

Legal Corner

*By Brian Lytle, Attorney
Legal Liability Committee Member*

PARTY TIME

No, your man on the legal corner is not referring to the upcoming holiday season, nor am I suggesting that we do not socialize enough. Who wants to socialize with a lawyer anyway? Rather, I would like to focus on parties to listing agreements.

The REIN listing agreement presumes that you are obtaining the signatures of all of the parties necessary to sell the property. Indeed, VREB has regulations that would prevent you from advertising and offering property where you do not have the permission of the (true) owner to do so, and without looking I am sure it violates the Code of Ethics also. Imagine that -- you can't advertise or sell property without the permission of the owner – what is the world coming to?

But, I digress. Our real questions: how do you know who should sign and what are the consequences if you do not obtain the signatures of the correct and necessary parties?

Realistically, you rely on what you are told. Truly, the only way to determine who owns any particular piece of property is to have a title examination performed and obtain a legal opinion as to the state of that title from an attorney. Now, I feel quite certain that you are not inclined to explain politely to that \$350,000 York County listing prospect across the kitchen table that you can't quite take their listing until your lawyer has verified they really own the property. Not happening, nor should it.

Consequently, all you can do is accept what the client tells you and pay attention to information you learn during the course of obtaining and offering the listing. So, if a married couple represents to you that they own the house and you have no information that would lead a reasonably prudent agent to suspect otherwise, then I think you are perfectly okay to take that listing and move forward. However, if you take a listing from one child purporting to sell her deceased mother's house, then you should be put on notice that there may well be other heirs or a will involved because that is more often than not the case. Likewise, if you check tax records and see owners other than what you were told then you need to follow up and find out why.

If you permit a contract to be signed by the person you believed to be the owner, only to later learn he is not the only or true owner and he cannot obtain the necessary signatures from the other owners, then your seller would be in breach of contract (assuming the contract obligates the seller to provide clear title at closing). Whether you share any responsibility in that problem would likely turn on the information known or available to you as I have noted above. After all, sellers may not know any better, and they do rely on you to guide them if all that amounts to is to say "go talk to a lawyer."

Would you have a suit for commission based upon the misrepresentation, intentional or unintentional, of ownership status by a seller? I think so. The REIN Exclusive Right To Sell Standard Listing Agreement, at paragraph 12(vii), says that the seller represents that he or she has the authority to sell the property. So, if that is not accurate, and the seller is unable to close after you have produced a ready, willing and able buyer, then the seller would be in breach of your listing agreement and liable for your commission.

So, the simple moral of the story is accept the sellers' ownership representation and take the listing, but if something puts you on notice that there may be other owners then you should exercise due diligence in an attempt to ascertain and contract with them: (a) because you need to protect your client if they truly do not know any better, and (b) so you can protect your right to a commission.

If you would like to invite the author to a party (or if you have questions concerning this topic, or suggestions for future topics), please e-mail me at bdlytle@lytlelaw.com.

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ORDINARY PEOPLE

Your man on the legal corner, oft accused of making obscure, funny, clever references (at least I find them to be such), is not referring to the movie, nor am I suggesting we have dinner at that fine dining establishment in Gloucester. Rather, I want to talk about the duty you owe to your clients.

Va. Code § 54.1-2131 provides that agents are obligated to exercise “ordinary care” in the exercise of the agent’s duties to his or her client.

Well, what does that mean? Black’s Law Dictionary defines “ordinary care” as “that degree of care which ordinarily prudent and competent persons engaged in the same line of business or endeavors should exercise under similar circumstances.” In other words, ordinary care is what a reasonably prudent agent would do under the same or similar circumstances.

Let us suppose then, that in representing your client something goes wrong or there is a mistake that causes your client to suffer or be injured. The broad question, assuming there are no other factors imposing liability, would be whether other agents would have done what the client alleges you failed to do.

If for example, the general practice among listing agents in this area is to measure the square footage of the house in order to arrive at a listing price, then it might well be negligence (read: a breach of ordinary care) if a failure to do so caused the property to be sold for less than fair market value. Similarly, if you mis-measure the property and recommend and offer the property for less than it should have been offered, then you will have performed negligently. What if, as a buyer’s agent, you didn’t measure the house to confirm what the MLS told you and your client about square footage? If reasonably prudent buyer’s agents do not do that, and I do not think they do in our area, then you would not be guilty of negligence.

My experience has been that the most likely source of conflict and potential liability between agents and clients arises when a client suggests that the client’s agent either had information and failed to disclose it or did not obtain information that would have been important to the client. A fairly recent Virginia Circuit Court case, *Monica v. Hottel, Trustee* (Lowden County 2004) addressed our issue in a procedural context.

The court noted that while the General Assembly has re-written the law of agency insofar as it applies to real estate agents and refused to impute knowledge or information among or between clients and licensees, the law still permitted an agent to be found negligent for not discovering and disclosing information that a reasonably prudent agent would have discovered and disclosed in the exercise of ordinary care. The *Monica* case involved discovering and disclosing the status of a subdivision affecting the property and client in question.

The lesson here is to stay informed and abreast of current developments. Go to company and VPAR training. Go to Night Court. Familiarize yourself with local practice and custom by talking to your peers. Ask experienced agents what they do. Talk to your broker. That training and education is key to an understanding of what the reasonably prudent agent would do under the same or similar circumstances.

You are required to provide ordinary care. (Can you imagine the marketing slogan: "Hey, let me handle your listing. I'll give you ordinary care!). I would encourage you, however, to provide *extraordinary* care, because by so doing a client will be hard pressed to claim you have failed to represent them ordinarily.

You may contact the author at bdlytle@lytlelaw.com if you have any questions or comments on this or any other topic, and I am always looking for topics!

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Specific Performance

Everyone recognizes that a buyer and seller can sue each other – after mediation of course – in the event of a breach of contract.

Buyers have a special breach of contract remedy though, called “specific performance.” That is, a court can order a seller to specifically perform the contract, which means that the court will order the seller to sell the property to the buyer. If the seller does not obey that court order then the seller can be held in contempt of court or the court can appoint a third party to execute the deed to the buyer on the seller’s behalf.

Moreover, a buyer can file a notice *lis pendens* (Latin for pending litigation) in order to prevent the seller from selling the property to someone else while the lawsuit is pending. This document is filed in the courthouse land records, and constitutes record notice to any potential purchaser of the property that someone else claims an interest in it. As a result, other potential buyers cannot obtain clear title to the property thereby preventing its sale. This is a very powerful tool available to a buyer.

A recent case, *Alaragy v. Dengler* (VLW 004-8-178), out of Northern Virginia, illustrates this remedy clearly. In *Alaragy* the buyer and seller signed a time is of the essence contract calling for closing on June 30th, which was later amended by the parties to require closing on August 31st. The contract obligated the seller to provide the buyer with a written termite inspection no more than 30 days prior to settlement. The buyer had applied for financing and tentatively was approved, but the lender needed the termite inspection report in order to finally approve the loan and approve settlement. For reasons not published, it seems reasonably clear a dispute arose between the parties and the seller refused to provide the termite inspection report prior to the closing date. The seller argued providing the letter on the closing date was good enough because that is what the contract said. Of course, that prevented the buyer from getting final loan approval, which meant the buyer could not close. The buyer, having obtained the termite inspection report on the August 30th closing date, then faxed it to his lender, and the lender was ready and able to close on September 4th, but the seller refused to close after August 30th arguing that time was of the essence.

