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**HOW LAWYERS CAN ADD VALUE TO
REAL ESTATE TRANSACTIONS**

By Eric C. Rubenstein, Esq.



Lawyers can be seen as the bane of real estate professionals' existence, or a trusted advisor; an obstacle or a facilitator; an issue creator or a problem solver, and anywhere in between. The following are some practical pointers for real estate attorneys, and their clients.

Attorneys are commonly viewed as cost centers to real estate players. Attorneys fees are factored into transaction costs as are brokerage commissions, commitment fees, transfer taxes, etc. Lawyers may never be considered "profit centers", however, experienced, practical counsel can save or earn their clients real dollars in deals and thereby provide true value.

Clients appreciate counsel who know the clients' business and care about their clients' success. Lawyers who understand the financial (as well as the legal) aspects of a loan, sale, lease or other transaction are more valuable than those who simply paper a deal adequately. Real estate lawyers should learn their clients' business by reading the trade journals and business periodicals that their clients are reading every day, or even taking real estate business courses. At our firm's real estate department meetings, we often invite developers, retailers, brokers, bankers, appraisers, environmental consultants, title companies and others to keep our attorneys on top of breaking developments and trends in the industry.

Attorneys also need to understand their clients' business plan. If company acquisitions and mergers are foreseen, then focus should be on the assignment/subletting and transfer of interest provisions in the applicable transaction documents.

The true concerns of real estate professionals are money, time and liability issues, and not "winning" protracted negotiations of immaterial points, or artistic draftsmanship. Identify the provisions that can cost clients actual money, e.g., overtime charges for utilities in leases; fees and costs to obtain routine consents from a lender (particularly a servicer in a CMBS deal); apportionment of rent clauses in contracts. These are the type of clauses that warrant scrutiny and significant negotiating effort. There's no need to prove how smart an attorney you are by vigorously negotiating casualty and condemnation clauses in a lease when the terms of the mortgage will likely control.

Under what circumstances can a client become personally liable? Attorneys need to be vigilant about identifying and reducing, if not eliminating, risks of personal exposure. Don't let your client get tripped up on a non-recourse carve-out provision (e.g., nonpayment of real estate taxes constituting waste). Negotiate guarantees that are limited in monetary and temporal liability. Always consider environmental insurance to protect against claims for environmental liability, often an area where personal exposure arises.

Most real estate professionals are risk takers. As long as counsel is advising the client of the risk involved in a transaction, and suggesting methods of protection, they are probably doing their job. Eliminating risk is probably not feasible in our highly competitive industry; risks must be taken to make deals. Real estate professionals are astute enough to make a decision when presented with a risk/reward issue; they are not appreciative of protracted lawyerly efforts to cover any conceivable and remote eventuality, which will only unduly prolong the successful consummation of a transaction. Recognize that time is usually the enemy in real estate transactions.

I have found that clients are most appreciative when alternative potential solutions are offered rather than when lawyers simply identify obstacles. When an issue is added to the "open business points" list, craft possible resolutions and/or trade-offs for other points on the list. Create benchmarks and thresholds that can help the parties address issues before they become insurmountable (e.g., for a tenant build-out, impose obligations on the parties to allege delays immediately as they occur rather than relying solely on monetary or termination penalties as of a fixed date in the future). Suggest escrows to cover indemnity claims to avoid risk of personal liability. If you are representing a likely indemnitee, make sure the indemnitor is solvent so that any remedy is not illusory.

Once you've handled enough transactions, particularly for a specific client, you know where the parties will end up on most issues. You best serve your client by getting to those resolution positions rapidly, and don't let posturing or competitiveness slow down the ultimate consummation of deal.

This protective yet realistic approach is particularly important in this age of compression of legal fees. With the advent and expansion of alternative billing arrangements, including ranges and flat fees, it behooves neither the client nor the attorney to expend unnecessary time on immaterial issues.

Lawyers provide the best value to their clients by efficiently providing practical advice, articulating and minimizing risk, offering realistic resolutions, all while zealously protecting their clients' interests.

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