

LEAVE THE "LEGAL" TO LAWYERS: BE CAREFUL NOT TO "CROSS THE LINE"

By Jacqueline A. Oliver, Esq.

The duties of a real estate licensee do not include giving legal advice; however, it is easy to get "trapped" unexpectedly when clients ask you about their rights and obligations. Almost any answer is legal advice. Attorneys, not real estate agents, provide opinions on "rights and obligations."

The best way to avoid the "trap" is: 1) to be prepared with a response and 2) to truly understand your role as a real estate agent, (i.e., know what you are supposed to be doing in the first place.) This article focuses on how real estate agents can avoid the dangers of giving legal advice—either intentionally or innocently.

A real estate licensee has limited duties which do not include "interpreting" contracts, that is, determining the rights and obligations of the parties to a contract. You might ask yourself "how do I do my job if I can't tell the client what their rights and responsibilities are?" Unfortunately, the answer is complicated. Your role in the transaction might be to assist Sellers in marketing and selling real property or to assist Buyers in locating and purchasing real property. Sounds

simple, right? Not really. As you well know, a real estate agent's job is complex. The more you focus on your own role, the less likely you are to take on someone else's role—i.e., the attorney.

Consider the following questions you might hear from a client. Can we cancel the contract? Can we keep the buyer's deposit? Can I change my financing terms? Any response could constitute a legal opinion. For example, the consequences to a party cancelling a contract depend on which party wants to cancel, the availability of contingencies and the default remedies. In practice, it is best to tell your client that cancelling a contract may result in legal consequences and, since you do not give legal advice, you recommend they consult an attorney to answer their legal questions. Confirm this advice in writing. (See "Confirmation Letters" on the SDAR website under Risk Management.)

Another example of how agents fall into the trap of giving legal advice is when their client says "I don't have an attorney and can't afford, or don't want to pay for, legal advice." The response should be "You can contact the Lawyer's Referral Service in San Diego and get 30 minutes of free advice from

an experienced real estate attorney." Confirm this in a quick email and be sure to include the phone number to LRIS which is (619) 231-8585.

If you know the limits to your duties and really understand the contract you are using, you can be ready with an appropriate response to questions which trigger legal advice. Basic risk management protocol begins with determining the type of transaction, that is, whether it is a sale, purchase, lease, and whether it is residential or commercial. Then select the appropriate contract which fits the transaction. Using the wrong contract can result in liability since you are supposed to know which contract to use. If in doubt, remember to use the Forms Advisor®. As an example, you should not list vacant land using a Residential Listing Agreement nor should you use the Residential Purchase Agreement (RPA) for multi-unit income property when the Residential Income Purchase Agreement (RIPA) is more suitable to the transaction. To improve your skills, look to your resources such as additional real estate education courses, your broker, your manager, Forms Advisor®, and the CAR website.

After selecting the appropriate contract, complete it correctly and leave the legal questions to the client's own attorney. Although, the California Association of REALTORS® standardized forms (Zipforms®) include a disclaimer that REALTORS® do not give legal advice, it is prudent to pay attention to the particular circumstances and, when necessary, give additional recommendations to your client about the need to consult with an attorney. For this reason, confirmation letters work well to memorialize in writing that 1) you do not give legal advice and 2) you recommend the client consult with legal counsel.

In regard to disputes, be sure to tell your clients whether the contract requires mediation prior to filing an action, i.e. "automatic mediation." While mediation is often "automatic," arbitration is generally a negotiable term which carries legal consequences such as giving up one's constitutional right to a jury trial. The CAR website (www.car.org) and the Real Estate

Mediation Center website (www.realestatemediationcenter.com) include valuable information explaining both mediation and arbitration and the differences. If you are not familiar with these words, go to those websites to educate yourself today because you should know what they mean.

Unfortunately, not all attorneys recognize that most CAR contracts require mediation before filing an action. A party's failure to mediate before filing an action could result in their losing the ability to recover attorney fees—a benefit often available to the prevailing party. Be sure to advise your clients to consult with legal counsel if a dispute arises between the parties. Point them to the paragraph in the contract on "Dispute Resolution" (paragraph 23 in the RPA, for instance). If the contract provides for automatic mediation, be sure to remind your client to mention this to their attorney.

A common mistake that agents make is to consult with their own attorney about the client's legal questions. Your attorney will likely tell you not to give legal advice. However, your attorney may not realize that you intend to share their advice with your client. The mistake is giving your client the legal advice that your attorney gave you. BEWARE: This constitutes unauthorized practice of law by YOU. The client must contact their own attorney for advice; legal advice cannot come from you.

Finally, when faced with a legal question, the best practice is to be ready to respond that you do not give legal advice and strongly recommend your clients consult with their own attorney. Whether the client actually contacts an attorney is always a mystery so remember to create a paper trail of confirmation letters to prove your advice to your client to consult an attorney.

Jacqueline Oliver, Esq. is a frequent instructor for SDAR risk management classes. She is a broker and owner of Arpeggio Realty in San Diego, and provides legal services as well as risk management counseling and education for real estate brokers and agents.



INDEPENDENTLY OWNED AND OPERATED

SALES, REFINANCE, COMMERCIAL,
1031 EXCHANGES, REO & SHORT SALES.



San Diego Escrow Team

Diane Whiteley, President/Owner
Bruce Glaser, VP/Owner
Will Paine, Escrow Officer/Manager
Laurie Wentzel, Escrow Officer
April Johnson, CSEO®
Ryan Auer, Commercial/1031 Exchange Officer
Audrey Bankhead, Escrow Officer

San Diego
8885 Rio San Diego Drive, Suite 240
San Diego, CA 92108
(619) 688-1585

Rancho Bernardo Escrow Team

Vickie Everly, Escrow Officer/Manager
Voncile Carter, CSEO®
Kathy Saint, Escrow Officer
Susan Moser, Escrow Officer
Joe Salvatore, Account Executive

Rancho Bernardo
16776 Bernardo Center Drive, Suite 108
San Diego, CA 92128
(858) 487-6400

CSEO - Certified Senior Escrow Officer | California Escrow Association
 We are an Independent Escrow Agency Licensed by the State of California Department of Corporations.
 Corporate Office (Mission Valley) - License No. 963-2388 | Branch Office (Rancho Bernardo) - License No. 863-1565

In Memoriam RICHARD P. NESBITT

Richard "Rick" Nesbitt, age 67, passed away unexpectedly of cardiac arrest on July 31, 2011. Richard was born and grew up in Oakland, CA, before serving in the Army. Later moving to Lake Tahoe, he started a lifelong career in Real Estate. In 1978, Richard moved to San Diego, and later that year, he married the love of his life, Linda "Buffy" Nesbitt. Eventually Richard owned his own company, Regatta Real Estate. In 1993, he sold the company to Coldwell Banker and managed the Point Loma office for Coldwell Banker until he retired in 2009. Richard embraced his involvement with the San Diego Association of REALTORS® and the California Association of REALTORS® throughout his career. Survived by his wife, Linda; two daughters, Amy Pope and Jorie Lucas (Sean Lucas); four grandchildren, Shane, Natalie, Bailey and Zoey. Richard will be missed by all and especially his friends at Albie's. Richard was laid to rest at Fort Rosecrans National Cemetery.