

Successful Defense of Real Estate Broker Cases

by Lawrence H. Jacobson & David Laufer

In the course of our representation of real estate brokers in claims filed against them, we see recurrent problems and mistakes made which increase the likelihood of litigation and increase the costs of defense. We offer the following suggestions to reduce these risks and costs:

TRAINING

Real estate salespeople focus on the sale. They focus on potential claims too late in the game. The successful handling of real estate disputes depends on the broker's attention to the details of the sale in progress. The broker, seller and buyer acting out a typical transaction will pinpoint the danger areas:

- * Guaranteeing the sale price!
- * Accepting a listing above the market price!
- * Ignoring defects or potential defects in connection with the real property being listed!
- * Not listening to the owner's "talk".
- * Ignoring the telltale signs that a deal is going to go sour!
- * Failing to keep legible copies of all the documents — the listing agreement(s), advertising, amendments, escrow files, telephone messages and other communications.

Training brokers requires their complete attention. How do you get their attention when litigation prevention is not income producing? We must convince brokers that litigation poisons their reservoir of goodwill. Also, litigation costs are prohibitive. We must get their attention with a short, dynamic and memorable visual presentation designed to focus on ways to avoid the problem areas.

DOCUMENTS

Unfortunately, and all too often, the defense of a real estate claim only starts after a lawsuit is served on the broker. Not enough time is spent with the principals getting the facts of the transaction and legible copies of all the documents. Most of the time, the broker does not have signed legible copies of all of the documents. The escrow company must be persuaded to release documents! They are reluctant to do so knowing that there is a lawsuit threatened or pending! Are they going to get in trouble too?

Experienced litigation counsel insists on disclosure of all facts in meetings with principals! The preservation of evidence which may not be available later when the salesperson changes his or her job or loyalties must be a top priority.

Get it documented now before goodwill disappears! Get it documented now before memory gets this sale mixed up with the next one!

EVALUATION

Evaluation of the case must commence immediately. We must have a market evaluation of the impact of the defect claimed. For example, plaintiffs' lawyers usually insist that the damages caused are thousands of dollars, whereas a market evaluation made immediately upon the filing of a lawsuit will disclose that it is a minor defect. Therefore, inspection of the defects and a market evaluation of the property immediately is essential to successfully focus on the amount involved in the dispute. A group of technical people must be available on an immediate-use basis with the ability to inspect the defect, photograph the defect, preserve the defect and file a comprehensive report for later use in the settlement-litigation process. The preservation of this evidence at the earliest possible time facilitates focusing on the important facts prior to undertaking settlement discussions and discovery.

INSURANCE AND INDEMNITY

Insurance risk analysis is now not being properly undertaken by the real estate broker. Some claims should be covered under the general liability and the E & O policies. Some claims should be brought for indemnity and defense against the seller. Potential indemnity and defense claims also exist against contractors, appraisers and other parties improving or involved with the property prior to or after the sale. Documents may exist showing repairs to roofs and other "defects" which may have been concealed by the seller. A successful program of risk allocation therefore includes educating the broker on all aspects of insurance coverage, indemnity, and the tender of defense of the claim (E & O, General Liability and Third Party Indemnity defense).

CONCILIATION, MEDIATION, ARBITRATION AND LITIGATION

"Our present system of resolving disputes is much too expensive for the litigants and taxpayers. Former Chief Justice Warren Burger said:

Our system is too costly, too painful, too destructive and too ineffective for a truly civilized society. To continue use of the adversarial process for the resolution of conflicting claims is a mistake that simply must be corrected."

SFVBB, R.H. Millen, *Alternative Dispute Resolution*, October 1988.

All real estate broker disputes must be analyzed at the earliest possible time to identify the claims that should be referred to conciliation, mediation, arbitration or litigation.

Careful thought must also be given to the inclusion of these methods of resolving disputes in the contract. Thought should be given to the requirement that conciliation, mediation and arbitration be a condition precedent to litigation. In most cases, these methods of dispute resolution identify the issues more economically than lawyer-controlled discovery, even if the dispute must ultimately be litigated in the courts.

