

Being Unclear Can Present Dangers for Brokers

By Lydia G. Chesnick

BOSTON—Brokers operate in a world where competition is fierce and relationships are essential. Every listing is not only an opportunity for a commission but the likely pathway to the next source of business. Unfortunately, the very roadmap to your compensation is also a potential spoiler of that relationship. How do you balance assuring a property owner of your commitment to them and your collaborative spirit while negotiating a listing agreement which, albeit temporarily, may place you and the property owner on opposing teams?

In the interest of landing the listing, a broker may be tempted to follow the words of Teddy Roosevelt: “Do what you can, with what you have, where you are.”

REAL IDEAS



“

Clarity is the best weapon against future disputes.

”

LYDIA G. CHESNICK

since one size rarely fits all, customize the agreement to fit the task.

No matter what agreements are reached or concessions made, do not concede on establishing clear, easily determined dates on which commission payments are due, inserting user-friendly calculations to compute the amounts of those payments and taking the time to carefully express the agreements reached to minimize the enemy in any contract: ambiguity. If payments are to be made in several installments, whether those installments are to be made on actual dates or upon the

When the gravitational pull is towards the path of least resistance or your preference is to direct your energies to the transaction rather than the paper work, resist. Turn your attention to the listing agreement and focus on clarity and the nuances of the sale or lease transaction. Clarity is the best weapon against future disputes, and



Photo: Derek Szabo

occurrence of certain events, include sufficient details to describe the applicable trigger—inartful drafting can create an unintended imposition of conditions or impediments to payments.

Pay particular attention to how you address the so-called tail period—that period of time following the termination of the listing agreement in which you preserve your entitlement to a commission for those prospects with whom you dealt during the listing period. If language in the agreement is susceptible to different interpretations and litigation results, beware that you will not only be faced with potentially significant costs but that courts often adopt the belief that it is the broker who is in the better position to dictate what is included in the brokerage agreement when interpreting the agreement. Clarity now prevents controversy later.

Take the time to make the brokerage agreement fit the sale or lease transaction for which you have been retained. View the transaction, at this early stage, in the context of the moving parts that you will likely be managing. Address those moving parts not only when imagineering your marketing plan but when structuring the agreement. Think about whether certain elements of the deal will likely impact the needed timeline to accomplish those goals—factor in time to obtain third party consents, consider whether the complexi-

ty of the deal will require longer time periods for professionals to document it, and assess the scope of the likely due diligence required.

Before signing the Listing Agreement, read it and consult with professionals and, then, ask yourself one of the most important and most basic of questions: “If I asked the person sitting next to me to read the Listing Agreement, without any explanation from me (without what a Court would call “extrinsic evidence”), would that person be able to easily understand and implement it?” Only sign the agreement if the answer is “Yes.” ■

Lydia G. Chesnick is a partner at the Boston law firm of Bernkopf Goodman. Her practice encompasses real estate and business law, including acquisitions, leasing of retail and office space and working with small and large business owners.

The Real Reporter

VOLUME 4, NUMBER 18

© 2012 The Real Reporter, LLC. Ten Post Office Square, Boston MA 02109, 617-692-2997. All rights reserved. No part of this publication may be reproduced without the written consent of the publisher.