

MANEUVERING THROUGH THE ATTORNEY REVIEW MINEFIELD

by Barry S. Goodman, Esq.

Although you, as a real estate licensee, included the attorney review clause in a sales contract that you prepared, why is it necessary? In addition, have you truly complied with the requirements of the attorney review clause merely by including the mandated language in the contract? What actually constitutes proper disapproval of the contract? How should you handle back-up offers during the attorney review period? Is it true that you could be subject to criminal prosecution if you do not comply with all of the requirements of attorney review?

The answers to these and other questions are critical for you to avoid violating the mandates of attorney review and the sanctions that may be rendered against you for such violations.

The Reason The Attorney Review Clause Was Created

The preparation of contracts, including real estate contracts, historically has been considered to be the practice of law, which only attorneys may undertake. As a result, the New Jersey State Bar Association filed suit seeking to stop real estate licensees from preparing contracts, contending that it constituted the unauthorized practice of law. After years of litigation, the Bar Association and NJAR reached a settlement that created the attorney review clause.

The purpose of the attorney review clause is to permit real estate licensees to prepare a contract for the sale of residential property while providing the buyer and seller with three business days to consult an attorney about the transaction. Thus, the preparation and signing of the contract will not be delayed because an attorney was not available but the parties have the right to have an attorney review the contract to protect their interests.

The Essential Terms of The Attorney Review Provision

The settlement later was included as a regulation by the Real Estate Commission (REC).¹ It applies to all contracts prepared by licensees for the sale of residential real estate containing one to four dwelling units

and for the sale of vacant one-family lots in transactions in which the licensee has a commission or fee interest. It also applies to all leases prepared by licensees for a term of one year or more for residential dwelling units in transactions in which they have a commission or fee interest.

Real estate licensees are not permitted to prepare any other contracts or leases. If they do, it likely will constitute the unauthorized practice of law. The attorney review clause specifically provides that any permitted contract prepared by a licensee must contain the following language at the top of the first page:

THIS IS A LEGALLY BINDING CONTRACT THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS. DURING THIS PERIOD YOU MAY CHOOSE TO CONSULT AN ATTORNEY WHO CAN REVIEW AND CANCEL THE CONTRACT. SEE SECTION ON ATTORNEY REVIEW FOR DETAILS.

The attorney review section that must be in the body of the contract contains three separate provisions. The first provision is entitled "Study by Attorney." It essentially provides that the buyer or seller can have an attorney review the contract within three business days. The contract "will be legally binding at the end of this three-day period" unless an attorney disapproves the contract.

The second provision deals with "Counting the Time." It provides that the three days is counted from the date of delivery of the fully executed agreement to the buyer and seller, but does not include Saturdays, Sundays or legal holidays.

Finally, under the heading "Notice of Disapproval," the attorney sending such a notice must provide a copy to the broker(s) and the other party within the three-day period. The notice to the broker(s) must be sent by certified mail, telegram or personal delivery. However, there is no required method for sending it to the other party.

The REC also included in its regulations that the contract must contain the names

and full addresses of all persons to whom a Notice of Disapproval must be sent.

Interpretation of Attorney Review By The Courts

Numerous cases have interpreted the attorney review provision. As a result, licensees now have a clearer understanding of how it works. For example, early decisions held that attorneys who properly and timely serve a notice of disapproval can disapprove of the contract for any reason or no reason at all.²

In addition, the attorney review provision only has to be included in a contract³ (or an amendment to the contract⁴) if it is prepared by a real estate licensee. Thus, if the contract is prepared by an attorney, the attorney review provision does not have to be included.

Courts consistently have held that there must be literal compliance with the terms of attorney review. For example, in one case a licensee did not include the addresses of the buyer and seller in the contract. The Court stated that it understood that such a practice was intended "to protect the identity of their buyers and sellers from other brokers and parties," but that such a practice violated the REC's regulations.⁵

Similarly, a notice of disapproval was ineffective where the seller's attorney only sent the notice to the broker but not to the buyer. As a result, the contract was binding at the end of the three-day period.⁶

In another matter, the seller's attorney only sent a letter by ordinary mail to the buyer's broker (with a copy to the buyer's attorney). However, the letter should have been sent to the brokers for both parties by certified mail, telegram or personal delivery and the "better practice" would have been to send it to the buyer, as well as the buyer's attorney. As a result, the contract had not been disapproved and was legally binding at the end of attorney review.⁷

Significantly, one Court found that a party's new attorney can disapprove the contract even though the party's prior attorney had approved it. In this case, the seller's attorney

had approved the contract during attorney review by signing the contract for the sellers pursuant to a power of attorney. However, the Court held that the sellers could have a second attorney disapprove the contract as long as the disapproval properly was sent within the three-day period."