DISCOVERY

Discovery in real estate cases is more meaningful after thorough investigation of the facts. For example, a plaintiff's claim that the market value of its property is "X" dollars should be supported or rebutted by market evaluations obtained by defense counsel. These may be available from prior financing files and loan applications, as well as the evaluations conducted in the sale in dispute. A meaningful deposition cannot occur without the knowledge of the value of the property at particular times in the transaction and its corroboration by admissible, reliable evidence. This is also true with respect to defects. In one case, we successfully defeated a claim in a construction dispute by sending out a video crew with a forensic architect to shoot all of the alleged defects in the house. After a review of the video, the plaintiffs abandoned the claim because they knew their tale of horrors would be refuted by a 20-minute video of the house.

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Computers and the Real Estate Professional 4 Units DRE Credit

If you are considering the purchase of a personal computer or have recently purchased one this class will be of tremendous help to you.

Computers and the Real Estate Professional, a four-unit DRE class, will be held at the SFVBR auditorium. The goals of this class are:

- * to provide a basic knowledge of computer hardware and software
- * to provide an overview of computer application to the real estate profession
- * to alert users to some of the advantages, problems, and pitfalls of computers
- * to acquaint students with some computer software, such as farming, customer tracking, office management, etc.
- * to acquaint students with computer vocabulary and the knowledge of where to go, what to buy and questions to ask.

DATE: Tuesday, November 12

TIME: 9:00 — 1:00 p.m.

This is a lecture seminar which does require a written examination. This four (4) unit class is a Consumer Services credit class. Cost of the class is \$30.00. Class size will be limited to the first 50 registrations. You must bring a valid driver's license, your DRE license number and meet DRE attendance requirements. Sponsor No. 0001. Refund is available if class is cancelled 24 hours in advance.

Registration will be accepted on a first-come basis. **To register, send your check for \$30.00 to the Board or stop by the Real Estate Store.** Registration form may be found on full-page advertisement in this issue of REALTOR® REPORT.

Successful Defense... (Continued from page 7)

THE EFFECTIVE USE OF PARALEGALS

Broker litigation is particularly suitable for paralegal assistance. A trained paralegal can send out requests for inspection, interrogatories and document production. Forms can be created for use by the paralegal for demurrers to defective complaints, cross-complaints for indemnity defense against third parties and other appropriate documentation present in most broker claims. Interrogatories, document production and requests for inspections can be computerized so that a paralegal can initiate these procedures on a cost-effective basis.

CASE MANAGEMENT AND BUDGET

Attorney time must be devoted to establishing a case management and litigation strategy after careful consultation with the client.

A budget must be established for each phase of case management, including a realistic estimate for pre-trial investigation, settlement and negotiations, law and motion, discovery, trial and post-trial matters. By carefully adhering to a budget and the case management strategy, those cases that must be litigated can be and will be litigated consistent with the client's expectations.

CONCLUSION

Successful defense of broker cases requires the integration of in-house training systems, document retention, careful evaluation of claims, weeding out unmeritorious claims, risk allocation, and streamlined litigation procedures in those cases that must be litigated.

Brokers must also take advantage of conciliation, mediation and arbitration of those disputes suitable for those procedures.

Brokers should carefully consider the inclusion of conciliation, mediation and arbitration provisions in contracts, making utilization of those procedures as a condition precedent to litigation. Oftentimes, these procedures identify the issues more economically than lawyer-controlled discovery procedures.

Lawrence H. Jacobson is a real estate partner with the Woodland Hills office of the law firm of Kindel & Anderson and is legal counsel to both the Beverly Hills Board of REALTORS® and the Newport Mesa Association of REALTORS®. David Laufer is a litigation partner with Kindel & Anderson.

SURE START — Evening Sessions Offered in November

The sales training program **Sure Start** will be offered beginning Tuesday evening November 5, and continuing November 11, 13, 18, 20, 25 and 27. Cost to SFVBR members for the entire series is \$55.00; non-members \$80.00.

Pre-registration is required. See the full-page flier in this issue of REALTOR® REPORT for all details and registration form.

Valley Legislators

LOCAL:

Councilman Ernani Bernardi, 7th Dist.
LOS ANGELES CITY HALL
200 N. Spring Street, Room 240
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13517 Hubbard St.
Sylmar, CA 91342
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Councilman Hal Bernson, 12th Dist.
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Councilman Marvin Braude, 11th Dist.
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200 N. Spring Street, Room 275
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18425 Burbank Blvd.
Tarzana, CA 91356
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Computer Class Schedule

BASIC C.R.I.S. CLASS

Thursday, October 24

2 — 4 p.m.

Tuesday, October 29

9:30 — 11:30 a.m.

BROKER LOAD

Wednesday, October 23

9:30 — 11:30 a.m.