



## Maneuvering Through the Attorney-Review Minefield

By: Barry S. Goodman, Esq.\*

Although you, as a real estate attorney, routinely see the attorney-review clause in sales contracts that are prepared by real estate licensees, why is it necessary? In addition, what do you have to do to comply with the requirements of the court's attorney-review decisions? For example, what actually

constitutes proper disapproval of the contract? How should back-up offers during and after the attorney-review period be handled? Can you shorten the attorney-review period without committing malpractice? Will your approval of the contract on behalf of your client trigger the start of the attorney-review period?

The answers to these and other questions are critical for you to comply with the mandates of attorney review.

### The Reason The Attorney-Review Clause Was Created

The preparation of contracts, including real estate contracts, historically has been considered to be the practice of law, which only attorneys may undertake. As a result, the New Jersey State Bar Association filed suit seeking to stop real estate licensees from preparing contracts, contending that it constituted the unauthorized practice of law. After years of litigation, the Bar Association and the New Jersey Association of REALTORS®, which is a trade association whose membership is primarily composed of real estate licensees, reached a settlement creating the attorney-review clause, which was approved by the New Jersey Supreme Court.<sup>1</sup>

The purpose of the attorney-review clause is to permit a real estate licensee to prepare a contract for the sale of residential property, while providing the buyer and seller with three business days to consult an attorney about the transaction. Thus, the preparation and signing of the contract will not be delayed when, for example, the buyer and seller want to enter into the contract on a weekend. However, the parties then have the right to have an attorney review the contract to protect their interests.

### The Essential Terms of The Attorney-Review Provision

The provisions in the settlement approved by the Supreme Court were later included as regulations by the New Jersey Real Estate Commission ("REC"), which regulates all real estate licensees in New Jersey. As a result, these provisions bind all attorneys and real estate licensees in New Jersey.<sup>2</sup>

The attorney-review provisions apply to all contracts prepared by licensees for the sale of residential real estate containing one-to four-dwelling units and for the sale of vacant one-family lots in transactions in which the licensee has a commission or fee interest. They also apply to all leases prepared by licensees for a term of one year or more for residential dwelling units in transactions in which they have a commission or fee interest.<sup>3</sup>

Real estate licensees are not permitted to prepare any other contracts or leases. If they do, it likely will constitute the unauthorized practice of law. The attorney-review requirements specifically provide that any permitted contract prepared by a licensee must contain the following language at the top of the first page:

THIS IS A LEGALLY BINDING CONTRACT THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS. DURING THIS PERIOD YOU MAY CHOOSE TO CONSULT AN

ATTORNEY WHO CAN REVIEW AND CANCEL THE CONTRACT. SEE SECTION ON ATTORNEY REVIEW FOR DETAILS.<sup>4</sup>

The attorney-review section that must be in the body of the contract contains three separate provisions. The first provision is entitled "Study by Attorney." It essentially provides that the buyer or seller can have an attorney review the contract within three business days. The contract "will be legally binding at the end of this three-day period" unless an attorney disapproves the contract.<sup>5</sup>

The second provision deals with "Counting the Time." It provides that the three days is counted from the date of delivery of the fully executed agreement to the buyer and seller, but does not include Saturdays, Sundays or legal holidays.<sup>6</sup>

Finally, under the heading "Notice of Disapproval," the attorney sending such a notice must provide a copy to the broker(s) and the other party within the three-day period. The notice to the broker(s) must be sent by certified mail, telegram or personal delivery. However, there is no required method for sending it to the other party.<sup>7</sup>

The REC also included in its regulations that the contract must contain the names and full addresses of all persons to whom a notice of disapproval must be sent.<sup>8</sup>

### Interpretation of Attorney Review By The Courts

Numerous cases have interpreted the attorney-review provision. As a result, there is now a clearer understanding of how it works. For example, early decisions held that attorneys who properly and timely serve a notice of disapproval can disapprove the contract for any reason or no reason at all.<sup>9</sup>

In addition, the attorney-review provision only has to be included in a contract<sup>10</sup> (or an amendment to the contract<sup>11</sup>) if it is prepared by a real estate licensee. Thus, if the contract is prepared by an attorney, the attorney-review provision does not have to be included.

