Good Recordkeeping

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If you're in the right and have good records within your grasp, you can turn the tables on a lawsuit.
October 2012 | By Mark D. Stavros

About two years ago, my clients—a real estate agent and his brokerage—listed a home for sale. After the closing, the buyer sued alleging that she had found signs of water intrusion in the "rotted" subfloor. The court dismissed the case and directed the plaintiff to pay $60,000 to my clients for their attorney's fees—almost the entire amount—deeming the lawsuit frivolous. The plaintiff is appealing the decision, so the final outcome is pending. But the key to this dramatic turn of events was my clients' meticulous record-keeping.

When the plaintiff filed her claim, she asserted that my clients had "failed to ensure that the property was properly inspected" and that "the plaintiff's agent failed to ascertain the defects." She also claimed she had never received all of the documents she was owed and later claimed that drainage "upgrade repairs" ordered by the previous owner had not been done completely. The plaintiff also made allegations against others in the transaction, including the home inspector, the termite inspector, and the contractor and engineer for the prior seller.

The plaintiff's assessment of the damages changed over time. Experts that my clients brought in estimated damages between $22,000 and $35,000. Just before mediation, the plaintiff estimated damages at $62,000, but then, at the mediation session, she changed the number to $365,000.

After depositions on behalf of my clients (the plaintiff took no depositions), we filed a motion asking the court to recover my clients' attorney's fees or, at a minimum, to dismiss the case—arguing that the action taken by the plaintiff was frivolous. Before our sanctions motion was heard by the court, the plaintiff's attorneys failed to respond to all but one of 15 letters we'd sent to them, asking them to dismiss the case on the grounds that the plaintiff had failed to show any evidentiary support for her claim.

Aside from the lack of evidence, the grounds for our motion centered on my clients' record-keeping. They had gone above and beyond what's required for California law and were able to document that. Among the documents my clients were able to show that had been provided to the plaintiff at the time of the transaction were

1. a Receipt for Reports, which lists all of the reports that were prepared on the property (termite, home inspection, and so on);
2. a Transfer Disclosure Statement, which covers "red flags" identified at the property;
3. a Seller Property Questionnaire, a checklist of some 35 property attributes, including whether material repairs have been made;
4. Seller's Additional Disclosures, which provides disclosures required by law that aren't included on the TDS, such as whether there have been any insurance claims made on the home; and
5. Agent's Visual Inspection, which agents complete based on a visual inspection of accessible areas of the property. What's more, my clients had represented the sellers in their purchase of the property and provided the plaintiff with the entire file of that transaction.

In addition to having all of these reports documented, my clients had included in their files all pertinent e-mails that were sent at the time. "Pertinent" in this instance means material e-mails that are considered admissible in court because they serve as reliable business records in a transaction. In short, my clients weren't on cruise control; they took a pride-of-authorship approach and were aware of everything that needed to be in the file.