

Laura Prouse ([00:00](#)):

Thank you for joining us today on two topics that you probably address daily, but can lead to claims if not addressed properly, five considerations when filling out the Residential Purchase Agreement and properly handling dual agency. I'm Laura Prouse with CRES Insurance Services.

Laura Prouse ([00:15](#)):

Today, we welcome attorney Mark Carlson from the Carlson Law Group. Mark has been defending real estate agents since 1993 and has worked with CRES for over 20 years as a founding member of our legal panel. Along with Mark we also have Dave Miller, regional vice president with Fidelity National Home Warranty. Dave manages the CRES Advantage Home Warranty Program, which ties into CRES's E&O insurance. We have a lot to cover, so I'll hand it off to you, Dave.

Dave Miller ([00:41](#)):

Well thanks Laura. Two really good topics today. Obviously the RPA is probably the most used form in a real estate transaction, but unfortunately it's also where a lot of litigation can come up down the road. So I'm happy to have Mark back with us for our fourth installment here and our webinars series, and want to get started. Mark, with regards to the RPA what are, I don't want to say a list of top five, because that would insinuate that 6 through 20 are not as important, but give us five considerations that real estate professionals need to consider when filling out the RPA.

Mark Carlson ([01:23](#)):

Well like any house, it all starts with a good foundation. And so what I constantly have to remind agents so when I do seminars in person way back when, is just the simple things like filling out the contract and if there are counters, completely. So often I see the financing terms being left blank. And then of course if there's a problem and the buyer wants to get out saying, "I didn't get the loan I wanted, but then there's no term." So then the fault then falls to the agents for not drafting a clear contract.

Mark Carlson ([02:04](#)):

Just the other week I had a seller retain me to help evaluate offers and it was a very substantial property in the Beverly Hills area and there were 13 or 14 offers, something like that. They were all from the Beverly Hills A list of real estate agents. And without naming any names, of those 14 or so offers, there were only a one or two that even had all the paragraph there that lists all the additional documents that are going to be attached and one of them, that property was held in a trust and only one of them I had that the trust advisory was to be attached.

Mark Carlson ([02:51](#)):

So just little things like that that don't really create any problems in a transaction, but if other problems arise, then without the agents filling out the contracts completely, it just makes it look sloppy. So it's hard to justify your actions elsewhere when basic things like filling out the offer isn't done properly.

Mark Carlson ([03:14](#)):

I had an option contract many years ago, where there was no indication of whether the option money was to go to the purchase price. Everything about the option was just incomplete, it was just, okay, well at this time, we'll give you an option. And of course the agents got sued because of the buyer tried to

exercise the option and the seller tried to avoid it. So just starting with a good foundation and filling out everything completely and fully and clearly is, I would say, step one.

Dave Miller ([03:46](#)):

Perfect. How about services and stuff like that, pest control, escrow, title, home warranty, a home inspection?

Mark Carlson ([03:54](#)):

In this market and it may change if the market softened, but in this market you see selling agents trying to endear their offer to the listing agent by saying, "Seller's choice." And not putting something in, and I think most sellers probably don't care about service providers, if they do they'll just counter, but it's difficult, I think, when you give control right out of the shoot.

Mark Carlson ([04:22](#)):

So I would say even in a strong market like this, that I would have the buyers use service providers, title, escrow, that they know and trust and put that in the contract. I mean, I've had a lot of cases here, especially with the last nine months with COVID where if there's a broker escrow from the listing side, now the buyer's trying to get their deposit back and the escrow is favored. The broker-owned escrow is favoring listing agent and seller side. And it becomes a disadvantage to the buyer where the buyer has the ability to put that in at the first stroke, so to speak.

Dave Miller ([05:03](#)):

It was a hot topic a couple of years ago, but I know agents were cautious and were actually being advised by the risk-management attorneys, to make sure you put down at least three or four recommendations and making the buyers and sellers pick their services. They could possibly get in trouble for saying, "I want only ABC Escrow" or whatever. Is that still a big issue?

