HOW TO DEAL WITH A CRAZED HOMEOWNER

Responding to a Homeowner's Aggressive Threats and Tactics

CERTAINTEED BUSINESS BUILDING WORKSHOP
2019

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The Screaming Call, Text, Email, or Letter Has Just Arrived!

You just received an earful on your voice mail!
You just received an earful when you answered your cell phone!
You just received a 13-page, single spaced screaming letter!

How Do You Respond?

Rely On Instinct? – Wrong!

Think About Your Response Now. Don't leave it to instinct.

You must imagine yourself receiving a letter, phone call, or voice mail and you must think about how you will respond.

You will not yell, you will be calm and reasonable.

Keep the Letter. Don't write on it.

Keep the Text. Preserve it.

Keep the Email. Print it out.

Keep the Voice Mail. Transfer it to digital media.

You Are the Professional. Bite your tongue if you are talking to the person.

This is one theme for today's presentation: Be Professional (that is, be calm and reasonable).

You are held to a higher standard than the "crazed" homeowner. They are upset about their home. You are supposed to behave in a professional manner, even if the homeowner does not.

Evaluate the Seriousness of the Claim.

What Is Your Prior Experience With the Homeowner?

Listen to your "little voice."

If you have been in the real estate business (whether as a builder or a realtor) for a while, or even if you have not, if you have any doubt that these people are going to be difficult, you should always err on the side of keeping an extremely detailed file and documenting everything you do.

Are the "Problems" Only "Punch List" Items?

The more serious the claim, the proportionally more diligent and careful you must act.

Think of it graphically, the more numerous or serious the issues, the more time you must spend in making sure you are properly responding to the problems, and documenting your efforts.

Is the Homeowner Threatening "Personal Injury" Claims?

If the homeowner starts talking about their children having breathing problems, their concerns for their personal safety, or any other similar claims, it is serious. (We discuss responding to "serious" issues below.)

If You Built the Home: What Does Your Contract Say?

If the homeowner is asking you to make repairs or install items which are not part of the contract, the seriousness of your exposure may decrease.

Does that mean the "crazed" homeowner will stop there? – Of Course Not!

Homeowners are often highly emotional and inexperienced in understanding contracts. They may have a misguided belief that they are entitled to work which they are not.

Does the Contract Contain Required Notices?

Minnesota

Minn. Stat. § 327A.08(c) requires a contractor to include in the contract a copy of the homeowner statutory warranties provided in Chapter 327A.

Minn. Stat. § 326B.809(b) requires that a licensee in all contracts for improvement to residential property "provide a prospective customer with written performance guidelines for services to be performed. Performance guidelines must also be included or incorporated by reference in the agreement."

These guidelines spell out in advance the rights and duties of contractors and homeowners in the event of an alleged defect in a new or remodeled home.

Michigan

Under Michigan law, there are no required notices in a contract for improvement to residential property. Consequently, the Construction Codes Division of the Michigan Department of Licensing and Regulatory Affairs (LARA) provides helpful

information for homeowners to include when constructing such a contract.[1] For instance, LARA suggests the homeowner ensure the contractor carries liability insurance and has workers compensation coverage in case of accidents on the job.[2] LARA also recommends there be a statement of warranty on the work as well as a statement requiring the contractor be the responsible party to gathers all required building permits before the work begins.[3] Further, LARA stresses that changes or revisions be dated and initialed by both parties and to always make sure the contractor gives a copy of the contract, with changes noted, to the homeowner.[4]

If You Are the Realtor, Who Do You Represent?

Remember your fiduciary duties, even if your client appears to be a "bad guy."

What does the contract say?

Legal advice?

Is it covered?

Now The Big Decision.

Assume you have received a call or letter. Do you meet in person or respond in writing? This is a question of both style and the seriousness of the claim. If the claim is serious, it is proper for you to get your attorney involved and respond in writing.

Responding In Writing.

Responding in Writing to a "Letter from a Nut."

Often letters, texts and emails you receive will be both professionally and personally offensive. The letter/email/text will not only accuse you of being an incompetent realtor or builder, but may question your relationship with your mother and your political affiliation with the communist party. Once again, you must respond professionally.

You must not allow yourself to be dragged into the homeowner's world of fantasy or offensiveness when responding in writing. Consider the following:

You May be Required to Respond in Writing.

See ADR discussion below.

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[1] https://www.michigan.gov/lara/0,4601,7-154-89334_10575_17394_77372_88024-475864--,00.html (The Contract)

[2] Id.

[3] Id.

[4] Id.

Your Response is "In Stone."

