REAL ESTATE BROKERAGE CLAIMS EVALUATION – Part Two

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[Note: This is the second in a two-part series in managing brokerage risk. In the first article I discussed managing risk "from the top down," i.e. identification of what aspects of real estate brokerage practice need the greatest attention, and proper evaluation and treatment of customer complaints before a potential claim becomes a real claim. - PCQ]

Where Do Claims Originate? Real estate brokerage claims come from three different sources: (1) The customer, (2) the customer's lawyer, and (3) the Oregon Real Estate Agency.

Claims From Clients. If the client is presenting the claim on their own behalf, the real estate company is in the best position to have direct control over managing that risk. In fact, this may be the *one and only* time a managing principal broker has actual control over the outcome of the claim.[1] Here are some tips:

- What does the company's E&O insurance policy say? What type of threshold does it set for reporting claims?
- Is this the type of claim that needs to be reported?
- What is your brokerage's claims history? Is the claim worth reporting if it can safely be settled within the deductible limits? Remember that if it cannot be settled but is belatedly reported, it could result in a denial of coverage – be sure to know where that point is. If the claim has a risk of high damages if not settled, would it be wiser to get it to the carrier at the outset?
- Is the claim primarily one for monetary damages – or is it also based upon ethical or fiduciary duty issues which could likely result in an additional complaint to the Oregon Real Estate Agency or the local board/association of Realtors®? Claims that can be filed

[1] I am distinguishing this type of claim from those in the first article simply by degree. The type of claim discussed in Part One deals with the general dissatisfaction of the client before it ripens into an actual demand for money or other relief.

at multiple jurisdictional levels frequently are done simply to add value to the dollar claim and/or apply pressure on the defending company.

- Can the claim be resolved in ways *other than* the payment of a large sum of money? For example, consider asking the disgruntled client what solutions they have in mind.[2] If the complaint involves an alleged nondisclosure of a defect, can that item be replaced or repaired with a minimum of expense?
- Make sure the ground rules for settlement discussions are clearly established – i.e. that nothing said in the discussions can be used as evidence should the case not be settled. If need be, treat it as "settlement discussions" and submit a short written agreement to that effect before commencing the negotiations. Make sure to include a statement that this process shall *not* be deemed to be in lieu of the local board/association mediation process required in the OREF statewide Sale Agreement form. Clearly, if the case cannot be settled informally, the insurance company will almost certainly have to be notified.
- Never, never, never, settle a case without making sure that it includes a complete release of all liability, i.e. a "global settlement."
- Make sure that any written settlement includes the following: (1) A promise that the complainant will not file anything with the Oregon Real Estate Agency, the brokerage's local board of Realtors®, or any other private or public agency[3]; (2) A confidentiality clause prohibiting any discussion with third parties about the case unless compelled to do so by subpoena or other court order; and (3) A clause prohibiting the complainant from disparaging the brokerage, its brokers or employees to any third parties.

Claims From Attorneys. If the claim is presented in the form of a demand letter from the customer's attorney, the ante' will probably go up exponentially. It is at this point that the managing principal broker begins to lose control over the outcome of the case. The attorney has counseled his or her client about the "value" of the case (correctly or incorrectly), and now the client has a higher (and perhaps unrealistic) level of expectation about the outcome of their claim. Here are some tips in evaluating the claim once an attorney is involved:

[2] While this may sound overly simplistic, I have settled cases between sellers and buyers that involved low dollars amounts and a simple apology.

[3] Some will say that this cannot be done. I've included it routinely, and not met that objection. However, it is true that notwithstanding the promise, a complainant could still file something with the Real Estate Agency. I have yet to see this happen, so my view is to ask for it, even if there is a risk of violation. That's far better than not prohibiting it in the settlement agreement at all. Look at it this way: Is the Agency going to get excited about a fully settled complaint where the person now complaining promised they would not do so? I think the Agency has more important things to do. However, if the settled claim involved some egregious ethical or regulatory violation, the Agency could (legitimately) become involved.

- Get your own attorney – don't allow yourself to engage in a one-on-one dialogue regarding the merits of the case with the other side's attorney. Your statements are not protected under any legal privilege, and your words could come back to haunt you.
- Find out as much as possible about opposing counsel. How much experience does he/she have in litigation, in general, and real estate litigation, in particular.
- If the claim is small, talk to your attorney about making a formal offer of compromise (also known as an offer of settlement[4]) at the earliest possible time. If the claim has already been filed in court or arbitration it is known as an "offer of judgment" and if done correctly, may cut off the other side's right to recover prevailing attorney fees from the date of the offer.
- Try to get the case into mandatory mediation at the earliest possible time. Make sure the mediator is well versed in all of the facts ahead of time – the good, the bad and the ugly. Statements and submissions to the mediator, either written or oral, can be designated as "confidential" and do not have to be shared with the other side or their attorney.
- Don't sugarcoat your case to the mediator, since he or she is in the best position to render an objective evaluation only with complete knowledge of the facts.
- Don't play games in mediation, e.g. attending only to use it as a discovery tool on the road to arbitration, rather than engaging in good faith settlement talks designed to end the matter once and for all. Make a genuine effort to resolve the dispute.
- Remember that each side wants to walk away with some dignity. Don't insist upon positions that make it impossible for the other side to agree. Focus on the solution, not fault and finger-pointing.
- If the other side is taking an unreasonable position and significant dollars are at stake, ask that the mediator become more "evaluative" by focusing on the legal difficulties of that unreasonable position – as opposed to letting the process be only "facilitative," i.e. with the mediator shuttling back and forth simply trying to get the parties to "split the difference."
- Make sure you fully understand your legal defense. Discuss with your attorney his/her evaluation of the case. What are the strengths and weaknesses? Is there a chance that an arbitrator would conclude that the broker actually did fail to meet applicable industry standards? What type of witness will the defending broker(s) make? Are there principal brokers in other companies who would testify that applicable industry standards of care were met? Remember, you need to know what standards of care apply![5]

[4] See ORCP 54E.

