

Confirm there is no work until we enter into an attorney fee agreement: The scope of work to be performed by counsel on the client's behalf should *always* be formalized in a written fee agreement. This is both statutorily required (Bus. & Prof.C. § 6148(a)(2)—agreement must specify “general nature of the legal services to be provided for the client.” Therefore, we want you to know the scheduled appointment is a consultation and each of the paragraphs below request you to respond and what you would like our consultation appointment to cover. Note the broad nature of real estate transactions and a consultation may be all that is necessary to give you direction.

Identify type of property involved: The scope of work in any real property transaction depends in large part upon the kind of property being transacted or the subject of sale or acquisition or if this concerns litigation, the subject of dispute.

Our office never assumes consummation of the purchase and sale of a given type of property will *always* be easier as compared with any other type of property.

No work will be commenced without an agreed upon Scope of Work—Fundamental Steps: The scope of counsel's work and the time and expense involved necessarily turn on several fundamental aspects of the contemplated transaction. Thus, in approaching representation on a real property purchase and sale matter, the following points should be addressed at the outset:

a. **Extent of property being sold—real, personal and intangible:** First of all, ascertain what *type* of property is being sold. In addition to the underlying real property, does the transaction contemplate a sale of *personal* and/or *intangible* property (contract rights and other choses in action)?

For example, a transaction involving the transfer of substantial or complicated personal property, intangible property or appurtenances will affect the amount of documentation to be reviewed and prepared and, therefore, the timing of counsel's work and the structure and amount of counsel's fees.

b. **What is the current use of property:** Determine the current *usage* of the real property to be sold. Is it residential, industrial, commercial (office or retail), mixed use, tenant-occupied (or vacant), improved or unimproved?

The particular usage will determine how much investigation you and third party experts will need to conduct regarding the property. For example:

- *Industrial property* transactions present a significant concern over the existence of *hazardous materials*. In contrast, environmental (pollution) issues are generally of little concern in most single family residence transactions.

- If the property to be sold is presently *vacant*, the attorney's work may be less cumbersome in certain respects because there are no leases and often no management contracts or other third party agreements to review.

c. **Interest to be sold:** Determine what type of *interest* is to be transferred:

- **Fee interest:** Do the parties contemplate a sale of the entire *fee* interest or something less?
- **Ground lease:**
- **License or easement:**
- **Installment land contract:**
- **Option to purchase:** .

The type of interest to be conveyed impacts a host of collateral issues incident to the transaction and, necessarily, the time, cost and expertise that will be required. For example:

- The sale of an interest in a *ground lease* is typically more complicated than the sale of a fee interest. More documents need to be reviewed and/or prepared by counsel, more tax issues need to be considered, and financing issues are more complex.

- Similarly, a conveyance to be effected by an *installment land contract*, *license* or *easement* presents several issues not typically encountered in the conveyance of a fee interest.

d. **Vesting of title:** Determine how the buyer intends to take *title* to the property—i.e., individually, as community property, partnership, tenants in common, joint tenancy, corporation, limited liability company, trust, etc.

If more than one buyer is taking title, it may be necessary to draft a tenancy in common, partnership or other co-ownership agreement.

Or, the several buyers may contemplate acquisition and operation of the property as a *business entity* that does not yet exist. They may need threshold advice about the comparative advantages of taking title as a corporation, general partnership, limited partnership, limited liability company or trust, and then will need legal assistance in forming the desired entity.

e. **Physical condition of property:** Determine what investigations need to be conducted concerning the *physical condition* of the property—e.g., geological, construction, access issues, etc.

f. **Buyer's intended use:** Determine the *buyer's intended use* of the property—e.g., owner occupancy, lease to new tenants, development, construction, etc. The intended use may require your services in connection with such things as preparing leases, investigating zoning, subdivision or other development matters, and/or hiring architects, contractors or other third parties (such as property managers or real estate brokers).

g. **Condition of title:** To the extent possible, ascertain at the outset whether the condition of title might present significant problems.