The buyer then filed suit seeking specific performance of the contract. The buyer alleged that the seller had breached by refusing to turn over the termite inspection report prior to the closing date. The court found for the buyer and ordered the seller to perform the contract and sell buyer the property.

The court wrote as follows: “Because the [Buyer] was ready, willing and eager to perform his duties as set forth in the contract, the delay in the [Buyer’s] performance was due to the actions of the [Seller], and the [Seller] clearly stated his intention not to honor the contract, the [Buyer] should receive the remedy a specific execution of the contract, notwithstanding the [Buyer’s] failure to tender the purchase price.”

There is a lesson to be learned here. First, any party to the contract should be careful about relying on literal technicalities if that frustrates the performance of the other party. Second, when a buyer stands ready, willing and able to perform, and the seller refuses to perform, then the buyer may well be able to stop the seller dead in his tracks and force a sale. This can be

particularly useful in the current market because too often we feel that a seller is trying to avoid performance because a better offer has come along.

Please do not hesitate to call or e-mail me bdlytle@lytlelaw.com if you have any questions regarding this article.

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LIAR, LIAR, PANTS ON FIRE

Sometimes I think we all reach a point where we take language in the contract for granted, think we know what it says, and stop reading it. Recently, I have seen quite a few examples where I think agents have either forgotten the language of the Standard REIN Contract or do not understand it to begin with.

Assume for the moment that you have a client who is getting ready to sell and buy a house (good for you!). Given the pace and demand of the local market your client's offer to buy needs to be quick and clean. So, either intentionally or unintentionally, you do not disclose that your buyer needs to sell his existing house – a sale of home contingency – in his offer to buy.

Perhaps you think the buyer does not need to disclose this contingency. Perhaps you think the buyer will be protected because he cannot qualify for financing unless his house sells. Or, perhaps you simply think that in the current market you will have no trouble selling the buyer's existing house and it will not be an issue.

Paragraph Six of the REIN standard purchase agreement provides as follows:

“6. Representations: unless specified in writing, neither this Agreement, nor the financing is dependent or contingent on the sale and settlement, lease or refinancing of other real property.”

Hmmm. Seems pretty clear that our hypothetical buyer has a home sale contingency and that his financing is in fact dependent on that sale. And, clearly, the buyer has not made mention of this sale of home contingency. Most dictionaries define **“representation”** for our purposes as a statement of *fact* made for the purpose of inducing a party to enter into a contract. Clearly, by not disclosing the sale of home contingency, the buyer (and likely the agent, who has knowledge, advises, and signs the contract as well) has made a *false* representation. Schoolchildren, untainted by adult notions of diplomacy and tact, would simply say the buyer (and the agent) *lied*.

To make matters worse, VREB regulations provide, at 18 VAC 135-20-300(9), that it is a violation for an agent to “knowingly make any material misrepresentation or [to make] a material misrepresentation reasonably relied upon by a third party to that party’s detriment.”

So, while you think you might be serving your client, the truth of the matter is that by permitting or encouraging this undisclosed contingency you will have violated VREB regulations in my opinion, and also caused your client to be in breach of contract if the deal does not close.

Similarly, I recognize that many agents are tendering cash offers and then obtaining financing anyway. I do not think it is improper or impermissible for a purchaser to make a cash offer and then obtain the money by financing as long as: (a) obtaining the financing does not cost the seller any money or delay the closing and (b) the purchaser is in fact able to pay cash at the time the purchaser signs the contract. If the latter is not true, then the agent and the purchaser are clearly violating the provisions of the contract and as noted above VREB regulations.

So, in order to avoid being taunted with "Liar, Liar, Pants on Fire" at the VREB playground, please be careful with these particular undisclosed and misrepresented contingencies.

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The Quest for the Packet Truth

Your man on the legal corner recently went on a pilgrimage seeking the truth about Association Packet Disclosures.

My first encounter along the road of enlightenment was with an agent copying an old association packet she had stashed away from 1979 to deliver to a buyer. What, pray tell, are you doing I asked? Saving my client a \$100.00 by copying this package instead of requesting a new one she replied. But isn't your client supposed to request a new one? I don't think so -- the buyer can request an update if he wants one, that isn't our problem she noted in a huff. Of course, agent-friendly person that I am I kept my mouth shut, didn't point out that the contract really didn't say that, and resumed my journey.

Verily the road to enlightenment did not seem so lawyer-friendly, so I took a detour and entered a local brokerage. There, in front of my own eyes I witnessed the delivery of a packet by a listing agent to the receptionist, who signed for the agent. What, may I ask of you kind agent sir, is this new and strange procedure I have witnessed? I am delivering this packet to the firm as required and now the buyer has three days to decide whether he or she will cancel, he replied. I looked at the form and observed that wasn't exactly what it said, and also wondered, to myself of course, what would happen if the agent was off for the weekend or the buyer was out of town TDY. I was greatly puzzled. This did not seem satisfactory to me. Yet, I realize I am not wise in the ways of the agent and local practice, so again I kept my mouth shut.

Next, I came across an agent wandering in veritable listing wilderness. She had a wild look about her – clearly the look of an agent sent to the FSBO front lines – and I asked of her: oh wise agent, what do you do, packet-wise, when there is a FSBO? (Personally, it looked like there had been much pulling of the hair, but again, I know my limits). She told me she either got the package for the buyer or helped the seller do so. And so I queried, and how do you handle the 96 hour drop dead time for acknowledgment of receipt? I must say I have never heard an agent howl before ... it scared me. I left.

And so, since I knew I would have to fit this article in a small space and get to the point sometime, I decided to consult the VPAR Oracle, and of the Oracle I asked: Oracle, it seems to me that the law implies, and the REIN contract seems to direct, the seller to obtain a current packet – is this so? It is, replied the Oracle. Ok, Oracle, and what of the 96 hours? Once the packet is delivered to the selling firm the selling agent has 96 hours to acknowledge delivery to the buyer or the seller can void the contract. Ok, Oracle dude, I countered, and so how does the three day right to cancel jibe with the 96 hour provision? Once receipt of the packet has been acknowledged or it is otherwise received, I (oops, I mean the Oracle) replied, then the buyer has three days to cancel from that point. You see, the 96 hour provision is sort of a kick-out the seller can use to force a start of the three days and make the buyer get on with it. And last O-Guy, I cheerfully said: what of the FSBO? The hell with FSBOs, let them deal with it themselves: and if they run the risk of your buyer backing out of the deal then that is their problem and they got what they paid for.

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Power Of Me

Naturally, your man on the legal corner would like you to think that the term power of attorney refers to the author, but I recognize your first thought probably is of the document. To that thought we then turn.

A power of attorney is a written document authorizing a person to act on one's behalf. The person giving the power is known as the principal, and the person receiving the power and authority to act on behalf of the principal is known as the "attorney-in-fact." This is really an agency not too unlike the agency with which you are familiar.

An attorney-in-fact only has the power expressly granted to him or her by the written power of attorney, which in our context is the buying or selling of real estate. It goes without saying then that the power needs to convey and grant all of the powers necessary to do the intended act. A general power of attorney is one that authorizes the attorney-in-fact to do nearly everything the principal can do acting in his or her own right, and a special power of attorney is limited to a particular purpose. For example, a general power of attorney would likely grant the right to sell real estate, and among other things, also grant the attorney-in-fact the right to write checks to pay bills. A real estate special power of attorney, on the other hand, would strictly limit the attorney-in-fact's authority to sell and convey a particular piece of property.

