

WHEN DO YOU “NEED A LAWYER”?

For those of you who actually keep track, this article was first published in January of 2006. However the message still needs repeating: The standard of care in residential and commercial real estate requires that a principal have counsel and if not that a knowing and intelligent waiver of this important right be made and documented in the transactional file. If you don't believe this one simple fact then ask any Realtor whether or not your interests require that you have legal advise not just before you sign but after you sign a purchase or listing agreement up to and including close of escrow. Their answer will be an unqualified “YES” as required by their code of ethics to which all Realtors subscribe. (Article 13 of the National Association of Realtors' Code of Ethics.) Good counsel, both from your Realtor and Legal Counsel will go a long way to avoiding “failed expectations” in your real estate dealings. With that cheery introduction, here is a reprint of my 2006 comments about:

What should you do? Do you use an attorney to explain your rights and obligations arising out of a contract or simply sign the form presented and hope that everything is covered and clearly stated? Who has the responsibility to read, understand, and comply with the terms of the document presented? Who is looking out for your interests in the transaction? Who can and will explain the forms to you? Who cannot explain the forms or even recommend they be used? These are the questions that are asked when the transaction goes sour and litigation follows failed expectations. The answers can change the course of litigation and shift the risk of loss to the uninformed.

Today, whether you lease, sell, or buy, the use of “standard forms” in “standard transactions” without advice of counsel before they are signed can result in huge economic loss

and unnecessary litigation. Landlord/Tenant and Seller/Buyer transactions are not as simple as most believe, and the forms used are not designed for the specific transaction in which they are being used. They must be tailored to the specific transaction and client needs.

When a problem arises, the attorney is asked to evaluate what was intended, what was done, and what the contract says should be done. Too often the contract does not match the expectations of the client. Whether during mediation, arbitration or litigation after close of escrow, trying to match expectations with contract documents becomes harder and more costly as parties “naturally” begin to recall the specifics of the “unwritten deal” differently.

There are a number of common misconceptions about who does what and who is responsible for what aspect of the real estate purchase/sale transaction. The “Law” or at least those judges that interpret the Law, is not confused: You are responsible for knowing and if you don’t you bear the risk.

Common Misconception: Standard Forms do not require advice of counsel. A well-informed real estate agent will tell you that they cannot give you legal advice nor even recommend the standard forms used in the usual Seller/Buyer transaction. In fact, because most real estate agents are Realtors who subscribe to a Code of Ethics which requires them to advise a client to seek advice of counsel when the interests of their client require it, they will often tell you up front that before you sign any contract (this includes listing agreement, offer, acceptance, escrow instruction, or lease) you should have an attorney review it to make sure it fits the specifics of the client’s concerns and is inclusive of what will protect the client’s interests.

Most Realtors are aware that at the bottom of the California Residential Purchase Agreement and Joint Escrow Instructions, there is a boilerplate disclaimer which states: “No representation is made as to the legal validity or adequacy of any provision in any specific

transaction.” The 2005 CAR form entitled “Buyer’s Inspection Advisory” provides: “Buyer and Seller agree to seek legal, tax, insurance, title, and other desired assistance from appropriate professionals.”

Attorneys not only have the responsibility of making sure that you understand the “standard form” in terms of your rights and obligations, but they also make sure that any “specially drafted” provisions are legally sufficient. The assistance of counsel can make for a “win-win” situation for both buyer and seller, since each is then acting in a fully-informed and knowledgeable manner, which usually means less chance for failed expectations that can turn your “dream” into a living nightmare of post escrow litigation.

As is your real estate agent, an attorney is also mindful of the consequences to you resulting from a release of contingency, whether because it has been satisfied or waived. It is their job to evaluate the effect of that release in the context of your transaction. Many standard forms provide that when you release a contingency you are presumed to have conducted all inspections, satisfied yourself as a buyer as to the condition of the property, and have agreed to release the seller from any obligation to repair or replace any component of the home, unless there is a specific agreement to do so. “As is” or “present condition” provisions read in conjunction with these type of contract provisions can shift risk of loss to an uninformed buyer or seller when coupled with partial or incomplete disclosures that are not questioned or thoroughly investigated. Attorney, contractor, and real estate agent can form the team that is needed to advise when or if you are ready to release contingencies. Together they can do more than simply pass on information, unconfirmed or unexplained. They can help you understand what it is you are doing and whether the documents and reports have accomplished your goals and obligations to “know” before you close.

Another Common Misconception: Attorneys cost too much to be involved in the transaction. Think about the money and assets involved. In a sales transaction, hundreds of thousands of dollars, even millions, depend on the formation of a contract that is often never reviewed by counsel. And yet, the contract is so complex that Realtors are trained to avoid the unauthorized practice of law by withholding their advice regarding what provisions are best suited to protect their clients' rights or drafting contract or escrow amendments that affect the substance of the transaction. Real Estate Agents know, as must you, that if you fail to use the "appropriate professional," you will be waiving a valuable right and have only yourself to blame. The Law is clear: If you sign it, you are bound by it, whether or not you read it. The only clear exception to that rule is where a person signs the contract or acts to their detriment because of the fraudulent conduct of someone in the transaction -- a tough exception to prove. Other exceptions exist, but they are also tough and expensive to establish. It is a lot easier and less expensive to know than to assume what is going on in your transaction.

So, when do you need a lawyer? You have a choice to make. After the close of escrow, litigation retainers are usually substantially higher than the cost of involving counsel in your due diligence period prior to close of escrow. If you ask a lawyer, or experienced real estate agent, they will both likely tell you that you should have counsel even before the first offer is made or listing is signed. Knowing what your plan is and who is going to carry it out will save time, money, heartache, and allow for information to be developed and evaluated within the relatively short time frames that a buyer is permitted to investigate the property. For the seller, there is nothing better than having a "fully informed and happy" buyer to make the "close of escrow", the close of the transaction.

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