

## **YOU HAVE THE RIGHT TO REMAIN SILENT**

You are walking in the street or about ready to sit down to dinner when you receive an accusatory email or text message from your client or customer berating you on an issue which you are told has resulted in monetary damages because of a perceived misrepresentation by you or you are told that you committed a licensing violation which will result in the filing of a complaint against you with the New York State Department of State. No matter what you may be doing at that moment, your first impulse is to respond with a scathing email or text absolving yourself of any liability and proceeding to restate the facts of the claim as they are perceived by you. With no time to think about the consequences of your actions and failing to realize that every word you write is memorialized for posterity to be reproduced at any moment by your accuser or which will be broadcast on social media for the world to view, you attempt to absolve yourself of any liability or wrongdoing and through it all, you are making a very serious mistake that can cost both you and your firm years of emotional distress and financial loss.

First and foremost, learn to take a step back and breathe!! The advent of social media has allowed us to seek instant gratification when faced with a disgruntled customer/client; however, your ill-advised tirade or *mea culpa* in sending a quick response with little forethought could have been avoided. There is no obligation to respond to your accuser at that very moment nor should you do so. While the statements you are reading may be hurtful or they may ring true because of a mistake you may have made in the transaction; nothing is going to be corrected at that exact moment. More than likely, your immediate response will contain statements you may come to regret because they are based on emotion rather than logic. Or in the alternative, you may be acknowledging factual wrongdoing which will have consequences to both you and your firm. Remember that your immediate response is not going to solve the problem and will more than likely inflame the situation.

The next thing to do, at your first opportunity, is to contact your manager or broker and report the incident. This will allow you to benefit from another person's assessment and shift the risk to someone who may be better suited to help you prepare a response if in fact one is required. If the issue will have legal consequences, your broker or manager may contact an attorney to obtain guidance as to how to proceed in a way that will protect you and the firm. If the email or text you received from the client/customer indicates that the issue may result in litigation, your firm will contact the professional liability carrier to put it on notice of a possible claim. Failure to do so can result in the carrier disclaiming liability when and if a lawsuit is initiated because the policy has a notice provision that must be acknowledged.

Document your activity for your own protection. I will always request that the agent prepare a narrative statement detailing the chronology of events and the particulars of the

transaction as the agent understands them to be. Keep in mind that based on the allegations of impropriety, the claimant can initiate an action within three years or six years and during that period of time, you will easily forget the particulars of the transaction. Detailing your recollection of events is clearly a risk reduction tool that will work to your advantage if the claim results in a court action.

It is difficult, if not impossible, to try to undo the effects of the agent's unfortunate barrage of emails or text messages in his or her attempt to absolve one from any wrongdoing as alleged by the claimant. As you have heard me say or write time and time again, your statements are analogous to whip cream out of a can. Once you pull them out, you can never retract them and put them back in the can. On the other hand, what you say or write can and will be used against you and hang like a Sword of Damocles over your head during the entire proceeding.

No one is devoid of emotion. No matter who you are or how long you have been engaged in this business of ours, it hurts to be told that you may have made a mistake. Nevertheless, mistakes do happen and in those instances when you are certain that no mistake was made and the allegations are simply the rantings of a difficult client/customer, be advised: put your phone away and resist the impulse to lash out to your accuser. There will be a proper time and place for your response but seconds after you receive those disturbing messages is not that time so guide yourself accordingly.

*Submitted by Alfred M. Fazio, Esq. of Capuder Fazio Giacoia LLP. Visit our website at CFGNY.com for copies of recent articles as well as other areas of interest to the real estate community. If you would like to be added to our mailing list and receive future articles, please click the link below.*

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