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"PLEASE -DON'T TAKE LICENSE WITH MY LICENSE!"

By Michael L. Lapin, Esq.

"IT SHOULDN'T HAVE HAPPENED, BUT IT DID"

As a manager with a real estate brokerage company, you have oversight responsibility for the activities of your sales people. You and your company do your best. You hold regular training sessions, utilizing company policy and procedural manuals that reflect the most current appellate decisions and Department of Real Estate disciplinary proceedings. You keep abreast of the progress of every deal and even look over the paperwork generated at each significant step of the transaction. The deal closes and you congratulate your salesperson. You may even include some special celebration upon presenting the hard-earned commission check to him or her.

You move on to the next deal. The finished transaction quickly becomes recent history. The file is eventually warehoused. The details fade from memory as the weeks pass.

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When the buyer's attorney's letter hits your inbox, you struggle to recapture your memory of that concluded deal. The letter is calculated, however, to get your attention and to accelerate your recollection because it not only itemizes certain factual allegations, but characterizes them with the accusation that conjures up visions of endless damages – "fraud".

By passing on inflated rent-rolls that were prepared by the property owner, your salesperson is accused, at minimum, of gross negligence. But since no self-respecting lawyer will be satisfied with a single-count complaint, the letter goes on to say that your company, as the landlord's agent, acted with knowledge, actual or imputed, and is therefore guilty of fraud. If you were lucky enough to represent both sides of the transaction, then your company was also the agent of the buyer, and therefore guilty of breaching a fiduciary duty as well.

The letter ends with a threat certain to finish off your day: in addition to nullifying the deal, returning all monies plus treble damages, your salesperson and your company will be the subject of a formal complaint to be filed with the Department of Real Estate seeking a disciplinary proceeding for a fine and revocation of individual and corporate licenses.

After reviewing the file and discussing that matter with your agent, you have concluded that the agent had no knowledge of any distortions of the rent roll. The rental information was passed on to the buyer as it was given to the agent by the seller. The buyer was a sophisticated and experienced real estate investor and would have been expected to independently examine all the leases and construct his own rent roll for comparison with that prepared by the seller. Your own lawyer believes that good defenses exist to the charges.

You have a good chance of beating a lawsuit. But who can comfortably predict what a judge or jury will do? Equally, if not more importantly, who needs the threat of a license revocation? Company reputation can be tainted and loss of potential business can easily be threatened by claims that go to trustworthiness and

reliability. Even if the matter ultimately settles, the public may be leery of placing business with your company.

"ISN'T THERE ANOTHER WAY TO DEAL WITH THIS SITUATION?"

If the original contractual documents had contained a provision requiring mediation, there would be more than a reasonable chance of resolving the matter without publicity and without the threat of license revocation. Even if no prior mention of mediation had been made, the parties should be educated to the advantages of mediation even at this stage of the dispute.

Mediation that is triggered as a result of a contractual provision requiring that process whenever a dispute arises increases the likelihood of a resolution for several reasons. First, the absence of a lawsuit means there has been no public announcement. It also means that the essence of the dispute is not exacerbated by the creative ability of an attorney to take a single event and clone it into a series of separate counts of a formal complaint.

Second, by having in place a given process means a greater probability of early resolution and significant cost savings. Lawsuits take time. In the time it takes to prepare and file a complaint and answer, many if not most mediations can be successfully concluded. Any company that has been through a lawsuit can comment on the extraordinary internal costs of document production, personnel time in attending depositions and answering interrogatories, not to mention attorney fees.

Third, the parties can take advantage of the confidentiality rules of mediation or construct their own confidentiality agreement. Nothing has to leave the mediation room.

In addition, the parties control the process and give up no options. If they don't like the direction, the mediator goes another way. If an impasse is reached, they can always go back to square one and litigate and threaten license disciplinary hearings.

The process works. But only if the parties, and their attorneys (if involved) sincerely commit to it. The effective mediator will let it be known early to the parties that he is not the decider of the issues. He can give his opinion, even forcefully, but he or she has no decision-making role. This means that the mediator has to make sure that the parties come to the mediation with as much motivation to negotiate a resolution as is possible under the circumstances. Only the parties can make this problem go away.

"BOILER PLATE CAN BE USEFUL AFTER ALL!"

By trying to avoid the entanglements of litigation, you are saying "let's not take the step that is going to make this even more difficult to work out. We can always go there. But we would rather talk this out in an informal and confidential setting in order to allow each of us to understand the other's point of view. Let's save time and money and allow an independent neutral third-party try to help guide us to a settlement. We want to retain the relationship and think this way works for both of us."

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Every broker agreement and every property management agreement should have a provision requiring the mediation of disputes as a condition prior to mandatory arbitration or litigation. It is reflective of sound business judgment for a company to say to its client at the outset that the relation being entered into is valuable. Too valuable to allow it's being jeopardized without trying to resolve it through a constructive, private, cost-efficient and speedy method.

Michael L. Lapin, a member of the bars of California and Illinois for over thirty-five years, is a full-time mediator, serving the real estate and business communities. He has owned/managed as general partner 1.5 million square feet of retail/commercial property, overseeing development, leasing, financial and operational management. He is also a licensed real estate broker.

A twelve-year member of the Orange County Airport Commission (twice chairman) and three-year member of the Orange County Public Finance Advisory Committee (chairman), he was retained by the County of Orange during 1999-2000 in a consultant capacity of Program Manager of the Orange County MCAS El Toro Master Development Program, administering a $10 million annual budget.

In the course of a professional career spanning the practice of law, real estate development and public service, Mr. Lapin has negotiated and resolved hundreds of disputes. More information about him may be found at **www.lapinmediation.com** or by emailing him directly at: **mlapin@lapinmediation.com**