

ALL I DID WAS RECOMMEND A HOME INSPECTION COMPANY!

By: Alvin C. Monshower, Jr., Esq.

Well, there you are. Plodding along, minding your own business. Dealing with the daily trials and tribulations of a REALTOR® in the sale and lease of residential real property. The fates have smiled upon you today, however. You have just presented a contract offer on behalf of your client, the buyers, and the seller has accepted the offer. You promptly notify the buyers of the good news. Because the contract of sale is contingent upon a home inspection within ten days, the buyers, being totally unfamiliar with buying a home, ask you a very simple question - "Who do you recommend we contact in order to have the home inspection performed?" Based upon your own contacts and experience with home inspection companies, you not only refer the buyers to a particular company, but you provide the buyers with a phone number and also give glowing reports as to the competency of the home inspection company you have recommended.

In light of today's events, you feel particularly satisfied, as well as gratified, that you were able, through your experience, to assist the buyers in beginning the task of completing the home inspection contract contingency. What you do not know at the present time, however, and will not know for several months to come, is that you have just become involved in the real estate transaction from hell.

The buyers, acting upon your advice and glowing reports, dutifully contact the home inspection company which promptly conducts an inspection of the property. The home inspection report indicates no observable problems or defects in the roof or in connection with water in the basement. Based upon the contents of the home inspection report, the home inspection contingency is satisfied and the parties proceed to settlement. Following the completion of the home inspection, the buyers contact you and express their complete satisfaction with the professionalism of the home inspector and the manner in which the home inspection report was completed and thank you graciously for referring the buyers to this particular home inspection company. You, always gratified to be stroked whenever possible, reiterate to the buyers that you are very happy the inspection report turned out so well and that the buyers were pleased with the company. You again speak glowingly of the competency of both the home inspection company and the particular inspector involved. The gratitude of the buyers, however, is about to change.

Within a few weeks following settlement, during a period of extraordinarily heavy rainfall, the buyers experience leaks in the roof and significant water seepage into the basement area. Despite their many efforts to resolve the situation, the buyers become frustrated and seek legal advice. A lawsuit is filed against the sellers, the home inspection company, your company and you, as the buyer agent. A sheriff serves the lawsuit on you at your residence

in the evening. You begin to read the complaint and, at one point, become enraged based upon a claim in the lawsuit against you. Count Three of the lawsuit, which names you specifically, contains damning allegations and gross distortions of fact. One of the allegations is that you referred the buyers to a home inspection company which later proved to be incompetent and negligent in the performance of the home inspection. Even more astoundingly, the complaint alleges that you knew or should have known that the home inspection company was incompetent and would perform a negligent inspection and, further, that you knew or should have known that the home inspection report was incomplete, false and based upon a less than satisfactory inspection.

After the lawsuit is filed, the various defendants begin to answer the complaint. When it rains, it pours. The next document you receive is called a cross-claim which is filed against you and your company by the seller in the transaction. The seller generally alleges that the seller had nothing to do with the engagement of the home inspection company and that if, in fact, you were negligent in hiring and recommending the home inspection company, then you, as the agent of the buyer, breached a duty to the seller and that you should indemnify the seller from any losses arising out of the lawsuit and contribute toward any monetary judgment against the seller. You, of course, through your legal defense counsel, out of pure self defense, file cross-claims against the seller and the home inspection company. Plaintiffs always love these kinds of lawsuits where the defendants are so busy blaming each other that the plaintiffs' case becomes a foregone conclusion. You now reflect back on the day when the fatal question was asked of you by the buyers as to whom you would recommend they contact to conduct the home inspection.

Generally, an individual is not liable to a third party for merely referring them to or recommending a third party service provider. Nevertheless, it is an all too frequent allegation against REALTORS®, particularly by purchasers of residential real estate. These allegations, as you might well imagine, are also far more prevalent in connection with a home inspection company.

You begin to ask yourself - "Is there something that I could have done to have prevented this lawsuit? All I did was recommend a home inspection company!" The global response is "yes." Under the American system of jurisprudence, anyone can sue anybody at any time for any reason and the courts are open five days a week except for holidays. However, certain risk reduction strategies were violated in this case and these strategies, if followed, may have prevented the lawsuit from being filed in the first place, at least as against you and the brokerage company, or, in the alternative, certainly would have bolstered your ability and the real estate company to defend against the allegations as made in the lawsuit.

Obviously, in any real estate transaction there are numerous contingencies which require the services of third party service providers. These include home inspection companies, termite inspection companies, attorneys, title companies, lenders, mortgage bankers, environmental

inspectors, well and septic inspectors, structural engineers and contractors. Most buyers do not have any experience in dealing with these types of third party service providers and would naturally consult with the REALTOR® involved and seek a recommendation. Certainly the REALTOR®, from his or her own personal experience and interaction with certain third party service providers, has a general knowledge as to the competency as well as the responsiveness of third party service providers. The referral of buyers (or sellers) by REALTORS® to these third party service providers, therefore, is a symbiotic relationship. Nevertheless, in today's litigious society, there are certain well defined risk reduction strategies which REALTORS® should follow when referring clients and customers to third party service providers.