- Unfortunately, it is often difficult, if not impossible, to determine the existence and/or magnitude of title problems at the beginning of the transaction. This is because a preliminary title report is often not made available until several days (or more) after the purchase contract is signed.

h. **Compliance with law:** Does the client need or desire guidance with respect to such things as building permits, occupancy certificates or other legally-required permits or official approvals? Does the client want or need you to be involved on issues of environmentally hazardous materials, zoning, subdivision or other land use matters?

i. **Financing:** How does the client contemplate financing the purchase transaction? (*See Ch. 6.*) He or she may want or need attorney guidance. (At a minimum, buyer's counsel ordinarily will be asked to review the loan documents on the buyer's behalf.)

If the buyer is obtaining *third party financing* (i.e., seller is *not* providing a purchase money loan), you and your client should be aware of two important preliminary points:

- Generally, institutional lenders (such as banks, savings and loans, insurance companies, pension funds, etc.) utilize preprinted standard form loan documents that are rarely negotiated or changed. Accordingly, your client should be advised that it may be a waste of time to even attempt engaging in expensive, time-consuming (and ultimately fruitless) negotiations with an institutional lender over many of the terms in the lender's standard form loan documents.
- Before any loan documents are signed, also review carefully the terms of the loan (amount, interest rate, duration, etc.) to be sure the client is actually getting a loan on the terms he or she expected.

j. **Tax considerations:** Many clients (both buyers and sellers) will need tax advice. Of course, you should not attempt to counsel on tax and other specialized areas of law unless you have the appropriate expertise. But, minimally, you should be prepared to spot the relevant tax issues; for example:

- **Tax advantages of allocating purchase price between real property, personal property, goodwill, etc.:**
- **Documentary transfer tax:**
- **Real property taxes**—including *reassessment*; and *proration* between buyer and seller.
- **The “basis” of the acquired property**, which becomes especially important for purposes of calculating *depreciation*, as well as *gain or loss* upon disposition of the property.
- **IRC § 1031 tax-deferred “like-kind” exchanges:**
- **Other income tax issues upon acquisition or disposition of the property:**

k. **Real estate broker issues:** Almost every real property sales transaction involves a listing agreement between the seller and a real estate broker for the payment of a commission.

l. **Existing agreements:** Identify any agreements (written *or* oral) affecting the transaction that your client may have entered into before consulting you. Often, a purchase and sale agreement will have been negotiated before counsel are consulted; indeed, the agreement and/or escrow instructions may already have been prepared (if not signed). In such cases, attorney roles could be minimal; your services may simply be needed in the preparation and review of a limited number of documents and in monitoring progress of the transaction.

m. **Formation of entity to take title:** Some real property purchase transactions are part of a larger real estate venture among a group of persons who contemplate acquisition, development and operation of the property as a *business entity*. These buyers often need preliminary advice and counsel about the *formation* of an appropriate business entity that will meet their primary objectives.

As a threshold step, the buyers may need to be educated about the comparative advantages and disadvantages (tax and nontax considerations) of a corporation, general partnership, limited partnership, limited liability company and business trust. Although the various types of entities share some common characteristics, each also has distinct features. Counsel will have to probe the buyers to identify which features are most desirable. Then, having identified the type of entity that most satisfies the buyers’ needs and goals, steps must be taken to properly form the entity.

PRACTICE POINTER: Advising about choice and formation of business entity is itself a specialized field of practice that is beyond the expertise of many real estate transactional lawyers. You may require to consult corporate counsel or we may be required to recommend the association of competent counsel in this area before the clients venture too far toward acquisition of the property.

3. **Impact of Client’s Relative Sophistication and Expectations:** An extremely important but often overlooked issue bearing on the scope of counsel’s work is the client’s *experience* and level of *sophistication* in real property transactions. Counsel representing unsophisticated clients generally must play a greater role in such things as negotiations, due diligence investigations, and document review and preparation, as well as simply explaining the meaning of the various documents and the process of the transaction. Indeed, relatively routine transactions involving clients with little or no transactional experience may be more demanding of your time and attention than complex transactions involving clients with substantial business acumen.