Under Virginia law, a power of attorney will terminate upon its revocation or upon the death or disability (legal incompetence) of the principal. Since we do not want to be in the business of determining whether a principal is insane or incompetent as of the closing (or negotiation of the contract, etc.) we need for the power to survive that disabling act, and that is accomplished by having words to this effect: This power shall survive the disability of the principal. If that language is present then we call it a *durable* power of attorney.

Settlement agents will need the original power of attorney to record along with the deed and deed of trust (I repeat we must have the original). As a general word of caution, you should notify both the settlement agent and the lender if the buyer is using a power of attorney well in advance of the closing so that both the settlement agent and the lender can review it.

In my office we have a checklist we go through to make sure the powers are acceptable. While I do not want agents making legal determinations regarding powers of attorney, it would not hurt for you to make a cursory review upon receiving one before you pass it on to your favorite, *powerful*, attorney of your choice for his review. Among the items to look for:

- ? Do we have the original or will we? We *must* have an original to record.
- ? Does the power actually give the power to do the thing it will be used for? For example, does it clearly and broadly authorize and empower a seller to sell, a buyer to buy and borrow, etc.
- ? Is the legal description accurate? Check the legal description very carefully; if it is a mailing address verify it; if it is a short legal description do the same. If there are discrepancies then the power is not acceptable, and you can not white it out and make changes!

- ? Are the names accurate? Make sure the names on the power match the names on the deed, deed of trust, etc.
- ? Fax to the lender. Send a buyer's power of attorney to the lender for them to review as they sometime have special requirements for a buyer power.
- ? Power for Veteran and VA loan? Powers for Veteran buyers may need special VA language. The lender can tell you if necessary on your deal and the power may need to be amended or re-done.
- ? Power limited in time? Check to see if the power has an expiration date – if so, has the date passed?
- ? Notary clause done and done completely and correctly? Was the notary clause properly executed and completed? Note that it does not need a seal but it does need a signature, identification and commission expiration date.
- ? Are there any conditions in the power that must be satisfied? Have they been?
- ? Is the power durable? This means does it have language like this: "This power shall survive the disability of the principal." If not then the power is probably not going to be acceptable.

Lastly, company policy will dictate whether it is permissible for you or your company to act as the attorney-in-fact for one of your clients in the transaction, but I recommend that you not do so. I cannot and do not speak for other settlement agents, but generally I will serve as an attorney-in-fact in one of my closings.

Feel free to send a powerful email to the author at bdlytle@lytlelaw.com if you have any questions or comments

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I Swear, Agents as Notaries

Your man on the legal corner is quite concerned and has been for some time that agents who are also notaries are not paying attention to the requirements imposed by that office.

A notary acts as an official, unbiased witness to the identity and signature of the person who comes before the notary for a specific purpose. The person may be taking an oath, giving oral or written testimony or signing or acknowledging his or her signature on a legal document. In each case, the notary attests that certain formalities have been observed. The key function is to be certain that the person appearing before the notary is who that person claims to be. A notary who fails to perform notarial acts in accordance with the law may be sued for damages caused by their official misconduct or prosecuted criminally. The employer of a notary may also be liable for the notary's misconduct under certain conditions.

The most common mistake I think agents make when acting as a notary is to not require the act be done in their presence. A notary must have the person sign or acknowledge a pre-existing signature in the notary's presence. That bears not just underlining but repeating: the act must be done in the notary's presence. It is not permissible for you to notarize a signature that was not signed before you even if you are super-duper-absolutely-positively-cross-your-heart sure (the highest legal standard there is, of course) the person you think signed actually signed. So, for example, it is not appropriate for you to notarize a client's signature that was signed in California but not notarized there even if the client tells you over the phone that the signature is genuine. There may soon come a day when "in one's presence" will incorporate video conferencing or Internet cameras, but for now, at least in Virginia, they do not.

Another common mistake is that agent/notaries fail to require identification of someone who is not personally known to them. You may not take a person's word that they are who they say they are, and you may not take a third party's word that someone is who he or she says they are. That is simply not appropriate. Additionally, if a document or acknowledgement calls for the person to be under oath (uses the words affidavit or oath or sworn and subscribed) then you must swear the person in. Frankly, my experience has been that most notaries, not just agent notaries, frequently ignore this requirement. I realize that it can be embarrassing to ask someone to raise his or her right hand and swear to tell the truth, etc. but you must do so. Lastly, to resolve one common misconception, Virginia law does not require a notary to own a seal or use a seal on any document although lenders frequently want them.

Please feel free to email the author at bdlytle@lytlelaw.com if you have any questions about this article or have a topic to suggest for a future article.

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A Real Estate Agent's Guide - The Unauthorized Practice of Law - Part 1

As I hang out on the legal corner I frequently hear agents, usually more experienced ones, chastise their younger colleagues not to give legal advice lest they find themselves pursued by the practice of law police. And as a member of VPAR's Legal Liability Committee I too am concerned about that, but I think that warning is too often taken to the extreme with the result that agents fail to give their clients the benefit of their specialized knowledge and experience.

I cannot cover this complex topic in one article, so I will divide it into three. Part 1 -- Background, I will provide an overview of the regulatory framework and working definitions; in Part 2 -- Real Estate Provisions, I will cover in detail the provisions of Unauthorized Practice Rule 6, Real Estate Practice; and in Part 3 -- Practical Considerations, I will try to summarize the topic and deal with some real world issues.

The inherent power to regulate the practice of law begins with the Constitution of Virginia, which vests the judicial power of the Commonwealth in the Supreme Court. Thus, pursuant to the Court's inherent power the Court defines and regulates the practice of law through its rules and through its agency, the State Bar. The rules it has issued in this regard are called the Unauthorized Practice Rules and Considerations (and the General Assembly has made it a criminal act to violate them). The Court defines the practice of law as follows:

Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill. Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever —

(1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal — judicial, administrative, or executive — otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

(4) One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.

RULE 6, § 1 OF THE RULES OF THE SUPREME COURT OF VIRGINIA, UNAUTHORIZED PRACTICE RULES AND CONSIDERATIONS.

Don't you just love lawyers? You would think we would avoid circular definitions but it strikes me that saying "whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill" or "involving the application of legal principles to facts or purposes or desires" just avoids truly defining what we mean. But it is hard to come up with a ready definition. Try it yourself.

Commonwealth v. Jones & Robins, Inc., 186 Va. 30, 41 S.E.2d 720 (1947), was a Virginia Supreme Court case where a real estate broker was convicted of practicing law without a license for drafting deeds, notes, deeds of trust, leases, etc. for profit. Justice Holt (one of the dissenters actually) observed that under modern conditions neither professions nor business could function successfully in a straight-jacket and wrote:

The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field.

Chief Justice Holt continued with many examples where the regions overlap, and I note one that I believe is instructive:

Hospitals are something more than boarding houses. Nurses prepare charts which tell at a glance the progress of patients up or down. Technicians tell us the color of their blood. All of this is of great value to physicians. They take their art from empiricism into the atmosphere of science, yet no court, State or Federal, with or without a statute, has ever held that these instrumentalities are practicing medicine. The educational qualifications of doctors is certainly not less exacting than those required by lawyers, while public interest touching qualifications of doctors is not less vital than that which attaches to lawyers. The object, aim and purpose of a hospital, — the reason for its establishment and operation, is to render and perform medical treatment and nursing of a skilled character. It is the facility for affording the patient a higher and greater degree of nursing and medical attention than would be ordinarily possible outside of a hospital that makes it desirable. The opportunity to render such service enables a hospital to make a higher charge than a hotel or boarding house. The desirability of securing the needed service provides inducement for the patient to enter the hospital. The patient comes to the hospital for advice, aid and treatment — not to give either.

