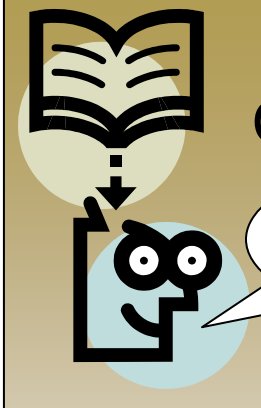
WAYNE'S WORLD NEWSLETTER

A WORD FROM GENERAL COUNSEL • September 2004



Give us some

FEEDBACK!

Hey Guys and Gals . . .

Are you reading our little publication?

If so, we'd appreciate your feedback.

Are there any topics, issues, or particular problems you would like us to cover in future editions? **LET US KNOW!**

Please contact either me or Helen Gynell. THANKS.

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Attn: Sellers of Condominium Units . . .

IT'S THE LAW: *Effective October 1, 2004,* sellers of condominium units must provide their Buyer with a **Frequently Asked QUESTIONS & ANSWERS Sheet.** This obligation was eliminated by the 2002 Legislature but reinstated by the 2004 Legislature. Condominium Associations are required to keep a copy of this question and answer sheet on file, so either you or your Seller should be able to get a copy for the Buyer.

UPDATE ON FAR-7 CONTRACT

Just like "Ivan The Terrible", it appears that we may have "dodged a bullet" and received a reprieve. The distribution of the FAR-7 contract is **indefinitely delayed** for reconsideration of the proposed revisions to the financing provisions in the contract. Apparently, I wasn't the only person totally confused with the proposed language in the new contract! Whew!! We'll keep you posted . . .

DOCUMENTING YOUR FILES

THERE IS A METHOD TO THE MADNESS!

I've spent a bit more time this month attending depositions of some of our agents who have become involved as witnesses in lawsuits. Therefore, I thought it a good opportunity to review the importance of documenting your file. Some of you may still be asking why it is so important to document a file, so let's just use a recent example—no names please!

A lawsuit was filed by a Buyer represented by EWM against a Seller represented by EWM for the return of a reasonably small deposit ($10,000.00). The Seller countersued the Buyer, not only for the deposit being held by EWM, but for the balance of the deposit (the second deposit), which the Buyer had been obligated to deliver under the terms of the contract. The second deposit was very large, which changed the significance of the lawsuit and the potential exposure to EWM.

The Buyer contended he rightfully and legally cancelled the contract and is entitled to the return of the deposit.

The Seller contended that the Buyer breached the contract and that the Seller is entitled to all deposits which were already delivered (the first deposit) and/or required to be delivered under the contract (the second deposit) as liquidated damages.

As soon as there was more at stake (the second deposit), the Buyer alleged that his agent misinformed him about the need (and timeframe) to procure the financing and, that his agent also made certain representations and assurances to him that EWM would get him out of the contract. In effect, the Buyer was "hedging" against the possibility that if he lost, he could somehow prove EWM was responsible for all or a portion of his damages.

Let's assume you are the agent being deposed, and the attorney is asking questions about a transaction that happened a year or two earlier. You have no notes. You have no journal. You have no log. You have no correspondence, faxes, or e-mails to your client discussing anything pertinent to financing, or to *any* problems that may have evolved in the transaction. Your answers to questions at a deposition will probably resemble most of the answers of the agent at this deposition:

"I don't know" *"I'm not sure"*
"I think so" "I can't remember"
or . . . *"I don't recall."*

Although with *those* answers you may not be admitting to any wrongful conduct, you certainly have not contradicted the allegations made against either you or EWM by your client. Bottom line—you're not really helping your cause and you are opening the door for other witnesses to fabricate facts and testimony against you!

Documentation can be very helpful if your client ignores your professional advice and then turns on you when the transaction falls apart.

Now, what if you *had* notes in your file documenting specific conversations or meetings with your client? What if you had a copy of an e-mail or fax *specifically outlining a potential problem* that summarized the specific advice or instructions you had given your client at the time? I'll tell you—it makes a ***HUGE*** difference! When you keep records, notes, logs, etc., in the ordinary course of business, it tends to bolster your credibility as a witness.

So when should you document your file? ("CYA" ☺)

My rule of thumb is to **use common sense.** Document *when the client has to make an important decision* (i.e., when your client would benefit from utilizing the services of a professional). *If your client is a foreign national* requiring the assistance of an accountant, or perhaps the assistance of an attorney because the drafting of the contract is complicated, or the general nature of the transaction is unusual—write a brief, simple, polite, and friendly letter to the client stating that you have recommended hiring such professionals. This may be very helpful if your client ignores your professional advice, and then turns on you when the transaction falls apart.