Courts consistently have held that there must be literal compliance with the terms of attorney review. For example, in one case, a licensee did not include the addresses of the buyer and seller in the contract. The court stated that it understood that such a practice was intended "to protect the identity of their buyers and sellers from other brokers and parties," but that such a practice violated the REC's regulations.<sup>12</sup>

Similarly, a notice of disapproval was ineffective where the seller's attorney sent the notice only to the broker and not to the buyer. As a result, the contract was binding at the end of the three-day period.<sup>13</sup>

In another matter, the seller's attorney sent a letter only by ordinary mail to the buyers' broker (with a copy to the buyers' attorney). However, the letter should have been sent to the brokers for both parties by certified mail, telegram or personal delivery and the "better practice" would have been to send it to the buyers, as well as the buyers' attorney. As a result, the contract had not been disapproved and was legally binding at the end of the attorney-review period.<sup>14</sup>

One court found in a very fact-specific decision that a party's new attorney can disapprove the contract even though the party's prior attorney had approved it. In this case, the sellers' attorney

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had approved the contract during attorney review by signing the contract for the sellers pursuant to a power of attorney. However, the court held that the sellers could have a second attorney disapprove the contract as long as the disapproval was properly sent within the three-day period.<sup>15</sup> A subsequent decision explained that the second attorney could disapprove the contract because the first attorney was acting as the sellers in signing the contract, not as an attorney.<sup>16</sup>

In another decision, the seller instructed the broker to forward the signed contract directly to her attorney. As a result, the broker sent the contract to the seller's attorney but not to the seller. Since the signed contract never was delivered to the seller, the court held that the review period never commenced.<sup>17</sup>

It is also clear that brokers are not entitled to a commission if the contract is properly disapproved by the attorney for one of the parties<sup>18</sup> or if the broker does not comply with the attorney-review requirements.<sup>19</sup>

Significantly, the Appellate Division has held that the attorneys for the buyer and seller can agree to shorten the attorney-review period.<sup>20</sup> The court also stated that, once one of the attorneys approves the contract, the contract is binding on his or her client unless the attorney for the other party makes a change that is unacceptable within the three-day period. As a result, an attorney for the buyer or seller should be very careful about agreeing to bind his or her client to a contract where the other party has not also agreed to be bound by the contract. Otherwise, the attorney's client will not be able to void the contract during attorney review even if the client gets a higher offer, if the client is the seller, or finds a better home, if the client is the buyer.

Interestingly, a trial court decided that there are two attorney-review periods, one that begins when the buyer receives the fully executed contract and one that begins when the seller receives it. However, the Appellate Division reversed, holding that there is only one attorney-review period that begins to run when the fully executed contract has been delivered to both the buyer and the seller.<sup>21</sup>

Finally, where the buyer signed the contract prepared by a real estate salesperson but the seller did not, even though the attorneys for both parties approved the terms of the contract on behalf of their clients, the court held that there was no contract under the statute of frauds. As a result, no contract between the buyer and seller ever was delivered to them to begin the attorney-review period and the seller was free to accept another offer.<sup>22</sup>

### **Offers Received During And After Attorney Review**

During attorney review, all written offers must be presented to the owner by real estate licensees pursuant to REC regulations.<sup>23</sup> After attorney review has been completed, written offers are treated as "back-up offers" but all such written and signed offers still must be presented to the sellers or their authorized representative.<sup>24</sup> In addition, the licensee must provide written notice of the offer to the owner, the offeror, and, if the licensee is not licensed with the listing broker, to the listing broker.<sup>25</sup>

### **Conclusion**

Attorneys representing buyers and sellers therefore must be certain to provide the proper notice of disapproval not only to the other attorney, which is routinely done, but also to the broker(s) and the other parties. Otherwise, the notice likely will be ineffective and the attorney's client will be bound to the contract even if the attorney had recommended changes to it. In addition, attorneys

should not only check to ensure that the fully executed contract has been delivered to both the buyer and the seller but also determine when it was delivered in order to know when attorney review began and, correspondingly, when it will end. Moreover, although attorneys now can agree to shorten attorney review, attorneys for the buyer and seller should be extremely careful not to unilaterally approve the contract in an attempt to shorten the attorney-review period where the attorney for the other party has not agreed to shorten it. Finally, attorneys should not approve a contract on behalf of the buyer or seller without a written power of attorney from the buyer or seller, in order to avoid a claim that there is no contract under the statute of frauds and to eliminate an argument that attorney review never began. By simply being familiar with the cases interpreting attorney review, attorneys will be able to avoid the minefield that attorney review has created.

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<sup>1</sup> Under the New Jersey Constitution, the New Jersey Supreme Court has sole jurisdiction with regard to the practice of law, including the unauthorized practice of law. New Jersey Constitution, Art. VI, § par. 3 (1947). See *State v. Bander*, 56 N.J. 196 (1970). As a result, the settlement had to be and was approved by the Supreme Court. *New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards*, 93 N.J. 470, modified in part, 94 N.J. 449 (1983) (the "Settlement").

<sup>2</sup> N.J.A.C. 11:5-6.2(g).

<sup>3</sup> As used in this article, the term "contract" includes both contracts of sale and leases.

<sup>4</sup> This language must be included at the top of the first page in print larger than the predominant size print in the writing.