It seems to me one could easily substitute a real estate brokerage firm for the hospital in this quote with attendant changes substituting selling real estate for agents for nurses, etc.

In conclusion, in this article I wanted you to learn who regulates and defines the practice of law, to allow you to read the black letter definition for yourself, and to see some judicial discussion of the application of that definition. In my next article I'll focus on specific regulations and statutes that apply to the unauthorized practice of law in the real estate context.

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Whose House is it Anyway?

Sales are subject to existing leases. And in fact, sales can be subject to oral leases. That is why a seller signs an affidavit at settlement saying there are no such leases and that no one else is in possession of the property at closing. It is also why the standard contract obligates the seller to deliver possession at closing. Note, however, that these provisions and documents only serve to give the buyer the right to sue the seller; they do not give the buyer the right to remove a tenant in possession of the property pursuant to a lawful lease. So, if your listing-to-be has a tenant then you need to request copies of any written leases or a summary of any oral lease. You should confirm those facts directly with the tenant. Moreover, you should disclose the existence of tenants in the MLS and you might need to accept offers subject to the tenants terminating their lease and moving out on or before settlement.

Property managers frequently encounter landlord tenant issues but sales agents rarely do. So, assuming the tenants do not have a valid lease or are holding over, how does one remove a tenant from property, and is the tenant obligated to allow the property to be shown to buyers? When a landlord seller wants to have a tenant removed, either due to the tenant's rent default or because a tenant refuses to leave at the expiration of the lease term, the landlord must get the assistance of the courts. Virginia does not permit a "self-help" residential eviction - changing the locks to the door, cutting off utilities, etc. - even if the lease allows for it. One should note that in Virginia a lease can be oral - express or implied - and if a landlord has accepted any money from a tenant then there is at least a month-to-month tenancy requiring thirty day written notice of termination. Generally (the lease may require otherwise) the first step is for the landlord to send a five-day notice to pay or quit to the tenant. The landlord seller may then file an unlawful detainer (eviction action) with the court, which can ask for rent, late fees, attorney's fees if allowed in the lease, and other damages. The initial court date will be two to three weeks away. The tenant must be served with the pleadings and given the opportunity to defend. If the tenant contests the eviction at the initial return date then the matter will be scheduled for trial 20 to 60 days later. Assuming the landlord wins, either at the initial return date or the later contested trial date, then the landlord can obtain a writ of possession directing the sheriff to physically remove the tenant and the tenant's property if the tenant does not leave voluntarily. Note that tenants subject to the Virginia Landlord Tenant Act have a one-time right to redeem the lease after suit has been filed by paying all sums then due, including costs and attorney's fees. Lastly, a tenant is obligated to allow showings of the property only if there is a written lease and the written lease specifically and expressly requires the tenant to permit showings for the purposes of sale. Please do not hesitate to call or email me if you have any questions or comments.

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In My Judgment

Lawyers frequently notify agents that a judgment has shown up in the title search and will impede or prevent closing. Why is that?

A judgment is a judicial declaration - an order if you will -- that someone owes money to someone else. That order (judgment) may be docketed (recorded) in the Circuit Court Clerk's Office (the same place where deeds are recorded), upon which recordation it becomes a lien on any property then or later owned by the judgment debtor(s). This forms the essence of the title problem: the seller is unable to deliver clear and marketable title because the judgment is a lien unless it is satisfied by payment. There are a number of points agents should keep in mind as they deal with settlement agents in resolving judgment issues.

First, a judgment against one spouse does not attach to property owned by the other spouse alone or owned by them jointly provided they hold title as tenants by the entirety with right of survivorship as is common law. In order to obtain this protection it is critical that the couple actually be married, which is why settlement agents sometimes ask sellers for continuous marriage affidavits. Quite often one spouse will have judgments that do not attach during marriage to marital property held as indicated, but they do attach when the parties divorce because the act of the divorce legally severs the tenancy by the entirety and transforms their title by operation of law to a tenancy in common. The judgment will attach to the debtor's interest in the property and run with the land until paid. If the deadbeat ex-spouse cannot pay then the innocent spouse will have to pay in order to transfer clear title.

Second, I'm sure agents are often frustrated with settlement agents announce they have a possible judgment only to later find out the judgment is not against the seller and the angst and work was not required. The reason this happens is because of a rule of law known as the Rule of Idem Sonans, which provides that misspellings are immaterial as long as the name sounds the same and the initial letters of the family names are the same. For example, Virginia case law says that Ed Bolen is the same as Edmund Bolden, that Any O'Klay is the same as Annie Oakley, and that W.D. Poyner is the same as W.D. Pointer. Likewise, initials and abbreviations of the names can be dissimilar yet still count for the purposes of constructive notice in the record: For example, Jake is the same as Jacob, Mike is the same as Michael, and Frank is the same as Francis. These are the reasons we call you to ask for Social Security numbers and further information.

Third, we frequently encounter a situation where we report a judgment lien only to be told that the sellers filed bankruptcy and discharged the lien. Hrrmph (and worse) the sellers (and the agents) say - you must be mistaken because that debt was listed and discharged! Unfortunately, however, while discharging the lien in bankruptcy does mean the judgment creditor cannot pursue collection of the debt with the sellers personally, it does not mean the debt automatically is discharged from any real estate to which it might have attached as a lien pre-bankruptcy. One is an action against the debtors, which is barred, while the other is an action against the property, which is not barred. There are bankruptcy mechanisms by which the lien can be released in bankruptcy, e.g. by avoiding it as a preference, and astute bankruptcy

attorneys usually, but not always, take that action. Often we can persuade creditors to release it anyway.

Lastly, there are statutes of limitation regarding the enforcement of judgment liens. The basic rule is that no suit can be brought to enforce the lien of any judgment after twenty years have elapsed. This period may be extended by application but that is a fairly rare occurrence. There is another statute of limitations rule that provides that the judgment may not be enforced if the property was transferred from the judgment debtor to a grantee for value more than ten years ago. Remember, once a judgment attaches it attaches forever unless paid, discharged or barred.

Legal Corner

*By Brian Lytle, Attorney
Legal Liability Committee Member*

Escalation Clauses

Given the current seller market, buyers are forced to respond rapidly and dynamically to competing offers received by the seller. As often as not, a particular buyer and her agent do not feel as though they are able to manage that process as well as they would like, so buyers are resorting to escalation clauses in their offers to make sure they get the house, or to at least make sure they do not lose it by a relatively small amount of money.

The consensus of opinion is that an escalation clause is enforceable – it is not an unenforceable invitation to bid or too vague to enforce – provided the price could be readily determined by reference to some ascertainable standard. In other words, can a judge determine whether the parties actually agreed on a sales price?

If not properly drafted, an escalation clause can devastate your purchaser. For example, one must include a cap – a sales price ceiling – to the purchaser's escalating offer otherwise your purchaser may well find himself agreeing to buy the house for more than it is worth and for more than he can pay. Instant breach, complaint and lawsuit. Likewise, one must consider what we mean by our definition of "offer" since an offer can be less than one ostensibly higher because it contains concessions. Consequently, simply specifying the highest offer plus a number does not truly identify the best offer.

At the Association we are in the process of revamping the standard clause booklet and we are working on an escalation clause for members. Recently, at the contract writing seminar, we showed students a draft of our escalation clause. To give you an idea of how this process works, I have modified the clause twice since then.

