

# REAL ESTATE ATTORNEYS: STILL A TARGET FOR MALPRACTICE SUITS



*By Amy Hill*

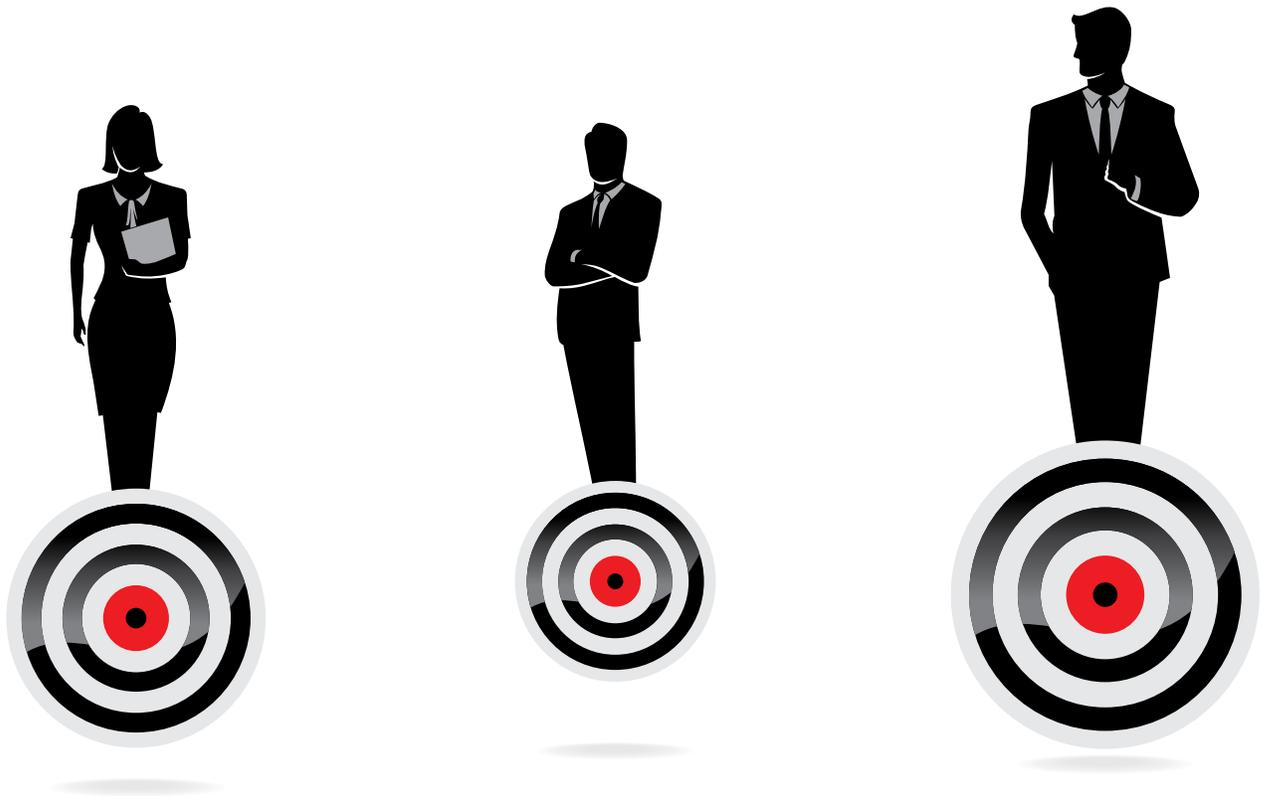
Most legal malpractice attorneys, both plaintiff and defense attorneys, will know that real estate issues are one of the most frequent subjects of a legal malpractice actions. Four or five years ago, the war stories would center around regarding title searches, real estate closings, poorly drafted deeds or trust fund issues that prevented someone from purchasing or owning a valuable piece of property. While those issues are alive and well, the type of legal malpractice complaints directed at real estate attorneys has shifted with the downturn in the economy.

Today's legal malpractice claims frequently result from purchasers who find themselves in a foreclosure action because they can no longer financially manage the property. One of the first places these purchasers look to recover is the attorney's file.

As a result of the avalanche of foreclosures, many homeowners are searching for anything to keep a foreclosure at bay, including a careful review of how the attorney handled the loan closing. A recent South Carolina case held that when the attorney was not present at the closing, the lender necessarily had unclean hands and thus could not pursue an equitable remedy of foreclosure. *Wachovia v. Coffey*, 698

S.E.2d 244 (SC Ct. App. 2010). If an attorney failed to attend the closing and the lender lost all ability to foreclose on the property, the result can be a tough legal malpractice action. While all states do not require attorneys to handle real estate closings, in most jurisdictions an attorney has some involvement that will be scrutinized in the event of foreclosure.

There are also many cases that result from simple real estate deals that did not reach fruition or were not as fruitful as the client had hoped. One such case is *Spalla v. Fransen*, where the attorney simply played the role of the escrow agent for the earnest money. 936 N.E.2d 559, 2010 WL 2892694 (Ohio App. 11 Dist.). The earnest money check did not clear due to insufficient funds. However, the attorney failed to make this fact known to the seller until shortly prior to the closing. The deal did not close and the seller had to search for another buyer. During the search, the real estate market contracted and the property was ultimately sold for much less than the original contract. The court did not allow an award of the difference in price, but limited the award against the attorney to the amount of the earnest money. Attorneys need to be aware that time delays resulting in a changed sale



price could be asserted as damages in a legal malpractice case.

Both Spalla and Wachovia indicate the issues that can arise when a party is looking for deep pockets to cover losses as a result of a bad real estate market. When the borrower no longer pays the mortgage or the buyer backs out of a deal, all parties will look to the attorneys to see if the closing was handled correctly or if other trends related to the sale or financing of the property were performed correctly. Of course, attorneys cannot correct the real estate market, but it is prudent for attorneys to handle all real estate transactions as if their files will be reviewed at some point in the future.

Another issue that arises in this economy is the dispute between developer partners. When the partnership falls apart, how does the attorney fall into the mix? The attorney represents the partnership, not any particular partner. Real estate attorneys need to be very conscious of possible conflicts between members, shareholders, and partners in this economy. When the real estate revenues dry up, there is an inevitable dispute over who will be left holding the bag. If one partner asks an attorney to handle a deed transfer, a refinance, or a work-out agreement, the attorney needs to have

something in writing showing that all partners agree with the transfer to the extent required by an entity's partnership agreement or applicable statutes. The attorney should not take any action without carefully reviewing the entity's partnership agreement or applicable statutes and making sure that the attorney has obtained the requisite consent. Many developers will be trying to collect their lost profits through a legal malpractice action.

The bottom line is that all real estate attorneys need to be keenly aware of the devalued real estate market. When a real estate deal goes south, the value of the property cannot make up the difference in this economy. As a result, many will look for other ways to recoup their losses, including looking at the attorney's actions with a magnifying glass to see if there is a possibility to recoup their losses from the attorney.

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