In a very recent decision, the seller instructed the broker to forward the signed contract directly to her attorney. As a result, the broker sent the contract to the seller's attorney but not to the seller. Since the signed contract never was delivered to the seller, the Court held that the review period never commenced."

Finally, it now is clear that brokers are not entitled to a commission if the contract properly is disapproved by the attorney for one of the parties" or if the broker does not comply with the attorney review requirements."

Offers Received During And After Attorney Review

During attorney review, written offers are not

"back-up offers" and must be presented to the owner. After attorney review has been completed, written offers are treated as "back-up offers" and the licensee must provide the following written notices:

1. to the owner to consult an attorney before taking any action concerning the back-up offer;
2. to the offerer that the property is the subject of a pending contract of sale or lease; and
3. if the licensee is not licensed with the listing broker, a copy of the notice to the offerer must be sent to the listing broker when the back-up offer is presented."

After the contract is out of attorney review, the licensee still must present all written and signed offers to the sellers or their authorized representative."

Possible Penalties For Noncompliance With The Attorney Review Requirements

In addition to a licensee not earning a commission if he/she fails to comply with the requirements of attorney review, the REC's regulations specify that the failure of any licensee to include the mandated language in a contract is conduct that demonstrates "unworthiness and incompetency." A licensee also can be criminally prosecuted for the unauthorized practice of law for failing to comply with the requirements of attorney review."

Conclusion

The attorney review clause clearly has provided opportunities for real estate licensees

to prepare contracts that otherwise would be prohibited as the practice of law. However, licensees must comply with all of the requirements of attorney review in order to avoid a charge that they are committing the unauthorized practice of law. Each of you, therefore, is encouraged to not only carefully read the attorney review clause but also to ensure that you understand the nuances set forth in this article that create the minefield that we know as attorney review.

1. Under the New Jersey Constitution, the New Jersey Supreme Court has sole jurisdiction with regard to the practice of law, including the unauthorized practice of law. New Jersey Constitution, Art. VI, § 3, 1947. See *State v. Bander*, 50 N.J. 196 (1970). As a result, the settlement had to be and was approved by the Supreme Court. *New Jersey State Bar Association v. New Jersey Association of REALTOR Boards*, 93 N.J. 470 (1983).

2. N.J.A.C. 11:5-6.2(g).

3. As used in this article, the term "contract" includes both contracts of sale and leases.

4. This language must be included at the top of the first page in print larger than the predominant size print in the writing.

5. N.J.A.C. 11:5-6.2(g) requires that the following paragraph concerning "Study by Attorney" be included:

The Buyer or the Seller may choose to have an attorney study this contract. If an attorney is consulted, the attorney must complete his or her review of the contract within a three-day period. This contract will be legally binding at the end of this three-day period unless an attorney for the Buyer or Seller reviews and disapproves of the contract.

6. N.J.A.C. 11:5-6.2(g) requires that the following paragraph concerning "Counting the Time" be included:

You count the three days from the date of delivery of the signed contract to the Buyer and the Seller. You do not count Saturdays, Sundays or legal holidays. The Buyer and the Seller may agree in writing to extend the three-day period for attorney review.

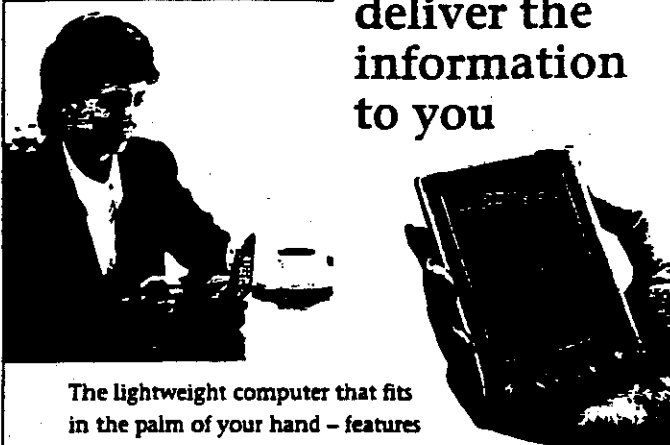
The day that the signed contract is delivered to the buyer and seller is not to be included when counting the three days. *Kargen v. Kerr*, 248 N.J. Super. 91, 96 (Ch. Div. 1991). Thus, if the contract is delivered on Monday, the three days does not include Monday and the three-day period runs through Thursday.