Presently, the working clause is as follows:

Escalation clause

Uses: An escalation clause is used in a seller's market where multiple offers are expected, your buyer wants to make sure they do not lose the property over relatively minor amounts of money, and there is no time to negotiate in the traditional fashion.

Note: An escalation clause should only be used in a situation where the purchasers have been fully advised of the consequences of an escalating offer. They should be fully prepared to purchase at a higher number. Note particularly the "net of concessions" language so there is an apple-to-apple comparison.

Clause: Contract Price to be [insert number, e.g. \$500.00] higher than the highest bona fide offer, net of concessions, received by Seller, not to exceed [insert cap number, e.g. \$5,000.00]. The parties intend this agreement to be a binding contract, and not an offer to enter into a contract at a later date. The price determination will take place as set forth herein, but the fact that the price is not determined as of the time this contract is fully executed by both parties shall not

defeat the existence of a contract. Listing Firm to provide Selling Firm with a copy of the next highest bona fide purchase agreement offer.

As always, I commend you to your broker and company policy when drafting or using this clause.

Legal Corner

By Brian Lytle, Attorney
Legal Liability Committee Member

Vicarious Liability

Vicarious liability may be defined as the liability one suffers for the act or acts of another. In the real estate agent context, vicarious liability concerns itself with whether a broker or firm is liable for the acts of its agents. And under traditional tort principles, as you were taught in your real estate class, a brokerage firm is liable for the acts of its agents. In the case of *Meyer v. Holley*, the United States Supreme Court very recently decided a very important real estate agent vicarious liability case.

In *Meyer* the Supreme Court considered whether an individual officer and owner of a corporate brokerage firm could be held personally liable for the acts of one of its agents. The agent was alleged to have made disparaging remarks to a racially mixed couple, thus violating fair housing laws. The high court held that corporate officers and shareholders could not be held personally liable for the acts of the corporation's agents, and reversed the United States Ninth Circuit Court of Appeals in California, which had extended liability to owners and officers.

The difference is in the distinction, and here it is significant. The issue is not whether the company is liable – under basic tort law the corporation itself is vicariously liable for the acts of its agents in all 50 states to my knowledge – rather, the issue is whether that liability can be extended not just to the company but all the way down to its owners even though they may be mere shareholders expecting insulation from liability, which is the *sine qua non* corporate benefit. Thus the issue presented by the *Meyer* case was whether the corporate veil could be pierced and the individual owners of the corporation held liable even though they may not have had any thing to do with the underlying offensive act.

The Ninth Circuit Court of Appeals had concluded that traditional vicarious liability rules did not control the personal liability of corporate shareholders and officers in Fair Housing Act cases, and that owners and officers might be liable "simply on the basis that the owner or officer controlled (or had the right to control) the actions of the employee." While that is indeed the law in some situations, the United States Supreme Court held it was not the law in Fair Housing Act cases.

This case should give some comfort to real estate brokerage firm owners, but recognize that it does nothing to relieve individual agents or brokerage companies from liability.

Legal Corner

*By Brian Lytle, Attorney
Legal Liability Committee Member*

I CLAIM, YOU CLAIM, WE ALL CLAIM TO DISCLAIM

There once was an agent named No-brainer,
Who in haste failed to deliver the disclaimer,
Until after it was accepted,
Leaving her seller rejected,
With no choice in the suit but to name her.

Anon Tall Lawyer

Your man on the corner continues to hear grumbling about failure to get disclaimers and disclosures to buyers before contract acceptance.

Va. Code § 55-520 provides as follows:

- A. The owner of . . . shall deliver to the purchaser the written disclosures or disclaimer . . . prior to the acceptance of a real estate purchase contract . . . The residential property disclaimer statement or residential property disclosure statement may be included in the real estate purchase contract, in an addendum thereto, or in a separate document.
- B. If the disclosure or disclaimer . . . is delivered to the purchaser after the acceptance of the real estate purchase contract, the purchaser's sole remedy shall be to terminate the real estate purchase contract at or prior to the earliest of (i) three days after delivery . . . or (ii) five days after . . . [mailing], or (iii) settlement . . ., or (iv) occupancy . . ., or (v) the execution . . . of a written waiver . . ., or (vi) [loan application with disclaimer termination language].

So, in the haste to get an offer before the REIN electrons even begin their journey into cyber space, the buyer presents an offer without the disclaimer. Seller (after dutifully considering the other ten offers) signs and accepts buyer's offer. The disclaimer, with a smiley face Post-It™ note on it asking the selling agent to "please sign and return" is then sent to the buyer's agent, along with the executed contract. At closing, the buyer, mad over [insert your favorite buyer mad over a minor thing story here] says I am canceling pursuant to Va. Code § 55-520 and walks away. Whether the buyer can do so without penalty turns, of course, on how and whether the disclaimer was delivered, and the unabridged language of Va. Code § 55-520 is fairly clear regarding the possible outcomes so I will commend that to your self-analysis. Ask yourself though whether as a listing agent you have done your job well – particularly in this market – if you have left a buyer with an out, even if it is only for a few days and not until settlement.

Look, although I am but the (tall) oracle of judicial wisdom loitering on the agent corner, I recognize the practical problems here. I just think you can easily solve them. For example, it would be quite easy to scan the disclaimer, save it in Adobe pdf (or any other small file size format), and email it to any agent about to write an offer. Many of you have web sites – scan

and post the disclaimer there for downloading. Note those options in agent remarks. Recall there is no statutory requirement for the disclaimer to be signed (and having dutifully read my previous articles you will know that a return email can be a signature in any event – right?) although the VREB prescribed form has a buyer signature line. You can fax it (and you can get an internet fax number that can be sent, received and accessed whether you or the recipient are at a fax or not). You can leave it at the property and require acknowledgement with any offer. I understand your Association – of which I am, ahem, Affiliate of the Year – plans to help solve this problem soon with a transactional platform, but until then you need to solve it.

You can see an example of such a posting at www.lytlelaw.com, where in the REALTORS® Overview page I have posted a link to a sample pdf disclaimer. Call or email me if you have any questions or comments.

Legal Corner

*By Brian Lytle, Attorney
Legal Liability Committee Member*

Title Insurance

Your man on the corner frequently hears agents and buyers say that lender's title insurance protects a buyer to the extent of the loan. This is particularly true, they say, when there is little or no equity in the property. Nothing could be further from the truth.

A lender's title insurance policy affords a buyer no protection whatsoever. That insurance contract is between the lender and the title insurance company. Only the lender can make a claim on its policy. A lender will only make a claim on its title policy when the lender's security interest is impaired, and impaired is not the same thing as threatened. This is an important distinction, which I will address later.

Think of title insurance like car insurance. And assume on our metaphorical car that you have borrowed money in order to buy it. If your car is stolen and if you do not have insurance to cover that loss then you still owe the loan to the bank regardless whether you have the car or not. Just like with the car, our real estate buyer executed a note to his bank: trust me that nowhere does that note say "but if you lose the house the loan is forgiven." So, if the proverbial defrauded-prodigal-wife-in-the-chain-of-title shows up on the new buyer's doorstep and rightly says, "get out of my house" then your buyer still must pay the loan to the lender.

Suppose in our example the buyer then called the title insurance company and said I have lost my house, please pay the loan. The title insurance company would rightly say that the buyer is not its insured, the lender has made no claim on the policy, and it is not its problem. It would only be when the purchaser failed to make payments, thus driving the property into foreclosure, that the lender's security interest would be impaired (it would be unable to foreclose without clear title). But it would be the one making the claim, not the buyer, and it alone would receive payment. Note that since there is no collateral upon which to foreclose, there are no sale proceeds available to satisfy the loan.

