



## 14 Things Brokers Can Do to STAY OUT OF LEGAL Trouble

Being a broker can be a challenging job. Some joke that agents make all of the money, but brokers have all of the liability. While this is obviously an exaggeration, there are risks in being a broker, particularly as companies grow and have more agents to supervise. Let's explore some of the areas where there are increased risks to brokers and how best to avoid that potential liability.

### **[1] ADOPT A DESIGNATED AGENCY POLICY**

The Brokerage Relationships in Real Estate Transactions Act ("BRRETA") allows brokers to practice designated agency if the broker assigns one of its agents to represent the buyer and another to represent the seller. The only problem is that, in reality, the broker almost never assigns the different agents to act as designated agents. Instead, the agents assign themselves as designated agents. One possible way to comply with BRRETA is to adopt a company policy where the broker automatically assigns each agent to represent their clients as designated agents whenever agents in the same company find themselves on opposite sides of a real estate transaction. An example of such a policy is as follows:

"Whenever one or more agents in our Company are representing the buyer in a real estate transaction and one or more agents in our Company are representing the seller in the same transaction, all such agents are hereby assigned as designated agents to exclusively represent the party they are representing."

### **[2] DO NOT DELEGATE TOO MUCH AUTHORITY TO YOUR AGENTS**

Most brokers give their agents the authority to sign customer agreements, brokerage engagements, purchase and sale agreements, compensation agreements and other standard GAR Forms on behalf of the broker. Based on such a grant it could be argued that the agent has the apparent authority to enter into other agreements on behalf of the broker. Brokers may want to state more clearly in their independent contractor agreements that other than the standard form documents agents are expressly

permitted to sign, the agents have no authority to bind their broker. Brokers may also consider putting conditions on the ability of an agent to sign the broker's standard form documents on behalf of the broker. For example, it might make sense to require the agent to get the broker's permission if a client seeks to delete, modify or amend any portion of the standard brokerage engagement agreement used by the broker. Here's another example using a specific form. The GAR Exclusive Buyer Brokerage Engagement Agreement contains a one year statute of limitations for claims against the broker. If a buyer sought to change this to ten years, it should be a change only the broker could approve (and not the agent).

### **[3] INCREASE THE AMOUNT OF CAR INSURANCE YOUR AGENTS ARE REQUIRED TO HAVE**

This may seem like a strange one for brokers to focus on, but here is why it is important. Arguments have been made over the years, that some agents, particularly onsite sales agents, are really employees of the broker rather than independent contractors. It does not matter what you call an agent; it's how they function that is key. While employers are legally responsible for the torts or negligent acts of their employees committed during the course of their employment, they are not legally responsible for such acts committed by their independent contractors. For example, if an agent who is an employee is speeding to go to a meeting with a buyer and gets into an accident, the broker employer may be responsible for the negligence of the employee. So, what does this have to do with insurance? Well, the more car insurance an agent



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has, the less likely the broker will get sued by a lawyer arguing that the agent was really an employee rather than an independent contractor. Historically, this is the reason brokers have required their agents to have car insurance. But frankly, the amount of insurance that agents should be required to have has generally not kept up with the times. Many brokers still require their agents to have only \$300,000 of liability insurance when a million dollars should probably be the minimum requirement.

#### **[4] REQUIRE THAT AGENTS NOT POST “FOR SALE” SIGNS TOO CLOSE TO THE ROAD**

We have seen several claims recently where “For Sale” and “For Lease” signs were placed too close to the road and blocked visibility to oncoming traffic. This can result in serious traffic accidents. Brokers may want to consider requiring that all such signs be placed a safe distance from the street to ensure visibility.

#### **[5] WHEN AN AGENT LEAVES YOUR COMPANY, IMMEDIATELY FORWARD THEIR LICENSE**

License law requires that when an agent leaves a brokerage firm, the broker must cause the agent’s license to either be forwarded to the new broker or returned to the Georgia Real Estate Commission (GREC). Brokers cannot condition forwarding the license on the agent either returning property to the broker or repaying monies owed by the agent to the brokerage firm.

#### **[6] TRAIN YOUR AGENTS ON HOW TO WARN ABOUT HAZARDOUS CONDITIONS ON THE PROPERTY**

Claims resulting from persons being injured in touring properties are on the rise. Brokers should consider training agents on how best to avoid such claims and encourage agents to get disclosure forms warning of hazardous conditions signed before buyers walk through a property. Injuries occurring during open houses are probably the area of greatest risk to brokers. Certain warning phrases will hopefully become standard in our industry such as the following:

- “Please hold onto the handrail as you walk [up] [down] the steps.”
- “Please be careful of the step down.”
- “Please be careful of the step up.”
- “There may be rainwater on the floor” (said when it is raining) “please walk slowly and carefully”.
- “Please keep your children with you. We do not want anything to happen to them.”