7. N.J.A.C. 11:5-6.2(g) requires that the following paragraph concerning "Notice of Disapproval" be included:

If an attorney for the Buyer or the Seller reviews and disapproves of this contract, the attorney must notify the broker(s) and the other party named in this contract within the three-day period. Otherwise this contract will be legally binding as written. The attorney must send the notice of disapproval to the broker(s) by certified mail, by telegram, or by delivering it personally. The telegram or certified letter will be effective upon sending. The personal delivery will be effective upon delivery to the broker's office. The attorney may but need not also inform the

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broker(s) of any suggested revisions in the contract that would make it satisfactory.

8. See N.J.A.C. 11:5-6.2(p)(3) (regarding contracts) and 6.2(p)(6) (regarding leases).

9. In *Denesevich v. Moran*, 211 N.J. Super. 554, 456 (App. Div. 1986), the Court explained as follows: "The attorney review clause provides each party a three-work day escape during which the contract may be disapproved at the unfettered discussion of that party's attorney." Similarly, the judge in *Trenta v. Gay*, 191 N.J. Super. 617 (Ch. Div. 1983) held that the attorney for either party can disapprove the contract during attorney review for any reason, including that the seller received a higher offer, without explaining the reason.

10. In *Bassford v. Trico Mortgage Company*, 273 N.J. Super. 228 (App. Div. 1994), the Court held that no attorney review clause was necessary when a mortgage representative, not a real estate licensee, assisted a buyer in completing a contract to purchase property at an auction.

11. In *Freedman v. Clommel Construction Corporation*, 246 N.J. Super. 396 (App. Div. 1991), the real estate licensee prepared a mortgage waiver that was an amendment to the sales contract. The Court

ruled that the mortgage waiver was "deemed void at the buyers' option," because the attorney review clause was not included in the amendment by the licensee. *Id.* at 405. The buyers exercised that option because the buyers, who got married after signing the contract, separated before construction of the house was completed.

12. *Kargen v. Kerr*, 248 N.J. Super. 91, 97 (Ch. Div. 1991). The Court explained that such information was essential for an attorney to send the notice of disapproval to the other party.

13. *Denesevich v. Moran*, 211 N.J. Super. 554 (App. Div. 1986).

14. *Kutzin v. Pirmic*, 124 N.J. 500, 507-508 (1991).

15. *Levison v. Weintraub*, 215 N.J. Super. 273 (App. Div. 1987). Although the Court indicated that it was limiting its decision to the facts before it, the Court unequivocally stated: "[I]f attorney disapproval is registered within three days there can be no contract, regardless of prior approval." *Id.* at 277.

16. *Peterson v. Estate of Pursell*, Appellate Division, Docket No. A-3973-99T5 (decided April 10, 2001).

17. *Century 21-Candid Realty v. Client*, 203 N.J. Super. 78 (Law Div. 1985).

18. *Wheatly v. Suh*, 207 N.J. Super. 539 (Law Div. 1985), *aff'd in part and rev'd in part*, 217 N.J. Super. 233 (App. Div. 1987).

19. N.J.A.C. 11:5-6.4(b).

20. N.J.A.C. 11:5-6.4(g) and (h).

21. N.J.A.C. 11:5-6.2(p)(7); N.J.S.A. 45:15-17e deals with sanctions that can be applied by the REC where a licensee has been found guilty of unworthiness or incompetency.

22. N.J.S.A. 2C:21-22. Under this statute, a person is guilty of a disorderly person's offense if the person knowingly engages in the unauthorized practice of law. Criminal penalties for such an offense may include (1) a fine of up to \$1,000 or two times the economic gain of the licensee or loss to the victim, whichever is the highest; and (2) up to six months in prison. N.J.S.A. 2C:43-3.8. ■



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