At that point the title insurance company would indeed pay the loan off pursuant to the policy. In doing so they are "subrogated" to the lender's rights. Think of "subrogation" as the title insurance company legally stepping into the bank's shoes. And standing in the bank's shoes the title insurance company can turn to the buyer and say: you agreed to pay this loan, now pay. If the buyer does not pay then the title insurance company can sue the purchaser on the note. In other words, the title insurance company has purchased the note from the buyer and is entitled to those payments.

Therefore, the only mechanism by which a buyer is protected by title insurance is through a policy issued in the buyer's name, for the buyer's benefit. So, follow the advice of your Association's Weapon of Mass Instruction and disabuse your client of the notion she is protected by a lender's policy, else she will hear those fateful three words from everyone: "not my problem."

Legal Corner

By Brian Lytle, Attorney
Legal Liability Committee Member

"Please Release Me"

The REIN form release serves three basic purposes. First, it clearly and unambiguously terminates the contract. Second, it releases both parties and agents from any claims against each other. Third, it specifies what is to happen to the deposit. Releases are clear, useful and to be obtained where possible.

Releases are not *legally* required, however, for a contract to terminate and end the obligations of the parties thereunder. The REIN contract has provisions that serve to terminate it on its own terms, e.g. the appraisal conditions in paragraph 10. But the REIN contract also expressly requires the parties to sign a release, as it does in paragraph 5(B) (loan qualification). The distinction could be useful if one has to sue for return of a deposit and probably would help the prevailing party obtain attorney's fees.

What happens when a buyer does not close but refuses to sign a release? Of course, the precise answer is fact dependent but generally I will advise listing agents to put the selling side on written notice of the seller's position regarding the buyer's failure to close and of the seller's intent to put the property back on the market. You should make a note in the "Agent Remarks" section of the listing to call attention to the pending contract still waiting on a release, and any subsequent contract should have a "subject to release of pending contract" provision. This problem almost always resolves itself by the time a new contract is received and ready to go – either the seller can avail herself of the thirty-day safe harbor provision of the REIN contract or I will be comfortable in rendering an opinion for my clients that they can proceed without more.

What happens when a seller does not close but refuses to sign a release? This is the more common occurrence in my experience, because it means the buyers – who feel they are innocent – can not get their deposit returned (and boy do they get mad). Here the tack is a little different: I also advise the buyers to put the sellers on written notice, but here the odds are much greater that the matter will be mediated and then litigated so our notice letter contains appropriate warnings in that regard. Here the buyers still need to be protected if the seller is insisting the buyers are somehow in breach by having a "subject to release from pending contract" provision in any subsequent offer they might make. I recognize that this provision may cause a practical problem for buyers in this market but it is the only 100% safe way to proceed early in the process – I will revisit that language and approve its removal depending on the circumstances as they develop.

As a reminder, brokers may not release the deposit absent written authorization, which almost always comes via the REIN release form. If there is no such written agreement then the broker must hold the money unless the broker can disburse it pursuant to the clear and explicit terms of the agreement of the parties after the broker has provided written notice of her intent to do so. After this notice there is a thirty-day protest period. If there is a written protest the broker should not pay the deposit. If no protest is received after the required notice then the broker may pay the deposit to the party entitled to it, but the broker still should be very careful and consult with counsel, who ought to recommend an indemnification agreement from the recipient of the deposit. Remember brokers, you have little to gain by paying the deposit without consent from all parties and an awful lot to lose.

And so we shall conclude this article, as your Legal Corner author is wont to do, with a popular culture reference. In this case, we hearken back to the golden voice of Englebert Humperdink and his hit:

Please Release Me:

Please release me let me go.

For I don't want to sell to you any more

To waste our lives would be a sin.

Release me and let me sell again

To waste our lives would be a sin.

Release me and let me sell again.

I have found a new buyer dear.

And I will always want her near.

Her loan app is good while yours is bad.

Release me, my darling, let me go.

Please release me let me go.

Legal Corner

By Brian Lytle, Attorney
Legal Liability Committee Member

To be determined, or not to be determined: that is our question.

Quite often buyer's agents are faced with a lack of loan information (or are lazy or have a buyer with options) when they write an offer. As a consequence the agent inserts the phrase "to be determined" in paragraph 2 of the REIN contract instead of a number.

The uncertainty in a contract with that phrase is particularly acute because it is a condition precedent, or contingency if you will, to the buyer's duty to perform. And so to what would a judge look to analyze the terms of the contract? Determined by whom? Determined in what manner and when?

Good, bad, enforceable? Well two out of three: I think it is bad practice but it is *probably* enforceable. The Virginia Supreme Court has said: "The law does not favor declaring contracts void for indefiniteness and uncertainty and leans against a construction which has that tendency. While courts cannot make contracts for the parties, neither will they permit parties to be released from the obligations which they have assumed if this can be ascertained with reasonable certainty from the language used, in the light of all the surrounding circumstances. This is especially true where there has been partial performance."

Given that statement of the law I do not believe a judge would throw the contract out based on our imprecise language alone, but would analyze the circumstances of the offer and the determination.

For example, I suspect if you had buyers who qualified at normal loan-to-value ratios the judge would enforce the contract, especially if the buyer tried to back out late in the deal based on some generalized "had a different loan in mind" explanation. On the other hand, if the buyers did not qualify for a 95% loan to value but did at 90%, and the evidence is that buyers only have marginally adequate savings, I think a judge would allow them out of the contract.

Using the terms "minimum down payment" and "maximum loan amount" instead of actual numbers is somewhat akin to using the term "to be determined." The use of these references is much less objectionable in my mind, however, because they are capable of fixed precision by reference to loan type. There is no arbitrary exercise or determination by the buyer.

As a lawyer my chief concern is whether the contract is enforceable, and I recognize that there are non-legal tactics and strategies involved in the use of these (and other) labels. But I would still caution you against their use: although the clauses are perhaps enforceable, both agents might not be serving their client well: the listing agent allows his seller to have the house tied up with an offer that may well not be enforceable factually or legally in a market where there are options; and, the selling agent allows her buyers to sign a contract where they might be forced to accept financing they did not want or have their offer rejected because it is not as cleanly or competitively written as competing ones.

In the final analysis, Agent Hamlet, ask yourself whether 'tis nobler in the mind to suffer the slings and arrows of marginal provisions or to take arms against a sea of uninformed agents, and by opposing end them?

Legal Corner

*By Brian Lytle, Attorney
Legal Liability Committee Member*

Material Changes

The times they are a-changin'. Of course, that Bob Dylan song spoke to social unrest and change in the 60's, but things also are constantly changin' in the fast-paced world of real estate transactions. When is an agent obligated to disclose transactional change? There are two particular sources of such a duty of which I want you to be aware:

First, VREB regulation 18 VAC 135-20-310 provides that "Actions constituting improper delivery of instruments include: ...2. Failing to provide in a timely manner to all principals to the transaction written notice of any material changes to the transaction...." Surprised? I thought so. This is fairly broad language and would seem to encompass many circumstances we take for granted (and may not always disclose, timely or otherwise). For example, short sale declination, financial changes, title problems, repair problems, closing date issues, contingency removal issues, etc.

Second, with respect to changes, the REIN Standard Purchase Agreement only provides that ""Buyer shall notify Seller ... in writing ... of the occurrence of any material adverse change in Buyer's financial condition which prevents Buyer from obtaining the specified financing...." Thus the contract imposes no more duty upon the agent to report transactional change than that imposed by the regulations. Note also that this particular duty to report material change is imposed upon the buyer and not the agent.

