

Getting creative

By James L. Goldsmith, Esquire

The most dangerous clause in the *Standard Agreement for the Sale of Real Estate (ASR)* is found in our current Paragraph 32(B), **Additional Terms**. Here's where agents can let loose with the most creative use of the pen imaginable! A problem is, that when these works of art fail for any reason, they are likely to penalize the author (agent) and his or her client. Most of you are familiar with the *legal maxim* "ambiguities are construed against the drafter."

We, the Hotline attorneys, hear from many of you who understand the potential risk of drafting special clauses and who want us to provide the language. Involvement in a specific transaction is beyond the scope of what the Hotline provides, but I understand why you ask. You really want to help your client even if it involves undertaking a job with which you are not completely comfortable. You think your client may think less of you if you say that this is something you don't traditionally provide or that feel uncomfortable drafting the language.

Entering into an agreement of sale involves risk. The risk belongs to the buyer and seller. Drafting unique provisions that may be required in a particular transaction has tremendous impact on the buyer and seller. Out of concern for your client, it is best to refer them to a lawyer experienced in the type of transaction in which your client is involved.

Some modifications may be easily made without resorting to lawyers. Unless the modification is one commonly made, discuss the issue with your broker or office manager and have them review any language you propose. Better to have someone else draft it and have it be their problem.

To be sure, the Pennsylvania Supreme Court has ruled that real estate licensees may draft agreements that arise from the efforts of a licensee in a specific transaction without engaging in the unauthorized practice of law. That decision, however, dates back to 1934 and times have changed. Today, it is fairly easy to rely on the standard agreement and the many standard addenda available. It's rare that a transaction calls for unique or specialized language and if that is the case then it's likely to be a complicated provision. Rather than tackle a drafting challenge, refer the buyer or seller to their lawyer. Not only will you duck any potential bullet, you won't have the angst of doing something you are uncomfortable with. Not only that, your pay remains the same and your client is getting the level of service he or she needs.

When a Hotline caller asks me to help draft special clauses I, of course, delve into the situation and the need for unique language. The explanations vary. One recent caller was trying to accommodate a 1031 exchange. I asked how many 1031 exchanges the agent had handled and the answer was "this is my first!" I advised that after 40 years of practicing law I did not feel comfortable handling 1031 exchanges as I've referred these transactions to my tax attorney partners in the practice who know what they are talking about. Tell the client that the task falls outside of the scope of what a licensee skilled in the marketing and sale of real property generally undertakes. Refer your client to an attorney. It is my belief, that undertaking such a task may very well fall under the unauthorized practice of law, in addition to subjecting you to license revocation or disciplinary measures.

Another caller was trying to draft a swimming pool inspection clause. This one was easy because it is already in the agreement in Paragraph 12, **Home/Property Inspections**. If you have any concern write that the swimming pool is one of the items to be inspected pursuant to the elected inspection provision.

Lawyers are criticized for taking a simple concept and turning it into a page-long provision. The reason, however, is that lawyers understand the importance that no ambiguities exist and that every “what if” is addressed so that there are no questions. And we don’t always get it right.

In this business the pen is indeed far mightier than the sword. Wield it carefully.

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