[5] This is the litmus test for finding a breach of fiduciary duty, i.e. did the broker fulfill their fiduciary duty to the client as prescribed by applicable industry standards?

- Don't walk over dollars to pick up pennies. If the case can be resolved by the payment of a few dollars more – even if seemingly unwarranted – consider doing so just to get the case resolved. Standing on principal is fine, but if there is significant legal exposure and the other side may likely prevail – *even for less money* – they will recover prevailing attorney fees. Sometimes these fees can meet or exceed the damage amount at issue. The payment of a little extra money now will buy peace going forward, which is a commodity that rarely occurs *after* litigation is filed.

Claims Made to the Oregon Real Estate Agency. Remember that claims to the Oregon Real Estate Agency sometimes can also become civil claims in court or arbitration. Unfortunately, occasionally the civil and regulatory claims get filed simultaneously, both in court and with the Agency. Here are some tips in dealing with the Agency.

- Dealing with a claim brought through the Agency is *not* the same as with dealing with a disgruntled client or their attorney. If the Agency suspects that a broker violated applicable licensing laws, it can be very difficult to resolve by a simple monetary settlement with the consumer. While settlement with the consumer may be taken into consideration in mitigation of any licensing sanction, settlement on the civil side will not necessarily make the Agency's claim disappear.
- On the other hand, if the basis of the Agency's claim is primarily monetary (*e.g.* the claimant alleges that their broker *negligently* failed to represent them[6]) reaching some sort of financial accommodation with the complainant directly can be very useful in reducing any possible sanction. It can also be useful if, as pointed out above, a written settlement is reached that releases the broker from any further civil liability. The Agency has less incentive to pursue a claim if the client says they are satisfied with the monetary resolution and are not interested in pursuing the matter through them.
- If the claim appears to the managing principal broker to be a serious one, Agency investigative interviews should be carefully handled. Make sure the transactional file is thoroughly reviewed and complete. Make sure the broker's personal file does not contain documents that should be in the broker's transactional file, or vice versa. Thoroughly debrief the broker before an interview with the Agency investigator. Make sure that you have read the complaint thoroughly and understand exactly what the customer is complaining about. Don't allow the broker to be interviewed outside the

[6] As opposed to some intentional or reckless violation of a licensee's statutory duties.

presence of the managing principal broker and/or an attorney familiar with this process.[7]

- Make sure that you've obtained the *entire* file from the Agency before an investigator's interview with the broker. In many cases, the investigator has already accumulated a substantial amount of information in advance of the interview.[8] In short, the investigator may already believe they know the answers to the questions being asked. For that reason, it is critical that the broker be absolutely familiar with the issues and truthful with their responses.
- You do not have to agree that an investigative interview be tape recorded. There are advantages and disadvantages of doing so. You should consult with your lawyer to evaluate the cost/benefit. Make sure your attorney has gone through this process before. I normally do not see any advantage in tape recording an interview – ever. The reasons are legitimate and tactical.
- Some investigators are easier to deal with than others. Try not to get on the wrong side of them. It's like arguing with a traffic cop before they give you a citation.
- Know the weaknesses in the Agency's case. Remember, the Agency doesn't like to lose either. They will be less likely to seek a serious sanction if they know it exceeds the likely result that would be handed down by an administrative law judge should the matter become a contested case. If the complainant is a poor witness, has been caught in lies, has a criminal record (it happens!), is a present or former licensee themselves, perhaps with an Agency record (it also happens!), this is useful information to have. Occasionally, it is possible to unearth information that the Agency itself does not yet have.

Conclusion.

Litigation, arbitration, and regulatory claims can take on a life of their own. Fighting is rarely worth the cost, and should be left as a last resort. Managing principal brokers can do much to stem the tide by - first and foremost - training brokers to recognize where risks are the greatest, and to keep management promptly informed of potential problems. If a particular broker continues to ignore company policy after being properly counseled, he/she should be let go. Managing principal broker supervision should be real, substantive, and continuous. While none of these precautions can prevent customers from becoming dissatisfied, they can help reduce the risk of dissatisfaction ripening into civil and regulatory claims.

[7] The use of an attorney during the interview can be quite helpful in keeping the proceeding on track. Some investigators have a habit of asking open-ended questions, which can invite the broker to give long rambling responses. Never allow the investigator to become argumentative with the broker or *vice versa*.

[8] It is true that under Oregon's Open Records Law, obtaining information while and investigation is pending may be refused. But in my experience, the Agency has never raised this in opposition to a formal request to see the file.