Document *whenever there is an important issue your client must understan*d. Certain issues are problematic, i.e., Amendment 10. Once again, a brief, simple, and friendly notice to your Buyer, notifying them about the possibility and likelihood of increased property taxes on the property after the transfer, will go a long way in complying with the new laws (*effective January 1, 2005*) and in educating your Buyers that they need to know the amount of their property taxes.

When you have a difficult client do not hesitate to document! Note the dates and times of conversations with individuals (name them) in the transaction. If a problem begins to develop (i.e., inspection or financing issues), re-confirm via faxes or e-mails to your client any information or advice covered over the telephone. **Do not** sign letters *from* your client. **That is not your job or responsibility.**

When the going gets tough, the best course of action for your client may be to retain an attorney. Document your recommendations or *any* advice to your client regarding their options. If they want to cancel because of inspection issues or an inability to obtain financing, they should have a clear understanding of the manner in which they must cancel and the appropriate timeframe in which to cancel the contract.

Lawsuits are often won or lost on the manner in which an agent's file is documented.

What does documentation do for you? It makes you look like a credible, organized, and highly professional agent. It's very impressive when you can open a file

at a deposition and refer to notes or correspondence on conversations or actions that have taken place years earlier, for which you can accurately and consistently describe what occurred. You will find that most Buyers and Sellers will not be as prepared as you, and you will be viewed as the more believable witness.

I am aware of your objections. First, you don't want to be spending most of your time covering yourself and being a "defensive agent". I'm not asking you to do this. Just use common sense and document when necessary. Second, many agents tell me they don't want to "offend" their clients. You won't! Most people who deal with professionals expect you to act professionally and will not be offended. *You don't have to be obnoxious, and you don't have to overdo it.* Lawsuits are often won or lost on the manner in which an agent's file is documented. When you have accurately documented a file, you'd be surprised how fast a potential problem will disappear. Sometimes, it even gives me the ammunition to preempt the filing of a lawsuit because I simply provide the attorney with documentation to "refresh their client's memory".

Just help me help you—that's all.

ESCROW DISPUTES

—THERE ARE **NO GUARANTEES** —

SO **PLEASE DO NOT MAKE THEM** TO YOUR CLIENTS

In this sizzling market one thing is certain—escrow disputes will continue. Many claims made by the Seller upon the contract deposit are justified—but just as many are not. In fact, some claims are totally frivolous. It's a sad commentary, but some Sellers look for opportunities to take advantage of the Buyer and hold hostage the deposit. Please do not assume that your Buyer will get their deposit back just because the Buyer has complied with the terms of the contract. Sellers are getting creative and very aggressive. If the Buyer and the Seller both make written demand for the contract deposit, then an escrow dispute has been established. It's that simple. It then becomes EWM's decision how to handle the dispute. EWM may either refer the matter to FREC for an escrow disbursement order (under which FREC makes the ultimate decision to whom the deposit should be released), or, may arbitrate, mediate, or file an interpleader action in circuit court. Under rare circumstances, EWM may unilaterally elect to distribute the deposit to one party if the circumstances overwhelmingly dictate that there is *no good faith basis for a dispute* over the deposit. However, in these situations, EWM does it at its own peril because the aggrieved party may elect to sue EWM for wrongfully disbursing the deposit.

The point I want to make is that if you, the agent, give your client *any assurances* that he or she is legally entitled to the deposit, or that the other party has no grounds to make a claim, you make my job more difficult in amicably resolving the matter. If you want to discuss the nature of the dispute, *do not discuss it with your client*. Do not give your client any opportunity to misunderstand what needs to occur. Simply advise your manager and conference me into the discussion so that we may review the file. Make your client understand that the matter is no longer in your hands, but must now be handled through the attorneys. I appreciate your assistance!

CORPORATIONS—WHO IS SIGNING YOUR LISTING AGREEMENTS AND CONTRACTS?

We've been having a few problems with contracts that have not been signed by *someone with the proper authority* to bind a corporation to the contract. Just a quick reminder: you can go to **www.sunbiz.org** to verify the officers of a corporation. Check to ensure that the corporation is in good standing (has paid its annual dues), and make sure the person signing your listing or contract is an officer of the corporation, preferably the president. If the name does not appear in the corporate records as an officer or director, you may need a corporate resolution confirming that your client has authority to sign contracts or buy/sell real property on behalf of the corporation.

BE AWARE, and let's be careful out there!