Mark Carlson ([05:26](#)):

So I think when it comes to inspections if you're going to give a list of inspectors, whether it be the home inspector or a termite or a roofer, or septic if that comes up in a deal, that's when I think it's smart for agents to say, "Okay, here's the list of vendors that our clients have had good success with." So that if they don't do a proper inspection, then you don't have a negligent referral argument.

Mark Carlson ([05:54](#)):

But when it comes to escrow and title and home warranty, I'm not that concerned. I think it'd be better for certainly the selling agent could have a conversation with the buyer. "Hey, are there any escrow companies that you like? But I think that just putting one in there in the offer is okay with respect to those types of service providers.

Dave Miller ([06:20](#)):

Excellent. Now we've had a webinar before on property management and tenants, and we've already gone over a lot of that stuff. Talk about tenants and possession.

Mark Carlson ([06:28](#)):

Well, right now in 2020 with COVID, tenants and possession is a huge deal because of all the eviction moratoriums. And I would say that on offers that are going on now, even though the state moratorium is currently scheduled here mid-December, 2020 is supposed to end in about 45 days at the end of January, but that may change and as an agent, you don't know if it's going to change.

Mark Carlson ([06:56](#)):

So I would be very careful about, and urge all agents that have been throughout this year, to have the buyers and sellers go talk to attorneys if there are tenants and possession and get direction from the principals as to whether the buyer is going to take the property with the tenants in possession, or whether the seller is going to try to evict or entice the tenants to leave so that the property can be delivered vacant. It would be a mistake for an agent just to assume that it's not going to be a problem to getting the tenants out during an escrow period, even if they provide for a longer escrow, because nobody knows right now when tenants are ultimately going to be able to be evicted.

Dave Miller ([07:42](#)):

Perfect. Now at this time of taping, the inventory is still very low. I think the unsold inventory index is 2.1 months, which is ridiculous. So obviously you just talked on a little bit, counter offers. How does that tie into the RPA? What's important when you have counter offers?

Mark Carlson ([08:00](#)):

Well firstly, if it's a multiple counter in this market where it's so hot, it seems that it's pretty common. And unfortunately we see more frequently than we would like, an error where the multiple counter box isn't checked, and then you get two acceptances and now you've sold the property twice because you failed to put in a multiple counter.

Mark Carlson ([08:26](#)):

There's always this urge to get the highest price and to use some sharp negotiating practice like counter with your highest and best. And I think that's dangerous also because in California, the two essential, well, three essential terms are the identity of the property, the identity of the principles and the purchase price. The courts can imply every other reasonable term, but those are the three things that have to be in a contract for it to be enforceable.

Mark Carlson ([08:59](#)):

In the California RPA or the CA-RPA has what's called an integration clause, which means that all of the terms of the contract are contained within the four corners of the document. That you can't look outside the contract to figure anything else out. So when you say, "Highest and best." You don't know where to find that number. And if you've got multiple counters or the acceptance that come back or another counter that comes back, it just creates a problem because you can't look at it from document to document and track the price terms.

Mark Carlson ([09:39](#)):

So I prefer just having recommended agents that they make a clear counter with an actual number, and then see where it goes. If you counter at a certain number and you get multiple acceptance, you can always call them back up and say, "You know what, I've got multiple counters at my counter price so let's do it again."

Dave Miller ([10:00](#)):

Right. And you've talked to me in the past about something, a theory called a mirror image rule. Can you explain that to us?

Mark Carlson ([10:03](#)):

So California has a mirror image rule when it comes to contract formation, and what that means is that the acceptance has to be a mirror image of the offer. So if I have an offer that comes in, and I like everything about the offer except for the buyer wants 45 days and I the seller would like to have 30 days. So if I scratch out just interlineate 30 and cross out the 45, that actually constitutes a counter that requires separate acceptance.

Mark Carlson ([10:39](#)):

And so we see that quite often where they're just minor, little terms and they say, "Oh, well just change it and initial it." It actually requires separate acceptance. And then of course, if there's a problem down the road, then maybe that little handwritten change becomes an issue as to whether a contract is enforceable or not.

