Year's end thoughts on risk reduction

By James L. Goldsmith, Esquire

May you be blessed with a superlative 2016. For me, I anticipate no shortage of real estate malpractice files to defend. Since that is a large part of how I make my living, thatôs not so bad. For you, my future clientele, thatôs bad. So what can you, dear reader, do to stay off my new-client list? My advice has changed little over 38 years of practice and it is much the same as I employ for my own protection as a lawyer.

Document. Document. Document. Get in the habit of confirming every conversation with your client, the cooperating broker, the inspector, title agent, mortgage broker or anyone else involved in your transaction. With email capability in your pocket, there is no excuse for not confirming those important conversations. Be sure to save your written confirmations in some format so that they can be retrieved when needed.

Whether by intent or due to the frailty of memory, clients invariably forget your advice. An email confirming your recommendation generally resolves the issue. Recently, a client was able to extricate himself from a lawsuit by the content of his saved email. Suit was filed by a buyer against the seller, listing and buyer agents over the location of the rear boundary. Shortly after buyer signed the agreement of sale, she met with her agent at the property to see whether they could ascertain its location. They could not, but the agent followed with an email suggesting that the buyer consider engaging a surveyor within the remaining days of the inspection period. Presumably the agreement of sale could be amended to accommodate a survey or the buyer could terminate on the basis of any adverse finding in the home inspection report. This email clearly demonstrated that the buyer agent had given the right advice.

Know and explain all written documents to be signed by your client. Written documents speak for themselves and, assuming there is no confusion, there is no need to confirm, via email, what they say. It is important, however, that the agreements be explained properly and appropriately marked. The agreement of sale is a center of every transaction and there is no excuse for not knowing the meaning and importance of <u>every</u> provision. If you have not done so, review the *Guidelines for Use* that is available to you via the Pennsylvania Association of Realtors® website (parealtor.org; go to Standard Forms). How well should you know your agreement? Imagine that you are on the witness stand being cross-examined by a buyerôs attorney. If one of you is at a loss for words or explanations, it better be the attorney and not you! This is your primary tool and there is no excuse for not knowing what every provision mean. Juries will have little trouble differentiating between a knowing witness and one who is winging it. My advice: read the *Guidelines* and gobble-up every continuing education course you can on the agreement of sale.

The same goes for the standard addenda. Most have *Guidelines for Use* on PARôs website. Despite available resources, many members demonstrate their lack of familiarity with addenda in

their questions to the HotLine. Again, thereôs no excuse for not knowing what the addenda mean or how to use them.

Use extraordinary care when modifying agreements, addenda or when drafting your own documents. Better yet, donôt. The standard agreements and their addenda have been thoroughly vetted. Your language has not! When a client or customer seeks to modify a document, you run the risk of being inartful in your execution and/or engaging in the unauthorized practice of law. Itôs one thing to select the standard form for a standard issue. Itôs far different when you seek to create special terms and conditions not accommodated by a standard form. Suggest to the party seeking the modification that they have their counsel draft the appropriate addendum or amendment. There is nothing better than putting a lawyer between you and a speeding bullet!

Know the rules and regulations. Real estate consumers not only file suit. They just as frequently file complaints with Pennsylvaniaôs Department of State that oversees the licensed boards. To file a civil (malpractice) case, the consumer has to demonstrate a financial loss. Financial loss is not an essential element for one to be found to be liable for violating a license law. A consumer who is angry but unharmed may very well exact ñbloodò by filing such a complaint. In many cases, the complaints can be filed anonymously assuming that it is based upon a document that sufficiently proves a violation (e.g., a misleading advertisement, an email that inculpates its author, etc.).

One need not be familiar with all of the rules and regulations. For example, if you are not running a real estate school, donôt worry about the requirements for licensure as a school. On the other hand, there is a subchapter of the rules and regulations entitled *Standards of Conduct and Practice* beginning at Section 281 and concluding with Section 340. Within this subchapter you will find the requirements for putting agreements and addenda in writing, dealing with escrow, property management, statements of estimated costs, seller property disclosure statements, comparative market analyses, the consumer notice and other everyday nuts and bolts of practice. You can read these sections in less than an hour. I promise that you will find answers to questions you hadnôt thought of asking!

Read your trade magazines and local news articles. There is no excuse for not knowing that a major highway in your area is being widened or other newsworthy events that impact real estate sales and marketing. Likewise, there is no reason for not knowing when a standard form is changed or when a real estate law affecting your practice has been modified or changed. Youôre probably reading this article in your local associationôs electronic or printed newsletter. If you are, thank you. But donôt just read this article. Stay current on whatôs happening in your locale. Likewise, stay current on state events by reading PARôs *JustListed*. It never fails to cover a standard form change or a change in the law.

Maintain good bedside manner. It has been proved over and over in many professions. Patients who hear from their doctors about a mistake or adverse outcome are less likely to sue. Failure to return calls email and otherwise going underground have the opposite impact. Itôs not malpractice when your advice leads to a less than perfect outcome. It is malpractice when a client has choices and the choices arenôt explained. Talk to your clients and take time to address

questions on matters we take for granted. The truth is, no matter how busy you are, youôre not too busy to communicate with clients and to be responsive when they reach out for you. As a matter of fact, good communication will not only serve you well in the immediate transaction, but it is the best way to garner those referrals that are so valuable to your practices.

May 2016 bring your health, happiness and wealth and may it keep you from becoming my client!

Jim Goldsmith is an attorney with Caldwell & Kearns and serves as general counsel to PAR. A substantial portion of his practice is dedicated to providing advice and counsel to real estate licensees. He and his firm represent and defend real estate salespersons and brokers in civil lawsuits and licensing claims across the Commonwealth. Jim also defends REALTORS® in disciplinary hearings conducted by the Real Estate Commission. He routinely counsels employers on employee relations issues and is one of the voices of the PAR Legal Hotline. He may be reached at www.realcompliance.com.