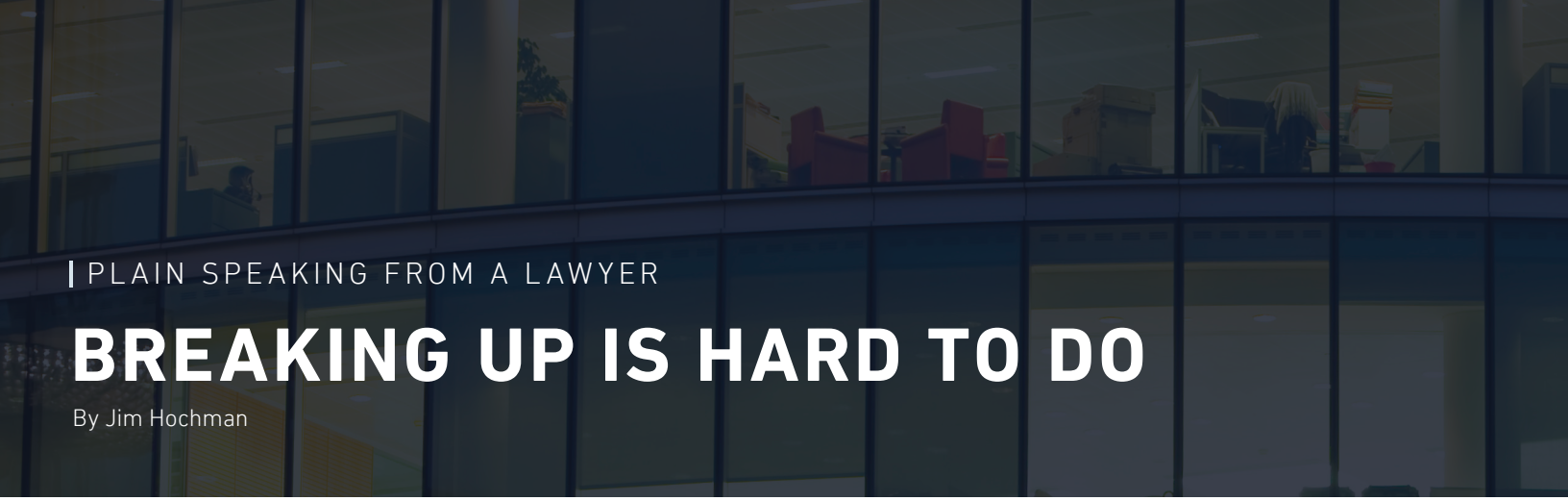

PLAIN SPEAKING FROM A LAWYER

BREAKING UP IS HARD TO DO

By Jim Hochman

Let's face it. Those who manage brokerage firms understand that commercial brokers can be recruited, trained, and turned into productive assets for a period of time—and then they leave. Maybe your firm has lost brokers to other roles within the real estate industry: development, asset management, in-house real estate director jobs, or even a competitor. There is no easy way to make the process smooth and painless, but preparation, planning, clear policies, and—of course—a clear termination procedure, can help. Losing a key producer is never good news, so as a manager/owner of a brokerage firm, it is important to have well-thought-out documents and processes in place, so you are not faced with documenting the termination "on the fly," at a time when you may not be at your best.

There are several components to carefully prepare:

1. Employment or Independent Contractor Agreement (ICA): Most states' broker license acts require the existence of such a document. This is in the hope that a well-written agreement between the brokerage firm and its sales professionals will reduce the chance of disputes over compensation, at least during the term and hopefully after the affiliation ends.

2. **Confirm that your ICA:**

a. Incorporates the company's policies and procedures;

b. Addresses termination;

c. Refers to and incorporates the company's termination policies and procedures; and

d. Requires a post-termination agreement, addressing how commissions and other compensation are shared post-termination, including:

i. Who "owns" current listing and representation agreements;

ii. Who owns undocumented client and customer relationships;

iii. How work and compensation for transactions will be shared (if shared); and

iv. Equally important, which party is entitled to share in future commissions arising from transactions closed during the period of affiliation.

This last component can be a thorny issue. If your departing sales professional earned fees (shared with the firm) on a lease, is the departing salesperson entitled to share in commissions paid for lease renewals and extensions, lease expansions, even purchase of the property by the tenant if there was a purchase option contained in the lease?

This is why it is important to address—in your firm's policies, procedures, and termination agreement—which party is responsible for naming/identifying these deals or potential deals/commissions, and most important, which party owns the right to commissions which are not identified in a termination agreement, a so-called "default" provision. That way, if a transaction, commission, and/or a future commission which arose from an inchoate right (the so-called "future commissions") should fall through the

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cracks, your policy determines which party is entitled to the commission.

In my experience, the departing salesperson usually has the best information on deals in his or her pipeline. This information could include valuable insight on existing client and customer relationships, listings, or representation agreements he or she has been seeking. It makes sense that, prior to the departing salesperson having a right to share in the fee, companies should include a condition in the termination agreement that charges them with the duty of identifying prospective opportunities in the termination agreement as a condition precedent to that departing salesperson having any right to share in that fee.

Brokerage firms can help themselves by taking the initiative to identify these future commission opportunities as well. The firm should know or be able to list/identify all past commissions paid, as well as the transactions from which the fees came. The firm should also have access to—and the right to see—all of the salesperson's correspondence, emails, and files. A review of that information should take place before the termination agreement is finalized.

I've heard it said that there has never been a real estate broker who did not leave one firm for another without a deal or two in his or her vest pocket. This is not repeated to malign any person or any firm; some just say that "it's the nature of the beast." Remember, however, that very few terminations or departures are 100 percent mutual and totally amicable. Indeed, the departure is usually stressful to one or both parties, especially if it is not mutual.

What are the takeaways from the column? Do you have:

1. A well drafted ICA?

2. A clear set of policies and procedures addressing termination?

3. A form of termination agreement that MUST be fully executed to protect both parties?

4. Language within that termination agreement that clearly states which party owns unnamed deals or opportunities?

More than one or two of you have likely spent time and money litigating issues and commission claims that could have been—and should have been—foreseen and addressed in your firm's policies. The time and money spent on addressing the breakup even before the relationship begins is time and money well invested. Neil Sedaka was right. Breaking up is hard to do.