Dave Miller ([10:59](#)):

Perfect. And anything else you can think of on the RPA there? I think we covered five really good things. Anything-

Mark Carlson ([11:05](#)):

Yeah. So I think that's really the meat and potatoes, so to speak, of a formation. Of course, we can save this for another topic, but performance is another issue where you have to be available. You have to calendar everything as an agent so that you don't miss deadlines. And I think that's the roof to the foundation or to the house that we've got on this good contract formation, but that probably is best served for another installment is to being available and diligent when it comes to contract performance.

Dave Miller ([11:41](#)):

Perfect. Well, let's jump into a dual agency. Obviously with the market the way it is right now, it's hard enough for a real estate professional to even get a listing or buyers to the table. And when they have the opportunity to be both listing agent and the buyer's agent, it can be a lucrative with commissions that can also be very dangerous. And correct me if I'm wrong, I would have learned over the years that dual agency's only allowed in about six different states. Most other states you have to have a real estate attorney handle the other side. Is that still true?

Mark Carlson ([12:18](#)):

I don't have a list of the number of states where there's dual agency. It is true that in some other jurisdictions that dual agency isn't allowed but I think in that kind of circumstance, I think you're referring to attorney closings where in a lot of states that attorneys actually handle the closing. They don't use escrow companies like we do here in California.

Dave Miller ([12:45](#)):

Perfect. I believe that's exactly what I was referring to. So run us through some of the considerations, I guess if you will, for folks that are going to be double-ending a deal.

Mark Carlson ([12:58](#)):

So the dual agency is allowable, of course, we all know that, so long as there are two things, that there's disclosure and there's confirmation. And so the confirmation is done on the RPA. That's at the end of the contract where you write in the broker's name, not the agent's name, they've got to be careful on that and then the disclosure is via the Agency Disclosure Form.

Mark Carlson ([13:27](#)):

And so when we see errors in this, we see that people just forget about the disclosure form, or they lose it, or they forget to get the signature on the disclosure form. And then as I alluded to a second ago, on the confirmation within the RPA, the agent writes down their name, not their individual name, not the company name.

Mark Carlson ([13:48](#)):

And so the problem is that there's one pesky case that suggests that if there's an undisclosed dual agency, that either principal can avoid the contract even after it's closed. And so you can imagine the kind of havoc that would wreak if you had a buyer or seller after a deal was closed saying, "Hey, there was an undisclosed dual agency because you forgot to send me the disclosure form and I want to unwind this deal."

Mark Carlson ([14:19](#)):

That would be a very expensive case to defend and of course, to resolve. And it's not like close enough in horseshoes and hand grenades, if you don't do it right, then it's an undisclosed dual agency so that the law is pretty clear on that point.

Dave Miller ([14:39](#)):

Perfect. What about if a dispute arises and I'm the listing agent and I represent the buyers, I have to be able to relay that concern to the other party, but then I'm also representing the other party. I mean, it just sounds like a mess. What I do if something arises?

Mark Carlson ([14:55](#)):

Yeah. So like death and taxes, the only other thing that's certain in life is that a real estate licensee like to be helpful and they're typically overly helpful and that gets them into problems. So when a dispute arises and the agent is dual, then there's a tremendous pressure for the agent to try to make the dispute go away.

Mark Carlson ([15:21](#)):

And so, with good intentions, I think, you see agents trying to persuade one side or the other that their position is not right. Or if one side clearly is not, the seller says, "I don't want to sell." And wants to breach the contract, you see the agent really putting pressure on the listing agent. And so when you're a fiduciary to both, you can't take positions that are contrary to the interest of either side.

Mark Carlson ([15:51](#)):

So you have to essentially be a messenger when there is a dispute between the buyer and the seller. The buyer wants this. Seller, what would you like to do? Well, I want to do this. Now if the seller wants to do something that doesn't seem to be in their best interest, it certainly is appropriate and proper for an

agent to say, "Well if you do that, then here are the consequences to your actions, so let me know what you'd like to do." But really, that's the limit to what an agent can do to try to resolve a dispute.

