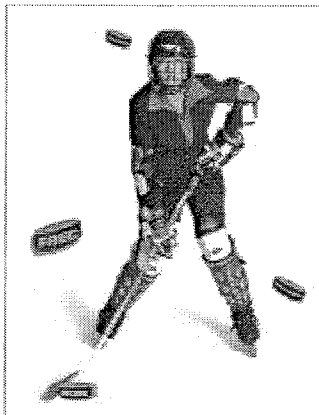


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Protect Yourself

You might think that fewer transactions and lower sales volume would lead to fewer real estate professionals getting entangled in lawsuits and Florida Real Estate Commission investigations. Not so.



“When everybody’s making money, mistakes can go under the bridge,” says Steven David, owner of Florida Professional Real Estate in Fort Lauderdale. “In a tight market, when sellers are losing money, they may be looking for somebody to blame. A simple mistake in times gone by can turn into a lawsuit today.”

But you can reduce your risk of being sued or losing your license by implementing smart risk-management practices—and there’s no better time than the present. “This slower market is a benefit to real estate professionals, who can create systems, checklists and forms so when the market picks up again, they’re ready,” says Sylvia Golden Norris, a principal at the Sarasota law firm that bears her name. “It gives them an opportunity to clean house.” Here are ideas for doing just that.

Follow the Money

You’ll reduce your risk dramatically by creating procedures to ensure that escrow amounts are collected, deposited and reconciled. Mishandling of escrow funds is the top cause of investigation by the Florida Real Estate Commission (FREC), according to Thomas O’Bryant, director of the Florida Division of Real Estate (DRE) in Orlando. “If there aren’t clear, defined business practices on how that money gets from the sales associates to the broker and then to the [broker’s] escrow account,” he says, “there will be problems.”

The most common escrow violation involves salespeople who fail to give a check received from buyers to their broker within the one business day time period required under the real estate license law. This in turn frequently results in the broker’s failure to deposit the funds in escrow within the three-business day period required by law. Another common escrow problem occurs when the contract requires a second escrow deposit to be held by the broker, but the salesperson who is licensed with the broker who is acting as the escrow agent and who is involved in the transaction fails to follow up with the buyer to ensure that it’s paid and then fails to inform the seller that the broker hasn’t received the deposit pursuant to the contract. “Technically, the buyer is in breach of contract,” says Daniel Villazon, principal at Daniel Villazon P.A, a law firm in Celebration, “and if the transaction doesn’t close and the seller makes a claim on the deposit, it’s not in the escrow account. That creates trust liability shortages, and when the Department of Business and Professional Regulation (DBPR) finds a shortage, your license can be revoked.”

To solve escrow mistakes, create a firm-wide policy detailing how sales associates should treat escrow funds. Then, make sure they follow it. “The solution is sales associate training,” says David. “The policy should be in your policy manual, and your associates should be trained on it on a regular basis.”

Brokers also have to be sure they’re following their own escrow management practices. “Escrow accounts have to be reconciled every month,” says O’Bryant. “You can’t borrow from them or dip into them, and the interest issue is dealt with by statute. They’re very, very tightly controlled accounts.”

Problems can arise when the person reconciling the account makes a mathematical mistake, doesn’t properly account for dishonored checks or fails to do the reconciliation altogether. And it’s not enough to leave the task of managing escrow

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funds to an accountant or office manager. "It's always the broker's responsibility for the management of the escrow account," says O'Bryant. Florida Administrative Code rule 61J2-14.012 provides that the monthly escrow statement-reconciliation must be reviewed, signed and dated by the broker.

Disclose and Document Diligently

Two more big risks to both brokers and sales associates are the failure to make required disclosures and the failure to document transactions, which are closely related. Not only should you implement policies and procedures for ensuring that all the disclosures required by law are made, but you should also create systems for documenting those disclosures, along with everything else in the transaction.