<sup>5</sup> The Settlement and N.J.A.C. 11:5-6.2(g) require that the following paragraph concerning "Study by Attorney" be included: "The Buyer or the Seller may choose to have an attorney study this contract. If an attorney is consulted, the attorney must complete his or her review of the contract within a three-day period. This contract will be legally binding at the end of this three-day period unless an attorney for the Buyer or Seller reviews and disapproves of the contract."

<sup>6</sup> The Settlement and N.J.A.C. 11:5-6.2(g) requires that the following paragraph concerning "Counting the Time" be included: "You count the three days from the date of delivery of the signed contract to the Buyer and the Seller. You do not count Saturdays, Sundays or legal holidays. The Buyer and the Seller may agree in writing to extend the three-day period for attorney review."

The day that the signed contract is delivered to the buyer and seller is not to be included when counting the three days. *Kargen v. Kerr*, 248 N.J. Super. 91, 96 (Ch. Div. 1991). Thus, if the contract is delivered on Monday, the three days does not include Monday and the three-day period runs through Thursday.

<sup>7</sup> The Settlement and N.J.A.C. 11:5-6.2(g) require that the following paragraph concerning "Notice of Disapproval" be included: "If an attorney for the Buyer or the Seller reviews and disapproves of this contract, the attorney must notify the Broker(s) and the other party named in this contract within the three-day period. Otherwise this contract will be legally binding as written. The attorney must send the notice of disapproval to the Broker(s) by certified mail, by telegram, or by delivering it personally. The telegram or certified letter will be effective upon sending. The personal delivery will be effective upon delivery to the Broker's office. The attorney may but need not also inform the Broker(s) of any suggested revisions in the contract that would make it satisfactory."

<sup>8</sup> See N.J.A.C. 11:5-6.2(g)(3) (regarding contracts) and 6.2(g)(6) (regarding leases).

<sup>9</sup> In *Denesevich v. Moran*, 211 N.J. Super. 554, 556 (App. Div. 1986), the court explained as follows: "The attorney review clause provides each party a three-work day escape during which the contract may be disapproved at the unfettered discussion of that party's attorney." Similarly, the Judge in *Trenta v. Gay*, 191 N.J. Super. 617 (Ch. Div. 1983) held that the attorney for either party can disapprove the

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contract during attorney review for any reason, including that the seller received a higher offer, without explaining the reason.

<sup>10</sup> In Bassford v. Trico Mortgage Company, 273 N.J. Super. 228 (App. Div. 1994), the court held that no attorney review clause was necessary when a mortgage representative, not a real estate licensee, assisted a buyer in completing a contract to purchase property at an auction.

<sup>11</sup> In Freedman v. Clommel Construction Corporation, 246 N.J. Super. 396 (App. Div. 1991), the real estate licensee prepared a mortgage waiver that was an amendment to the sales contract. The court ruled that the mortgage waiver was "deemed void at the buyers' option," because the attorney-review clause was not included in the amendment by the licensee. *Id.* at 405. The buyers exercised that option because the buyers, who got married after signing the contract, separated before construction of the house was completed.

<sup>12</sup> Kargen v. Kerr, 248 N.J. Super. 91, 97 (Ch. Div. 1991). The court explained that such information was essential for an attorney to send the notice of disapproval to the other party.

<sup>13</sup> Denesevich v. Moran, 211 N.J. Super. 554 (App. Div. 1986).

<sup>14</sup> Kutzin v. Pirnie, 124 N.J. 500, 507-508 (1991).

<sup>15</sup> Levison v. Weintraub, 215 N.J. Super. 273 (App. Div. 1987). Although the court indicated that it was limiting its decision to the facts before it, the court unequivocally stated: "[I]f attorney disapproval is registered within three days there can be no contract, regardless of prior approval." *Id.* at 277.

<sup>16</sup> Romano v. Chapman, 358 N.J. Super. 48 (App. Div. 2003).

<sup>17</sup> Peterson v. Estate of Pursell, 339 N.J. Super. 268 (Law Div. 2001).

<sup>18</sup> Century 21-Candid Realty v. Cliett, 203 N.J. Super. 78 (Law Div. 1985).

<sup>19</sup> Wheatly v. Suh, 207 N.J. Super. 539 (Law Div. 1985), *aff'd* in part and *rev'd* in part, 217 N.J. Super. 233 (App. Div. 1987).

<sup>20</sup> Romano v. Chapman, 358 N.J. Super. 48 (App. Div. 2003).

<sup>21</sup> Gordon Development Group v. Bradley, 362 N.J. Super. 170 (App. Div. 2003).

<sup>22</sup> Morton v. 4 Orchard Land Trust, 362 N.J. Super. 190 (App. Div. 2003).

<sup>23</sup> N.J.A.C. 11:5-6.4(h)1.

<sup>24</sup> N.J.A.C. 11:5-6.4(h)3.