important for brokers to be aware of how to deal with potential claims. This article will address what brokers should do when they learn of claims against themselves or between their clients.

Client A v. Client B

As individuals who provide a professional service to their clients, real estate brokers may occasionally be called upon by their current or former clients to assist in resolving problems with other current or former clients. For instance, Broker acts as a disclosed limited agent in the purchase and sale of a property. However, before closing, Buyer decides to back out of his purchase. Buyer's earnest money had already been deposited with escrow, and Seller believed she was entitled to retain Buyer's earnest money. Seller initiates mediation against Buyer, and asks Broker to participate as a voluntary information source at the mediation. Should Broker comply? Or should Broker attempt to stay out of the conflict by refusing to participate?

As with any dispute or potential claim, Broker should immediately consult with his principal broker or company legal counsel *before* agreeing to assist a client in a dispute or attend a mediation or arbitration on behalf of a client. A broker should also consult with his principal broker before agreeing to speak with a client's attorney about a dispute, even if the attorney solely requests that the broker provide information on the transaction.

Many principal brokers do not allow licensees to participate in such requests unsupervised or without principal broker involvement due to the inherent risks. A broker's willingness to participate in mediation or assist a client's attorney may result in the broker becoming a target of an investigation or claim. For instance, a broker may make statements to his client or client's

attorney that suggest the broker exacerbated any problems between the parties, or was in fact liable for damages to one of the parties.

Client v. Broker

Some brokers have the unfortunate experience of dealing with unhappy clients. If a broker receives a phone call, letter, facsimile or email from an unhappy client, he should immediately consult with his principal broker in order to determine how best to respond to such a communication. It is crucial that brokers attempt to deal with problems as they arise rather than avoid them, as avoidance may complicate matters further. If a client is accusatory, a broker should cease any further communication with the client, and should immediately involve his principal broker or company counsel in the matter. Once turned over to his principal broker, the broker should have no further unsupervised contact with the client.

Subpoena of Broker

Brokers may be subpoenaed to testify in depositions, arbitrations, trials and administrative hearings on behalf of their clients. If a broker is served with a subpoena, he should immediately discuss the matter with his principal broker or company counsel. Subpoenas require an appearance by the broker at a specified date and time, and brokers must adhere to the requirements contained in the subpoena. In addition to testifying, brokers may be required to provide documents to attorneys involved. Brokers should ensure that they fully understand the terms of the subpoena so that they may fully comply.

Furthermore, brokers should ensure that they adequately prepare themselves for providing testimony. Preparation should include a careful review of the relevant transaction file and any relevant emails, letters, file notes or other documents. Upon principal broker approval, Brokers should also discuss the process with company counsel in order to have a full understanding as to how they will be questioned, and what will transpire during the proceeding.

As with the above scenarios, subpoenaed testimony has a possibility of resulting in claims against the broker. For example, Broker is subpoenaed to testify at an arbitration hearing regarding a substantial sum of earnest money that is in dispute between the parties. Broker's draftsmanship of the operative document comes into question, and Broker is ultimately blamed by the losing party for loss of the earnest money due to lack of clarity of draftsmanship.

Conclusion

As service professionals, brokers may be compelled to assist their clients in whatever way possible. However, when participating in disputes, the risks may certainly outweigh the rewards, as brokers may unwittingly be brought into a dispute as a result of their willingness to assist. Accordingly, brokers should immediately contact their principal brokers upon receipt of a demand, notification of a dispute, request for assistance in a dispute, or request for documents. Brokers should also contact their principal brokers if their clients become accusatory or if they are contacted by a client's attorney regarding a dispute or request for documents. Brokers may be best served by staying out of disputes between clients.

This column contains general information only and must not be construed as legal advice. Questions may be submitted directly to Maylie & Grayson by fax at (503) 775-1765, by email at joelgrayson@mayliegrayson.com or by mail at 7959 SE Foster Road, Portland, Oregon 97206.

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