

Brokerage

Be prepared: Seven ways brokers can get sued

by Eric J. Gold and Patrick Armbrust

1) Misrepresentation or failure to disclose a material fact. Colorado license law and Real Estate Commission rules require a licensee to disclose all known material facts. Facts are "material" if knowledge of such fact would affect a buyer's decision to make an offer, or the amount the buyer might offer. Material facts fall into four broad categories: latent (hidden) defects, physical defects, title defects and environmental hazards. Material facts also include a person's ability or desire to complete the real estate transaction as contemplated, financially or otherwise, e.g., good faith.

2) Breach of fiduciary duties. If you are an agent, you owe your client three duties in addition to the 17 uniform duties under Colorado license law. The additional duties of an agent are: 1) promoting the interests of your client with the utmost good faith, loyalty and fidelity; 2) seeking a price or lease rate and terms that are acceptable to your client; and 3) counseling your client as to any material benefits or risks of a transaction that are actually known by the broker. Fail-

ure to provide these agency duties constitutes a licensee default of the listing contract and could result in termination of the listing agreement, waiver of commissions, actual and/or punitive damages and disciplinary action by the commission.

3) Fair housing violation. Forget the word "housing" in the title. Colorado Fair Housing laws apply to all property, residential and commercial. Treat everyone the same and develop a pattern of fair housing-compliant practices. Be very careful how you describe property. Statements such as "church building for sale," "tenant prefers Hispanic area" or "low crime rate" are all fair housing violations. If you have people in your marketing photos, you have a potential problem if the images of the people are not equally representative of the population.

4) False or misleading advertisement. Contrary to popular belief, that long disclosure at the bottom of your marketing brochure that says "broker is not liable for the accuracy of the information because it was obtained from a reliable source" will probably not help you in court. The real estate broker must

not use inaccurate or misleading statements in his advertising. Avoid comments like: "professionally remodeled" or "zoning allows (specific) uses" or "building is ADA compliant."

5) Preparation of contracts. When writing a contract make sure to complete all the blanks in the form and use appropriate addendums and disclosures. Competency is required when crafting additional provisions and Rule F states that additional provisions must result from negotiations or the instruction(s) of a party to the transaction. Furthermore, a broker who uses transaction-specific clauses drafted by the broker's attorney must understand the clause and it must be used appropriately.

Improperly drafted contingencies are a common cause of complaints to the division. Properly crafted contingencies must contain four components: (1) Whose contingency is it?; (2) What is the contingency?; (3) When will the contingency expire?; and (4) How will the contingency be kept alive or cancelled? Think carefully as you complete Section 3 dates and deadlines. Ensure that the dates are appropriate and can be accomplished within the required time

frame. For example, allow enough time for the buyer's attorney to review the title documents before the date of title objection. If the attorney cannot fully review title without a survey, title objection should be sometime after the survey deadline.

6) Unauthorized practice of law. Our authority to practice (limited) law is precious, so know your limits! We are privileged to assist in the completion of contracts. Along with the privilege comes an obligation; we must explain the forms to our clients. We cannot, however, tell people what to do or what to choose. Explain the option, and the ramifications of the choice your client must make. If they do not know what to choose, refer them to an attorney. One of the most common examples is telling the seller what type of deed to deliver, or the buyer what type of deed to accept. Explain the deeds, how the deed choice might affect future events, but do not tell them what type of deed is acceptable. Doing so would con-

stitute UPL, the unauthorized practice of law.

7) Misstatement of fact. Brokerage Duty 5.1.4. says the broker must "advise the party to obtain expert advice as to matters about which the broker knows but the specifics of which are beyond the expertise of broker."

Licensees should be very good at negotiations, contracts and marketing. We are not, however, experts in zoning, environmental hazards, ADA, water rights, etc. If you want to act like an expert in area beyond the scope of your statutory competencies, be prepared to accept the liability if you are wrong! ■



Eric Gold
President and owner, Sheldon Gold Realty Inc. Commercial Real Estate Services. He also is senior instructor for Armbrust Real Estate Institute.



Patrick Armbrust
Owner and director, Armbrust Real Estate Institute. He is also a certified residential appraiser.