

How to Avoid Legal Battles Over Broker Commissions

The first rule for owners and brokers is to clearly spell out the terms of their agreements. **By Rodger D. Young**

Commission agreements governing how brokers are paid typically utilize so-called form documents. The commission formula may change, but the terms and conditions usually stay the same from one transaction to the next. As a result, standard terms and conditions of commission agreements are often overlooked, or ignored, by brokers and owners once the agreement is signed. But because a broker's very livelihood is tied to the terms of those agreements, close attention to detail is in the vital interest of all parties involved.

A recent lawsuit in Detroit stemming from a dispute over a broker's commission reveals the harsh lessons learned about the importance of paying close attention to the commission agreement.

In the case of Grubb & Ellis Co. vs. Griswold Properties LLC, the owner of a large office building — The Dime Building in Detroit — entered into a written commission agreement with Grubb & Ellis, which was representing a tenant, H&R Block. The tax services firm was seeking more than 100,000 sq. ft. of office space.

Shortly after the commission agreement was signed, the tenant put its relocation efforts on hold for almost one year. The tenant's management team changed, and the new team negotiated and finalized a seven-year lease directly with the building owner, without the involvement of Grubb & Ellis.

The building owner refused to pay a commission to Grubb & Ellis on the grounds that the brokerage services provider was not the "procuring cause" and that the commission

agreement had expired during the year of inactivity. However, the commission agreement did not contain an expiration or termination date. After a lengthy two-week trial in which a dozen witnesses testified, it took the jury only 22 minutes to enforce the written commission agreement and award Grubb & Ellis \$888,000 — the full value of its commission.

The Terms are Binding, Period

Brokers and owners will face an uphill battle in dispute resolution, or at trial, if forced to claim that the commission agreement as written does not encompass the entire contract. In the Grubb & Ellis case, the building owner argued that there were a number of key terms that were understood and agreed to before the parties signed the commission agreement that were not contained in the final written agreement. The judge prevented the building owner from raising this argument, ruling that the contract was clear as written.

Judges and jurors are not real estate professionals. The term "procuring cause" may have a standard definition in the real estate industry, but no meaning to a juror. Every party involved must make sure the language is clear. In effect, a judge or jury will not rewrite a contract to save either party from a bad business decision.

Even after you have successfully negotiated and drafted a favorable commission contract, do not file it away with the intention of never reading it again. In this case, there was damaging testimony that the building owner's representative "forgot about" the commission

agreement with Grubb & Ellis during the time that the tenant placed the relocation project on hold.

The owner's management team admitted that it never consulted the commission contract after it was signed. This testimony was a serious blow to the owner's claim that the commission agreement expired before the lease was signed.

Lesson learned: Routinely and carefully note important conditions and terms, especially those that relate to performance, compensation and termination.

A Growing Problem

Legal disputes such as the Grubb & Ellis case are not unique to Detroit. Judges and jurors nationwide increasingly are showing resistance to insert terms into commission contracts, or allow parties to ignore the terms of a contract. The Grubb & Ellis case is a wake-up call for brokers and owners.

In recent years we've seen a dramatic rise in the number of disputes, many settled out of court, but a fair number of them ending up in litigation. That trend will continue unless brokers and owners invest more time and effort in piecing together agreements and abiding by them. Think of those efforts as a necessary dose of preventive medicine.

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