At a minimum, these risk reduction strategies include the following:

- Generally, verbal referrals or recommendations should be avoided where possible. It is recommended, instead, that the REALTOR® or the company prepare a written list of certain service providers in various areas of expertise which can be provided to the purchasers.
- The list of service providers in each area of expertise (i.e., home inspections) should contain the names of more than one company or individual. Ideally, the list will contain a minimum of three to five companies or individuals in each area of expertise.
- The names of the individuals and/or companies should be listed in alphabetical order.
- The list should contain a statement that many other qualified individuals and companies are available to provide similar services and should urge the purchaser to inquire of friends regarding such individuals; consult the yellow page or internet for the names of other individuals or firms; and inquire of the Better Business Bureau as to the general reputation of such individuals or firms.
- The written referral list should contain a generalized statement that the names of the companies in each area of expertise are made as a convenience to the buyer only and that neither the agent nor the company assumes any responsibility as to the performance of the service to be provided by the individuals.
- You should avoid, whenever possible, referring buyers to a particular company or individual or indicating a preference of one company or individual over another.

Had you followed the above risk reduction techniques under the facts of this particular transaction, would it have made a difference? Frustration is a product of failed expectation. Litigation is a product of frustration. In the instant case, the buyers are upset that they are

now experiencing problems with their new home which they did not contemplate and which, in their opinion, occurred after they had received assurance from you, would not be occurring, based upon the contents of the home inspection report from the home inspection company which you recommended. The buyers are both frustrated and angry. Unfortunately, even though the culpable party, more than anyone else under these facts, may have been the home inspection company, you have become the lightning rod of the anger and frustration of the buyers because you were the one who referred them to the home inspection company. Not only did you refer them to the home inspection company, but it is the only company you referred them to, coupled with your repeated glowing remarks as to their competency.

However, had you provided the referral list as discussed above, it would have been the buyers, and the buyers only, who would have ultimately determined which inspection company to hire. While the buyers may still be upset that the name of this company was on the list you provided to them, at least the lightning rod has been removed since it was the buyers who actually selected the home inspection company from the list provided. Consequently, there would have been less probability that the buyers would blame you under these facts. But, even where such allegations are made in a subsequent lawsuit, the list in your file which was provided to the buyers will be an invaluable defense asset during the course of the subsequent litigation.

There are other traps for the unwary in connection with recommending or suggesting third party service providers in a residential real estate transaction. This is particularly true if the agent or the company with whom the agent is affiliated has an ownership interest or will receive a financial benefit from the third party service provider recommended by the REALTOR®. Standard of Practice 6-1 of the Code of Ethics of the National Association of REALTORS® provides that REALTORS® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which the REALTOR® or the REALTOR'S® broker has a direct interest without first disclosing such interest at the time of the recommendation or suggestion.

Similarly, Article 6 provides that when recommending real estate products or services, REALTORS® shall disclose to the client or customer to whom the recommendation is made if there is any financial benefit or fee the REALTOR® or the REALTOR'S® firm may receive as a direct result of having recommended certain specific real estate products or services, such as homeowners insurance, warranty programs, mortgage financing, title insurance, etc. When referring a prospective client or customer to an individual or to an entity in which the REALTOR® or the REALTOR'S® firm either has a direct or indirect ownership interest or will receive a financial benefit or fee, such ownership interest or financial benefit must be fully disclosed to the client or customer. Obviously, in order to be effective, such disclosure and consent should be in writing.

By following the risk reduction strategies as discussed above and by complying with the precise provisions of the Code of Ethics of the National Association of REAL TORS®, the likelihood of being named as a defendant arising out of your recommendation and referral will be reduced. At the same time, the documentation as suggested above for defense value will be greatly increased.

The next time a client inquires of you as to whom you would recommend to provide a certain service, keep in mind, in reality that an entirely different question is being asked of you. The actual question being asked of you is - “Who would you recommend I use so that if they perform incompetently or negligently I can blame you for their incompetent and negligent service?”

The risk reduction strategies outlined above, if followed, will alter the equation by providing the consumer with the information they have requested. But it is the consumer who has to make the ultimate decision and it is the consumer who has to take whatever action they believe necessary to protect their own best interest.

(By Alvin C. Monshower, Jr., Esq., Monshower, Miller & Magrogan, LLP. This article is intended to be a general discussion of the topic. As with all legal matters, the reader should consult with competent legal counsel regarding any actual situations or questions.)

©2012 - Alvin C. Monshower, Jr., P.A.

All rights reserved. This article may not be duplicated, copied or distributed without the express written consent of Alvin C. Monshower, Jr., Esq., nor may it be used in connection with any educational program without such prior consent.