A related concern is the client’s *expectations*, which are not necessarily a reflection of his or her level of sophistication. Ascertain at the outset what the client expects of you both in terms of work to be performed *and* all collateral matters that will attend the attorney-client relationship—including your *availability* to the client (for telephone consultations and meetings), your *fees*, particular *time-frames* (e.g., “turn-around” time for document preparation), etc. Be direct with your client about all of these matters; and immediately dispel any unrealistic client expectations.

The intensity of your tasks will naturally escalate where the client expects quick results (requiring you to do work within a compressed period of time) or where the transaction appears to present problems that might create various

emergencies. The enhanced burdens from time pressures may justify charging higher fees or, alternatively, may require you to decline taking on the matter. Evaluate these points *before* investing time, energy and expense in the matter and, therefore, before accepting the proffered representation.

4. Several “caveats” merit consideration in determining the scope of attorney work.

a. **Satisfying third parties:** Never assume any issue or problem is one that must be resolved *solely* to the buyer’s and/or seller’s satisfaction. In many instances, *third parties* must also be satisfied if the problem is to be solved and the transaction is to close. Therefore, carefully analyze all apparent issues to ascertain the identity of all potentially concerned parties.

Several matters appearing to present an issue for only one party will actually involve *both* buyer and seller; and/or, on further analysis, will pose issues for third parties—such as *lenders, title insurance companies, escrow holders, or government entities* having jurisdiction over the property. For example:

(1) **Third party claim impacting financing:** Assume the seller’s title is clouded by the existence of a third party claim. The buyer might be willing to accept the risk of a possible third party claim, but the cloud on title might hinder the buyer’s ability to obtain financing—i.e., a *lender* may be unwilling to fund a loan unless the cloud is removed (regardless of whether a title insurance policy can be obtained to cover the potential claim).

(2) **Zoning, code violations impacting financing:** Assume the property violates existing zoning laws, or the improvements do not meet building code (or other legal) requirements. Again, a *lender* may be unwilling to make a loan even though the buyer is willing to accept the property in its deficient condition.

b. **Attention to details:** Details tend to be of far greater importance in the sale of real property than in other transactions. Real property interests cannot be transferred in a piecemeal fashion. Unlike the sale of goods, “partial performance” of a real property sale contract is of no value to either party. The parties are generally dealing with an indivisible asset and one minor mistake (e.g., an error in the property’s legal description, the misspelling of a name on a deed, or failing to timely record the deed) can cause significant—if not disastrous—consequences.

c. **Lasting effect of attorney’s work:** The sale of real property involves the recordation of conveyancing instruments in the land records, and those documents will be in existence, read and relied upon for years to come. Consequently, counsel’s work in real property sale transactions has a *lasting effect*—indeed, perhaps a far greater *permanent* effect than in other transactional matters. Bear in mind that poorly drafted language in an easement agreement, lease, deed or other relevant document could literally affect generations to come (and, again, increase your malpractice exposure).

d. **Short time fuse:** Real property sales transactions are typically consummated within a relatively short time-frame. The interested parties (buyer and seller, as well as brokers, etc.) generally want the transaction documented, signed and closed as quickly as possible. In turn, counsel are under tremendous pressure to give *immediate and complete attention* to the matter. This necessarily requires you to evaluate at the *outset* whether you will have the *resources and availability* to handle the transaction within the expected time period.

e. **Unpredictability:** Defining the scope of attorney work is not a science and is subject to countless unpredictable variables and scenarios. Each element of a given transaction (title insurance, zoning, financing, brokerage, etc.) will present a range of problems and, in essence, has a life of its own. In turn, each single problem is likely to impact the timing and cost associated with other issues and, indeed, the parties’ ability to consummate the transaction.

Forewarn your clients that there are a myriad of unpredictable variables but that you will use your “best efforts” to consummate the transaction in a timely manner with a view toward keeping costs down. Beyond that, *never*

guarantee results. Because you cannot pinpoint the various problems that might arise, any “guarantees” or “representations” regarding a particular “result” literally *invite* malpractice charges from a disappointed client.