The language above concerns your potential duty to report to the other party and agent, not to report information to your client. As to your client, you owe a much higher duty of disclosure: The Board says the agent must disclose to her client all material facts concerning the transaction when the failure to do so would constitute negligence. Note that dual agency can affect this requirement, however. Virginia courts have consistently held agents to a very high standard of disclosure to one's principal of material and relevant information known to the agent.

Simple principles of honesty, forthrightness and diligence generally provide the answer to disclosure questions, but when you are not sure if you have a duty to disclose, discuss the matter with your broker and lawyer, because as Dylan cautioned that "you better start swimmin', or you'll sink like a stone, For the times they are a-changin'."

Legal Corner

*By Brian Lytle, Attorney
Legal Liability Committee Member*

Termination of Contract

We all hope that a real estate contract terminates with a successful closing and performance by all parties concerned. After all, that is how you earn your living. Unfortunately, however, contracts can end in a variety of non-successful, non-paying, ways.

A contract may terminate early according to its own terms. Home inspection rejection and failure to reach an accord on home inspection items are good examples of a non-breaching, non-paying, contract termination. The standard REIN contract provides for a number of other different termination scenarios. For example, should financing not be obtained through no fault of the purchaser then the contract may be terminated pursuant to paragraph 5(b). This termination expressly requires the parties to execute a release agreement. Likewise, the home inspection contingency addendum requires a release agreement to be tendered if the buyer rejects the results of the home inspection. In some cases the contract contains language obligating the parties to execute a release. But is a signed release agreement necessary to terminate a contract? The short answer is no. There is no general legal requirement that a "release agreement" be executed to terminate a contract, and the REIN contract does not impose a requirement for one to be executed as a pre-condition to termination. An executed release is useful and prudent, however, because it resolves any question concerning the termination of the contract and it releases all parties – including agents – of further liability.

The standard release also expressly authorizes the release of the earnest money deposit. VREB regulations and the REIN contract require that the earnest money deposit not be released "until (i) all parties to the transaction have agreed in writing as to [its] disposition, or (ii) a court of competent jurisdiction orders disbursement of the deposit, or (iii) escrow agent can pay the deposit to the party who is entitled to receive it in accordance with the clear and explicit terms of the agreement." Our Association release form serves as the required written agreement regarding disposition.

What do you do if there is a recalcitrant party who refuses to sign a release when one should be signed? Obviously, you should consult with your broker and attorney under those circumstances, but generally the advice will be to confirm in writing that you believe the contract is being treated as terminated and unenforceable, and that you [really the client] are moving forward to either sell the property or purchase other property as the case may be. Please note in this regard the thirty-day option under paragraph 7 of the REIN contract. Depending on the exact circumstances, prudence might dictate that you include a protection clause in any subsequent contract which will make your client's performance in the subsequent contract conditional upon there being no duty to perform under the prior, unreleased, contract.

Finally, your broker has the ability to release the deposit notwithstanding a party's refusal to obtain a release under the "clear and explicit" language of the VREB regulations and the contract. Under this provision, however, your broker must give written notice and entertain objections. Upon such an objection, your broker may not release the deposit under any circumstances other than a court order. Quite often, unreasonable refusals to sign a release are predicated on a client's misapprehension of the law, the facts, or the customary practices of the

real estate profession, and in those events the dispute resolution provisions of paragraph 17 of the REIN contract are quite helpful in resolving or correcting those misapprehensions.

Legal Corner

*By Brian Lytle, Attorney
Legal Liability Committee Member*

Drafting Contract Clauses

Although the contract of purchase keeps getting longer and more complex in an attempt to cover all possible points and scenarios, agents still are routinely called upon to draft and insert language and clauses to modify it.

Current regulations provide that it is not the unauthorized practice of law for "a real estate agent, or his regular employee, involved in the negotiation of a transaction and incident to the regular course of conducting his licensed business, [to] prepare a contract of sale, exchange, option or lease with respect to such transaction, for which no separate charge shall be made." Accordingly, I think you are safe from the Virginia State Bar when you do draft these clauses or changes. You may not be so safe from your client or your broker, however, if you do so poorly. In my experience most drafting problems arise because agents are careless, in a hurry, or simply do not have the requisite skill or experience to draft changes or additions to boilerplate contracts.

Do not reinvent the wheel. Think you have a unique situation? Think again. The members of your association have been selling real estate for quite some time, and the extensive collective experience and wisdom of the group that comprise it has gone into a clause booklet VPAR makes available for purchase at a nominal cost. Likewise, many firms and experienced agents maintain their own clause booklets and resources. So, consult with your broker and seek help.

Take your time and think. I understand buyer's brokers need to get the contract presented quickly in this market, and I understand you may be drafting the contract at a client's kitchen table with the family pet gnawing at your leg, but you will have done your client a disservice if you write in paragraph 12 that the "buyer desires roof to be repaired." What does that mean? And yes, I have seen that clause on a contract -- you might as well write that the buyer desires to win the lottery.

Be honest. Are you skilled and experienced enough? Not just as an agent -- do you know enough about the subject matter of the clause? If there is no pre-existing clause -- either outright or as a template to modify -- and you have to draft one from scratch, then try to follow these drafting rules: First, state the expectation of your client (or the parties) as precisely, clearly and concisely as you can, and consult with someone, e.g. a home inspector, if you are not sure what the expectation should be. Second, anticipate potential areas of disagreement or interpretation and close them. Last, make sure there are no unintended consequences or conflict with the main contract.

Never hesitate to consult with your lawyer, broker, or mentor.

Legal Corner

By Brian Lytle, Attorney
Legal Liability Committee Member

Contingencies

What is a contingency? Black's Law Dictionary defines a contingency contract as "a contract, part of performance of which at least is dependent on the happening of a contingency." It goes on to define the word contingency as "an event which may occur" and says that the term contingent, when applied to a legal right or interest, "implies that no present interest exists, and that whether such interest or right ever will exist depends upon a future uncertain event."

So, in theory when one makes a contract, or one's performance under a contract, contingent upon a stated event, then that event must occur else the duty ceases or never becomes operable. Lawyers really refer to contingencies in contracts as conditions precedent or conditions subsequent. There is a distinction between the two in that the duty to perform never arises unless the condition, or contingency, is satisfied in the condition precedent, and in the condition subsequent the duty to perform exists unless it is removed or terminated by the later existence of a condition. In either case, from a legal standpoint, if a contingency or condition *is removed by the parties* then it is as if the contingency never existed in the first place.

For example, I understand it is customary to have a home sale contingency in a contract with a "kick-out" clause. When the Seller exercises the kick-out clause it is quite common to have the Buyer remove the sale of home contingency by producing a bona fide contract on the sale of the Buyer's existing home. While this may be the practice, the net effect of *removing the contingency* is that the Buyer may no longer rely on the sale of the Buyer's home in order to perform or not perform under the contract. I question whether that is really the desired outcome. In order to avoid misunderstandings in this regard, the addendum should define the evidence (ratified contract with approval letter?) necessary to satisfy the kick-out clause, and should state that after production of that evidence the contract will still remain "subject to (contingent upon) closing ..." Do not leave this to chance on the old "but I won't qualify for the loan without selling my house" argument because under the current REIN contract that is expressly excluded as an excuse.

