

## Heartburn

**James L. Goldsmith, Esq.**

Imagine that you meet with a buyer client for whom you are about to draft an offer. The client seems somewhat distracted and his occasional wincing suggests that he is in some physical distress. During the meeting he says to you that he is experiencing a burning sensation in his chest. He confides that while he believes it is indigestion, he's recently read that heartburn, angina and heart attack may feel very much alike. He asks your advice.

When I pose this situation to groups of Realtors<sup>®</sup>, the answer is universal: tell the client to call a doctor. Good advice.

Let's turn to a different scene. You receive a call from a buyer a month after settlement on his purchase. The buyer tells you that he's getting water in the basement, the roof is leaking, the HVAC has failed, there is mold in a closet and the house smells of cat urine. Like the potential heart attack victim, he asks your advice. This time, however, you do not refer your client to a doctor or even a juris doctor, aka lawyer. You step in and give advice.

To Realtors<sup>®</sup> who take these calls from their buyers, I ask several questions: 1) how much are you being paid to resolve this problem and 2) what potential liability do you create when you offer advice? To the question how much are you being paid, I don't get an answer; usually it is a question: what do you mean? I mean, how much are you getting paid by a former buyer for resolving his failure-to-disclose problem. The question is rhetorical because I know the agent is being paid nothing.

As for the question about liability, the answer is that the agent is liable for his or her advice. So to be clear, we are talking about a situation where you will not be paid for your intervention, but where you are creating potential liability!

How can you possibly be liable for helping? Chances are you will first call the listing agent to ask what he/she knows. You will ask the listing agent to follow-up by contacting the seller to see if the seller had experienced anything like what the buyer is now experiencing. Some of you are sucked deeper into these problems and will contact repair persons or offering advice on bringing a small claim before a magisterial district justice and you may even send your buyer to "your lawyer." Your advice may be good, or bad.

Here is where I impart the wisdom a mentor gave me many years ago: "a smart person knows what he/she doesn't know." Realtors<sup>®</sup> and lawyers do different things. There is no fault in not knowing how a lawyer might handle a potential failure-to-disclose case. There is fault, however, in not recognizing that how a buyer goes about seeking redress is a matter that is best placed in the hands of lawyers (knowledgeable ones).

Here is but one reason. There is a legal doctrine called spoliation. It provides that if one is going to sue another for causing damages, evidence of the damage has to be made available to the defendant. Making repairs before the defendant has an opportunity to view the item may be fatal to the claim! How much time is afforded will depend on the situation. Obviously, an owner has to promptly repair a heating system if it is winter. A few hours or a day's notice may be sufficient. What if your advice to the buyer was to have the system repaired, but keep all documentation so as to support a subsequent claim or suit? That would conflict with the advice likely to be given by an attorney. And there are many other ways the advice of a lawyer might differ from that of a real estate licensee.

So, why do you avoid the heart attack issue, but get involved in the post-settlement issue? Two factors contribute. First, unlike a medical question, you are confronting an issue about which you have some knowledge. The post-settlement issue involves questions of seller disclosure, the competency of the home inspector, the transfer of risk of loss from seller to buyer and other issues that you deal with as part of the negotiation and contracting process. The second reason you become involved is because you want to help your former client who may also be a future client. Also, it's hard to resist the genuine impulse to help someone with whom you recently shared a common endeavor.

It's reasonable to be sympathetic and affected by your client's issues. It's another to shoulder those issues and take the lead in finding a resolution. Advising a client to see a lawyer is not an admission of your shortcomings. If you value your expertise, you should have no problem indicating what falls within your expertise and what does not.

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