Norris keeps statistics of the types of cases she handles for sales associates and brokers, and about 67 percent of them arise from a failure to disclose. "I tell clients, 'If it's not in writing, it doesn't exist,'" she explains. "I call it having your cake and eating it too. Having your cake is documenting the file when disclosures have been made. Eating it too is getting people to sign a document acknowledging that you've told them something."

If you can't get a signed acknowledgment of a disclosure, Norris recommends sending a letter describing the disclosure: "This is to confirm that I told you that ...," she explains.

Many real estate professionals don't use the seller property disclosure form to their advantage, says Norris. They often fill it out themselves at the end of a long listing presentation by asking the sellers rapid-fire questions in an effort to get all the paperwork out of the way. "If it ends up becoming a problem, the first question a lawyer will ask is, 'Did you fill out this form and make these checks?' The sellers will say, 'I told my salesperson about this problem, but he didn't mark it on the form.'"

"The seller [property] disclosure form should never be in [the sales associate's] handwriting, not even the address," explains Jamie Billott Moses, a shareholder at the law firm of Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap in Orlando. "I recommend that sales associates leave it for the sellers to take their time filling it out. Let sellers think it over. 'Did we ever have this done? Was it because there was a leak?'" And don't forget the final step of requesting the buyers to sign the section of the form showing that they acknowledge receiving it.

Both Norris and Moses advocate giving too much information. "[The seller] should disclose anything and everything [they] know," says Moses. "I've gone so far as to recommend attaching prior disclosures sellers obtained when they purchased the property. I don't think overdisclosure is bad at all." However, sellers should note that both the seller and the listing agent have a legal obligation to disclose known facts that materially affect the value of residential property.

At every step of the process, you must document your actions. Whether you're a broker or sales associate, create checklists for everything you do, advises Moses. For instance, one might include all the issues to double-check on each contract—for example, Is it fully executed? Has every change been initialed and dated by all parties? Are the address, price and commission correct?

After each transaction, hold on to those records. "You must keep all business records—which is virtually everything that has to do with a transaction—for at least five years" says David. If the record has been the subject of or served as evidence for litigation, then it must be retained for at least two years after the conclusion of the civil action or any appellate proceeding—but in no case less than five years.

Moses recommends going a step further. "After you've passed that timeline, I recommend investing in a scanner or scanning company so that you always have those records," she explains. "I have a case right now involving a sale that was completed seven years ago, but the problem wasn't discovered until three years into the ownership. So you can't assume that once you get past a couple years, it's safe to destroy records."

Licensed to Sell?

Though it seems basic, you increase your business risk by not staying on top of

your administrative duties. For example, both brokers and sales associates must make sure their licenses are current. "You must do continuing education, and you must renew your license," explains Villazon. "It's expensive, and with these economic times, some people just put it off or don't pay attention, and their license goes inactive. That creates lots of problems, including the possible loss of commissions. But it's an absolute rule—if a real estate licensee does not hold a valid and current active real estate license at the time they perform the brokerage activity they aren't entitled to a commission."

Though being inactive seems like a minor violation that may go unnoticed, that's not the case. "A lot of consumer complaints to FREC are frivolous," explains Villazon, "but when investigators look into them, they realize salespeople were acting without a having a valid, active license." When brokers fail to ensure their sales associates are properly licensed, they can be hit with aiding and abetting unlicensed activity, says O'Bryant.

Brokers can reduce the risk attendant with employing a salesperson who has an inactive license by taking some simple steps. Villazon recommends that brokers do a monthly online check of their associates' license status. Other brokers go even further. "One broker told me that she avoids this problem by making her sales associates go online to myfloridalicense.com just before each closing," explains O'Bryant. "They must print the screen of every licensee involved in that transaction and keep it in the file. That's an outstanding business practice. That way, you know your license status and can prove it."

The bottom line is that all real estate professionals need to constantly evaluate their risks and do everything possible to minimize them. "Risk management should be a part of your business plan," says David. "You can never eliminate risk, so think about each component of your business and how you can eliminate or reduce the risk in that component."

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