While Virginia law did not previously require a party to a contract to act in good faith (at least in our context), the current REIN contract requires the parties to act in good faith and with due diligence. Accordingly, a party must try to satisfy any contingencies in good faith and with due diligence, and a party's failure to do so will cause that party to be in breach of the contract. As a rule, one should use existing, recommended clauses for contingencies and use the REIN or VPAR addenda designed for that purpose. If you find yourself drafting a contingency from scratch, you should consult with your broker and your attorney, and the general drafting advice is this: state the contingency clearly, detail the circumstances under which the contingency will or will not be satisfied, and outline the ramifications should the contingency not be satisfied. Consider and state time periods carefully.

Legal Corner

By Brian Lytle, Attorney
Legal Liability Committee Member

Zen and the Art of Getting Paid

Teacher, what is the goal of the REALTOR®?

Grasshopper, is it not to protect the individual right of real estate ownership and to widen the opportunity to enjoy it?

Er, yes, but I thought it was to get paid.

Ah, very good *acrididae*. However, like many, you believe a BMW can be purchased when in the way of Zen they are generally leased short-term.

Beg pardon?

Never mind, that is another lesson. But it is important to note that you should get paid: unless it is your goal not to get paid, in which case you can fail to get brokerage agreements signed or you can work with unqualified buyers or you can take listings from sellers so short they crawl like the shameful earthworm.

Well then, wise teacher, if that is not my goal then how else does one *not* get paid?

Grasshopper, very insightful to ask the question that way – let us start with the proposition that you want to get paid, that you will be paid and then ask why that might not happen.

I thought I asked that. Why might that not happen?

From the Zen legal perspective there are two categories of legal mistakes: those that come with inattention; and, those that are the result of ignorance.

How does one avoid this path?

Inattention – *not paying attention* – generally happens because you are too busy. Does the grasshopper not know when it is in the weeds and needs an assistant or computerized Personal Information Manager help? So too you know when your life is out of control. On these occasions it is too easy to miss a HOA delivery or a home inspection deadline. You must consult those who are known as the brokers, for they are known to help those who are *acrididae topus producerii*.

Are you saying I am ignorant?

No, of course not. But our real estate world becomes more complex daily: the contracts and addenda can be confusing – and so it is all too easy to make a mistake because you do not understand something. Perhaps you miscalculate costs, make an erroneous representation, misread the cap on a home inspection, or inartfully draft a clause.

What are the most common legal mistakes you see?

Missed deadlines (home inspection, HOA), mistaken representations (costs, repairs, funds), poorly drafted clauses (concessions, home inspections).

If I am confused and not wise in these ways, how can I find out more?

You can attend the Legal Liability programs, use your firm's standard clause booklet and/or the VPAR clause booklet, consult with your broker, and call your attorney. All can help. You may also email the author at bdlytle@lytlelaw.com.

Legal Corner

*By Brian Lytle, Attorney
Legal Liability Committee Member*

New Construction Builder Warranties

New home construction builder warranties arise either by implication under Virginia law or by an express provision in the contract between the builder and the buyer.

Va. Code § 55-70.1 implies a warranty in most new home sales regardless whether the contract provides a warranty. Under this statute, a builder warrants for one year that its product is free of structural defects, is constructed in a workmanlike manner, and is fit for habitation. Foundations are warranted for five years.

Of course, the contract may state a better warranty. It also may waive the implied warranty if done in the manner prescribed by the statute. I would strongly caution an agent against being a party to a contract where a buyer waived all builder warranties.

Many builders provide a warranty that is secured by a third-party private company. The builder still warrants the house, but for a premium paid by the builder a private company acts as a surety or guarantor of the builder's warranty. So, if the builder does not perform or goes out of business then the warranty company will honor the builder's warranty instead. These warranties help builders market their house and allow them to skip the VA and FHA new home inspection process.

In our area Residential Warranty Corporation (RWC) is the most common such company. These warranties typically provide one-year coverage for most defects, two-year coverage for systems, and ten-year coverage for structural matters.

At least one recent court case has held that such warranties are in lieu of the implied warranty under Virginia law. This is particularly notable because most such warranties have very specific exclusions and tolerances – e.g. how wide must a driveway crack be before the builder has to fix it? – instead of the vague "workmanlike manner so as to pass without objection in the trade" standard from the statute.

Also, be on the lookout for a new RWC offering: a five year warranty that provides one year coverage for most defects, one year coverage for systems, and five year coverage for structural matters. The premium for this policy will be substantially less than the ten-year policy so you should see it frequently. It remains to be seen whether it will satisfy the VA and FHA inspection waiver provision though.

Reputable builders are likely a buyer's best hedge against problems, but Virginia law and guaranteed builder warranties are not to be overlooked by agents and buyers.

Legal Corner

By Brian Lytle, Attorney
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ZEN AND THE ART OF MULTIPLE OFFERS

Teacher, must a contract be signed and delivered in order to be binding?

No, it must be signed, but it need not be delivered.

But I am confused, I thought an offer could be withdrawn until the seller had delivered a signed contract.

That is because you have lost your center and forgotten life is like the sand of the hourglass. That or you have forgotten the elements of a contract since you studied for your license.

Beg pardon?

A contract requires an offer, acceptance, and consideration. Acceptance must be communicated. Communication, little grasshopper, is not the same thing as delivery.

I see. Thus if I call the other side and say the contract has been signed and accepted does that mean we have a binding contract without delivering it?

Yes.

What then, teacher, if I tell the buyer's agent the sellers accept the buyer's offer but they have not yet signed?

Then you may have a contract because the elements are satisfied, but that contract in our context is not enforceable. And just as the world turns, when a contract is not enforceable it is of no consequence.

Is a verbal real estate contract not enforceable?

Verbal means *with words* – as opposed to the awful face you make at your listing presentations when asked to cut your commission, which is non-verbal – and words can be either written or spoken. So, never say verbal when you mean to say oral. Do you mean to ask are *oral* contracts enforceable?

Yes, oh wise one, that is what I meant. Are they?

Not as you mean it. Under Va. Code § 11-2(6) oral contracts for the sale of real estate are not enforceable standing alone. They may be enforceable, however, under some circumstances. Be very careful: like the butterfly arising from the chrysalis an enforceable contract may arise when not expected – a signature may be other than a written signature, it may be the signature of the agent and not the party, and the thing which may be signed is not necessarily the contract. A wise and learned agent would always seek the wisdom of the broker and lawyer in such situations.

Does that mean the sellers could renege and accept a better offer before they did sign?

Yes grasshopper. But you must be like the butterfly and land quietly. Or at least be like an agent who realizes he may be branded as someone with whom other agents cannot reliably do business. But you must remember the mantra of the wise agent – chant with me: Who is my client? To whom do I owe my duty? What is it they seek? To ask these questions is to answer them inquisitive one.

Is that not unethical?

It is not because you said your clients had not signed. Do not lie about the signing because then you will be like the moth trapped in the VREB spider web.

Can I sit on offers because I expect better ones to come in?

Do you mean *can* as in are you physically able? Or do you mean *may* as in is it permissible? Oh never mind winged-one that is a lesson for another day. There is nothing to prevent your seller from sitting on offers. You as an agent are obligated to communicate offers promptly to your clients but they are under no obligation to respond promptly. Buyers may condition or limit the terms of their offer and the manner in which it can be accepted so be careful you do not run afoul of the express terms of the offer.

If I am confused and not wise in these ways, how can I find out more?

You may make the holy trek and attend the April 25, 2002 VPAR Night Court entitled *Negotiating Pitfalls*, at which there will be many masters of this topic (and more) who will guide you in your journey from the bronze to the platinum. You may also email the author at bdlytle@lytlelaw.com