#### **[7] TIMELY NOTIFY YOUR INSURANCE CARRIER OF POTENTIAL CLAIMS**

Many REALTORS® are reluctant to quickly notify their insurance carrier of claims for fear that it may raise their premiums. However, if the broker delays in notifying the carrier, the insurance carrier can deny coverage. While this may be a “damned if you do, damned if you don’t” situation, the safe approach is to never delay in notifying the insurance carrier. The reason for this is that it is sometimes hard to tell which disputes will end up in litigation. Sometimes claims that seem minor, blow up into major claims.

#### **[8] HAVE THE RIGHT COMPENSATION AGREEMENT WITH YOUR AGENTS**

License law requires brokers to have a written agreement with their agents specifying the terms under which the agent will be compensated, including for work started but not completed prior to an agent’s departure from a brokerage firm. Many brokers provide for a significant reduction in an agent’s compensation for transactions when an agent leaves the company to reflect that another agent may have to be brought in to finish the transactions. To avoid challenges that the reduction constitutes an unlawful penalty provision, brokers may want to phrase the reduction language as a liquidated damages provision. An example of this is as follows:

“All parties agree that Broker will be harmed by the departure of Licensee from the Company, regardless of the basis for that departure. Broker and Licensee mutually agree that Licensee shall only be paid \_\_\_\_\_% of the fee Licensee would have received had Licensee not departed the Company on all transactions pending and not closed at the time of Licensee’s departure. The reduction in compensation shall constitute liquidated damages to the Broker and a reasonable pre-estimate of Broker’s actual damages rather than a penalty.”

#### **[9] KNOW WHEN TO REPORT VIOLATORS**

License law imposes an affirmative duty on brokers to report to GREC licensees who violate license law. This requirement applies to licensees working for the broker as well as those who do not. This requirement may be the most violated provision of license law. However, failure to report a broker’s own agents can make the broker liable for the violation.

There are minor violations of license law that can result in the issuance of citations by GREC. There are other more serious violations that can result in the imposition of

a more formal and permanent sanction. GREC's substantive regulations identify the fines for the more minor violations for which a citation will be issued. If brokers are reluctant to report violators, they should at least report the

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violations that can result in a formal sanction. These tend to be things that can result in the loss of an agent's license. Brokers should never risk losing their own license to protect another licensee.

### **[10] KNOW WHAT RECORDS YOU ARE REQUIRED TO KEEP**

Brokers are required to keep for three years copies of all sales contracts, closing statements (if provided to the agent attending the closing), any offer or other document resulting in the deposit of trust funds, accounting records for all trust accounts and other documents relating to real estate closings (See O.C.G.A. § 43-40-25(b)(27)). This means that all sales contracts and amendments to sales contracts must be kept, including sales contracts that were terminated after they were entered into. Unaccepted offers, however, do not need to be kept. Documents relating to the closing would normally include all documents received by the agent at the closing.

### **[11] BE CAREFUL IN ALLOWING AGENTS FROM OTHER COMPANIES TO HOST THE OPEN HOUSES OF YOUR AGENTS**

A growing practice in our industry appears to be agents in one company having other agents from a different company conduct their open houses. This largely seems to be happening in informal arrangements between the listing agent and the agent from a different company. An agent from one company holding an open house for an agent in a different company can only be done with the prior written consent of the brokers from both companies. Moreover, the listing broker should recognize that the agent from a different company is technically a sub-agent of the listing broker's company, and the listing broker may well have liability for

any misdeeds of that sub-agent. The listing broker should also not allow the practice without the prior written consent of the seller. This is because the seller hired a particular listing broker to market and sell the property.

### **[12] CONSIDER NOT HOLDING EARNEST MONEY**

The best way to avoid being in the middle of earnest money disputes is not to hold it. If you feel this is impractical, consider a policy where you will only receive earnest money in the form of a wire transfer of immediately available funds. If that will not work, make sure you have procedures in place so that if earnest money does not arrive on time, or if an earnest money check is returned by the bank, all parties are notified immediately. Failing to timely notify all parties of returned or unreceived earnest money checks is a leading source of legal disputes.

### **[13] LET SOMEONE ELSE BE YOUR QUALIFYING BROKER**

Many broker-owned companies have the owner as the president and chief executive officer of the company, but make someone else, usually a compliance officer, the qualifying broker since the qualifying broker can be sanctioned for the violations of the broker's agents. This can prevent the owner from being sanctioned for things that the owner may not have known much about. When companies have compliance officers, that person usually knows the most about what the company's agents are doing in the field. It is therefore logical that such persons be in the role of the qualifying broker.

### **[14] BE SMART ABOUT FAIR HOUSING**

Fair housing is the law. It is also smart business. Brokers should embrace fair housing as a goal by:

- Displaying a fair housing poster in your office;
- Conducting fair housing training;
- Requiring the fair housing logo in advertising; and
- Providing agents with fair housing materials for them to include in marketing presentations.

Adopting these practices can help reduce fair housing claims.

It's fair to conclude that the nature of the legal risks brokers face is constantly changing. Always being vigilant to the trends in potential broker liability is the best way to stay out of legal trouble.