

Fundamental Principles for Real Estate Deals

Joshua Stein

*Even though every real estate deal is different, they all require
the same practical skills to get the job done.*

WHETHER YOU ARE closing a loan, forming a partnership, negotiating a lease, buying a hotel, selling a portfolio of shopping centers, or handling any other major commercial real estate transaction, a handful of fundamental principles will help you understand, negotiate, and close every transaction more effectively and

with greater satisfaction for you and for your clients. Some of those principles are legal; others reflect a more practical “business” orientation. All will serve you well.

THE REALITY CONNECTION • As a starting point, real estate lawyers need to understand

Joshua Stein is a real estate partner in the New York office of Latham & Watkins. This article is based on a chapter from his new book, *A Practical Guide to Real Estate Practice*, published by ALI-ABA. To order a copy, call ALI-ABA at 1-800-CLE-NEWS (253-6397) and ask for item BK12, or order online at www.ali-aba.org/aliaba/BK12.htm

real estate assets, in a practical “street level” way. If you write your documents in a vacuum without understanding how the asset works and the practical intentions of the parties, you may miss important points.

Ask your client enough questions about the real estate so you understand how it really works. Visit the site if you can. Speak to the people who actually live with the asset day to day. Try to establish a clear channel of communications so the documents you write and the transaction you close accurately reflect the reality of the real estate.

When you write (or negotiate) documents, recognize that the business world is usually more complicated and less black-and-white than the perfect business world you might envision as you sit in your office thinking about how whatever relationship you are writing about “should” work. In the real world, there will be problems and issues that you might not even be able to imagine.

What may sound to you like a simple and obvious requirement or expectation—such as a requirement that someone notify someone else of something in writing within 48 hours after it occurs—may be utterly unrealistic, even ridiculous, taking into account what real people do in the real business world. Those real people may comply with, or ignore, legal requirements because of practical marketplace traditions, interconnections, and other realities of which you are completely unaware. Events might really occur in an order or with a focus totally different from what you would expect.

Therefore, to create documents that bear some relationship to reality, try to obtain a full understanding of what really happens in whatever marketplace, asset type, or property your transaction will affect.

Closings

Every major transaction “comes together” at a closing. This is when all the loose ends are supposed to be tied up; all the issues are supposed to have been resolved; and the real estate lawyer is in charge of producing an event rather similar, in many ways, to a Broadway show. As you plan your activities for any particular transaction, keep that “main event” in mind and try to assure that when the curtain goes up, every piece of your show is ready to go.

Simplicity Is Your Friend; Complexity Is Your Enemy

Whenever you can, try to keep transactions and documents simple. The more complicated a transaction becomes, the harder it is to make the documents and the transaction work correctly, regardless of how the facts turn out.

Although complexity may be more fun on an intellectual level—it makes you think harder—you may be able to derive even more intellectual satisfaction from figuring out how to reintroduce simplicity to a transaction that the parties have already made more complex than it needs to be.

In my experience, 20 percent or less of any transaction produces 80 percent of the complexity. Try to limit the impact of that 20 percent, so you can keep most of the transaction straightforward and easy. And try to avoid adding further complexity beyond whatever the parties have already perpetrated on their own.

When you see that something is becoming complicated, your initial temptation is to try to understand the complexity and think it through so it all works right. But don’t lose sight of another option, often better: get rid of it completely and start over. Perhaps all the complexity is unnecessary and you can achieve exactly the same goal in a much simpler way. Try to do it when you can.

If you cut back complexity, you will reduce the likelihood of mistakes, help transactions close more quickly, make your clients happier, do less work, get more sleep, and probably make your job easier.

Do One Job at a Time

A major real estate transaction will often require you to do many things, all at once, or at least in very quick succession. If you think about all of them all the time, you will get overwhelmed and may find yourself unable to take control of even one task and push it forward to completion. Therefore try to make reliable and complete lists, so you can clear your desk and your mind from the clutter of everything you have to do. Then just go do what you have to do. Start with one task on your list. Focus on that task. Finish it. Then go on to the next task. You can't do everything all at once.

If a System Is in Place, Use It

Recognize that other people, just as smart as you, have solved the same problems you are solving today, and have figured out some good ways to solve those problems. At least as a starting point, learn from their experience and follow the principles they established. If they have set up systems and procedures to prepare documents, close transactions, maintain files, or control teams, follow those systems and procedures rather than reinvent them yourself.

You Are Not the Last Person Who Will Walk Down This Path

Just as others have come before you, others will always follow you. When you edit a document, you are not the last person who will ever edit that document. Don't make the next person's job needlessly difficult. When you prepare documents and get them signed for a transaction, you are not the last person who will ever need to look at those documents. Therefore,

make those documents easy to understand and file them so someone else will be able to find them later. If you amend those documents, someone else may later need to amend them again. Try to make that person's job easy rather than hard. If you "check out" a document for the weekend from your firm's document management system, leave a note in the system indicating where someone can find you if they need to work on that document.

More generally, think about whoever is likely to follow you when dealing with your work product, as well as the fact that someone will have to read, understand, live with, and apply it.

Watch the Money

When a transaction becomes complex or you can't immediately figure out why the parties want to do whatever they seem to want to do, one great way to unravel the situation and prevent problems is to figure out where the money is and where the money is going. Who has it? Who is getting it? When? Why? And how much? In some sense, once you understand the money, everything else important follows. So start by understanding the cash. Figure out the rest of the transaction from that great starting point.

Third Parties

Almost every real estate transaction will involve one or more third parties—parties other than your client and the obvious "opposing party" on whom you will focus during negotiations. Identify who those third parties are, and figure out how to work with them, as early as possible in your transaction. The day before the closing, it can be extremely awkward to find out about a third party who was previously ignored. How you handle third parties can make or break your goal of getting deals closed gracefully and on time.

Listen

When your client or your supervisor tells you about a transaction or the steps you will need to take to get it closed, listen. Assume the person you are speaking with knows what he or she is doing. Don't assume you will always be able to go back and ask again if you didn't pay attention the first time. Listen and take good notes. Read them.

Be a Motor

When you are responsible for getting a deal closed, other people might say they will do things and then fail to deliver. That failure gives you a great excuse every time. But ultimately you will do better—and not even need the excuses—if you make yourself a “motor” for the transaction and make sure other people do what they said they would. Make sure it all happens when it is supposed to happen. That is

part of the responsibility you undertake when you are trying to get a transaction closed.

What's Missing?

In any transaction or other business situation, you will often be asked to evaluate and respond to an existing set of circumstances. But before you choose a course of action, ask yourself whether there is anything else you would expect to see as part of the particular transaction or other situation. What is missing? If something is not there but should be, or if there's an issue that you would expect someone to have raised but they haven't, give it some thought. Ask why. At a minimum you will learn something. More likely, you will identify a flaw that needs to be fixed or a potential problem that could derail the transaction. Usually your transactions will go better if you identify these missing items earlier rather than later.

PRACTICE CHECKLIST FOR Fundamental Principles for Real Estate Deals

In every transaction, some basic principles will help you understand, negotiate, and close your deals more effectively and with more satisfaction for you and for your clients.

- Here are some tips:
 - Test what you write against the reality of the real estate and the marketplace;
 - Plan each activity with the ultimate goal—the closing—in mind;
 - The simpler you can make things the better;
 - Do one job at a time;
 - Use the documents, programs, and systems others have created;
 - Organize the transaction by watching where the money goes;
 - Watch out for third parties;
 - Think about those who will follow you, and try to make their job easier;
 - Listen;
 - Take responsibility for getting things done; and
 - Ask what's missing.