Mark Carlson ([16:24](#)):

And what I always recommend is, if there's an issue that just is getting to be really hairy, then the agents should talk to a manager within the office and see if maybe another agent within the office is available to step in on one side or the other. Try to make it clear that there's no betrayal of confidence is via the one agent, because if Agent A is only conversing with seller and Agent B is only conversing with the buyer, then there can't be the argument that that confidence is what we're trading.

Dave Miller ([17:05](#)):

Now is your recommendation that only if there starts to be a feud, they should bring in another agent or should they actually bring them earlier, before there's even an issue and a trouble?

Mark Carlson ([17:16](#)):

Well, I don't want to be chicken little and say in every instance where there's a dispute. I would certainly talk to a manager if there's a dispute. I'd get to a manager and let he or she know what's happening. In that way you have another set of eyes on the transaction.

Mark Carlson ([17:39](#)):

But I don't know that getting another agent involved, because it obviously is complicated because now you've got to worry about commission and you've got to get the parties to agree. And so I think if there's a minor issue I wouldn't think that it would be necessary, but we just need to use our own experience and reliance upon the manager's and broker's experience as to when someone else needs to step in.

Dave Miller ([18:04](#)):

Perfect. Now we were talking about fiduciary a few minutes ago. Obviously fiduciary duties is the highest trait that an agent can have with a client. You've been in many courtrooms before. What are judges feeling and temperature when they look at an agent and say, "You had a fiduciary to this side and that side, how is that really possible?" Is it on the county or the judge? I mean what's their [crosstalk 00:18:30]-

Mark Carlson ([18:30](#)):

So jurors, unfortunately, having tried the 20-some odd cases before juries to verdict, they think that agents get paid too much money for what they do. And often you'll have jurors that have never bought a house and they have no idea what the process is, but they still have this concept that an agent is supposed to almost be a guarantor that the transaction goes without a problem.

Mark Carlson ([19:00](#)):

And so, they don't see the 50 showings to the Joneses before the Joneses decide they want to buy a house and all the extra time that the agents put in to try to market property. All they see is, "Hey, we wrote an offer and you got a great big check." And so all you are trying to do by being dual agent is jam the escrow closed so that you could get paid on both sides. That's where the extra risk is because it's an unlevel playing field in front of a jury for real estate agents.

Dave Miller ([19:42](#)):

Excellent. Anything that you'd like to circle back on with regards to dual agency or add before we close out that topic?

Mark Carlson ([19:48](#)):

The one analogy I like to give with respect to fiduciary duty, and I'm going to date myself here, but for those who will see this and can remember the I Spy cartoons where you have the white wizard, I guess, and the black wizard. So that's what jurors are trying to figure out. They're trying to say, "Okay, who's got the white hat on? Who's got the black hat on?" And they watch all these legal shows on TV and they're expecting a Perry Mason moment at any ... and then when it doesn't come, they're like, "Well okay, who's the bad guy?"

Mark Carlson ([20:26](#)):

And so when you're a fiduciary, you got to be thinking about what you do is whether it's going to be viewed by the jury, as you having a white hat on or are you having a black hat on? And look at how a jury would consider your actions retrospectively. And if you have the presence of mind to think, okay, I'm going to do this and how does that look to the outside looking in, then I think you're going to be more cognizant of your potential pitfalls as a fiduciary on certain issues.

Dave Miller ([21:01](#)):

Perfect. Excellent information on the RPA and dual agency. Mark, appreciate the time today as. Laura, back to you.

Laura Prouse ([21:09](#)):

I just wanted to say thank you to both of you. It's always very, very informative. I always love hearing the information, even if I know it I think it's valuable to hear it again. So thank you both and to everybody who's watching, thank you for watching. A copy of this webinar is available on the CRES Insurance homepage if you look under the claim prevent blog tab, and I guess we'll reconvene in a few weeks and we'll do another webinar together.

Mark Carlson ([21:33](#)):

Super. Looking forward to it.

Laura Prouse ([21:35](#)):

Great, thank you both.

Dave Miller ([21:36](#)):

Thanks Laura. Thanks Mark.

Laura Prouse ([21:37](#)):

Thank you, bye-bye.