

AVOIDING PROFESSIONAL LIABILITY

by Harold I. Levine

While there are tremendous opportunities for attorneys practicing residential real property law, we must also be cognizant of the fact that this area of practice is one of the highest categories for malpractice claims. If it was ever true that "anyone can handle a house closing," such is clearly not the case today.

In the past few years, we have witnessed an explosion of activity in the residential real estate market. Such blessings do not, however, come without a price. Disgruntled home purchasers, assessing damages from flooded homes, lost earnest money, and mortgage rates promised but not given, are often looking to the lawyer's pockets to recoup losses.

Lawyers should treat every new client as a potential claimant. "Horrible!" you say, "who can practice like that? What about the good old days of swapping stories around the closing table?" The answer is: "Those days are gone."

Consider the following:

1. There is potentially more hostility in real estate transactions than there is in litigation. At least, in litigation, you know who the enemy is.
2. The largest numerical category of malpractice claims is real estate related, making up 40% of all claims.
3. In a consumer society, clients are totally unforgiving. The old margins of error are gone.

To treat a client as a potential claimant does not suggest you should be mean, hostile, difficult, or unfriendly; it means you should be professional and businesslike:

- Don't over-promise a client who tells you that in four months he or she is going to close the sale at 2:00 p.m. and use the proceeds to purchase at 3:00 p.m. Explain the realities that close coordination is difficult, and send the client out for a gap loan.
- Every case should be covered by a clear and concise engagement letter. I was once an expert witness for a lawyer who put in 38 hours on a nightmare closing. The agreement said that the lawyer would get paid extra if there were any unusual circumstances. The trial judge decided 38 hours wasn't unusual and gave the lawyer \$530.
- Charge enough money to do a professional job. You didn't go to college and professional school so that the broker could set your fees. If you let the broker set your fees, maybe you should ask the broker to pay for your malpractice insurance.
- Use checklists and have proper closing procedures.
- Don't neglect post-closing details. Change the tax bill, file the release, and clear up the loose ends.
- Don't get into areas you don't know anything about. Real estate is a huge area. Just because you are great at closing deals doesn't mean you know about every type of real estate case.
- Avoid conflicts. Learn to recognize and deal with conflicts before they become full blown. Conflicts are very frequent in real estate.

You may say, "Well, if I have to practice like this, the heck with it. I'm just going to pack it in because I can't live like this." You may have to. Lawyers may become the farmers of the 1990s and in five years attorney involvement in the residential real estate process may vanish.