If you choose to respond offensively, or to respond with an equally nasty tone, your writing will permanently be a part of the record for everyone (judge, jury, Minnesota Department of Labor and Industry or Michigan Department of Safety and Professional Services) to review.

Your Professional Tone.

The nastier the homeowner is, the more you should convey a polite and professional tone. This helps you with judges, juries and the applicable state department.

Your Legal Help.

An attorney is often important as a sounding board. Your attorney can assist you in removing understandable emotion and separating the "wheat from the chaff" in responding to the homeowner's letter.

Meeting with the Homeowner.

If you decide your relationship is sufficiently cordial, or it is more consistent with your style to meet in person, that is okay, but you must understand there are both risks and benefits to personal meetings.

Personal Meetings.

Include all the key parties.

Homeowner (buyer and/or seller);

Builder; and/or

Realtors.

Informal results must be formally recorded.

The main advantage to an informal meeting is that it can diffuse tension and promptly resolve disputes. Homeowners are often less willing to be combative in person than if they sit in front of a computer and "vent."

If you meet in person and successfully reach a resolution, you must bring with you a computer or pad of paper, write out the resolution, and have both parties sign the agreement. This is often difficult and may jeopardize the warm feelings, but the result can be disastrous if you do not.

That is, you can digress into: "He Said vs. She Said."

I have had numerous situations where (for example) my client has said "we met and we agreed that the deck would be fixed and they would pay us the balance of the bill if that was done." Three months later, after the deck is done, the homeowner still has not paid and the homeowner has a list of ten other problems which need to be repaired before payment. A record of the meeting or a written agreement could have resolved this issue. The disquieting reality is people lie, even in court. Written agreements help resolve this problem.

Your Professional Tone. Of course, the other downside to a personal meeting is the "crazed homeowner." That is, the homeowner may have emotional, chemical, or other problems that lead to erratic and sometimes dangerous behavior.

If the homeowner becomes erratic, violent, or unreasonable, you must become more professional. You also need to terminate the conversation and leave.

Beware of Recordings. Why is it so important that you be professional? – Because others might see you and testify against you if you behaved unreasonably.

In the heat of the moment, when a "nut" is screaming at you, you might (understandably) lose your cool. You do not want that moment saved for trial.

Your conversation may be recorded. Recording conversations is legal – even if you don't know you are being recorded. In this modern technological world of iPads and smart phones, the likelihood of recording is even greater.

Minnesota and Michigan law **allow** such recordings by a person who is a party to the communication. Minn. Stat. § 626A.02, subd. 2(d); MCLA 750.539(c). That being said, Michigan law is often misinterpreted as requiring the consent of all parties to a conversation. However, one Michigan Court held a participant in a private conversation may record it without "eavesdropping" because the conversation is not the discourse of others. *Sullivan v. Gray*, 324 N.W.2d 58 (Mich. Ct. App. 1982). *See also Lewis v. LeGrow*, 670 N.W.2d 675 (Mich. Ct. App. 2003) (finding that a participant in a private conversation may record it without violating the statute because the statutory term "eavesdrop" refers only to overhearing or recording the private conversations of others).

Preserving Your Position.

If the customer has alleged there is damage, and if you have entered into an agreement resolving the situation or are making a repair, it is often a good idea to take video. This can be a double-edged sword. If there is a problem, video can hurt you later, but video can also protect you if the homeowner later modifies the condition of the property.

It is a Video World. Video is commonly used by landlords, realtors, and tenants to document damages and conditions. Video provides much more detail than checklists or other traditionally used recordkeeping methods.

Remembering Video. There have been many studies that show people remember better from seeing video than from any other medium. You are more likely to remember what is said if you see it on video instead of in person.

Pictures from a Nut. We are all better oriented with video than photographs. The homeowner who comes to court with a hundred individual photographs that he or she wants to show to the judge or jury is often viewed as a "nut." In contrast, a professionally edited video which takes the jury or judge on a "walk-through" of the home and zooms in on the problems is a welcomed break from the tedium of court.

Talk ist Verboten. I had a case where the opposing side gave us video in which the person making the video was making nasty comments and using profanity. I was then able to use that video at trial, not as much for the pictures in the video, but to make clear that the opposing side was the "bad guy." **The smartest thing to do when taking video is to keep your mouth shut.**

Spoliation and Preservation of Evidence. Spoliation of evidence means that evidence existed at one time, but because of the actions of one of the parties, it has been destroyed or no longer exists. The party destroying the evidence can be sanctioned, but it doesn't always work that way.

What if there are Serious Problems?

If it involves personal injury or a substantial amount of money, what do you do?

Notify Broker. If you are the builder, you should notify the broker if you believe that this problem can be solved with the broker's involvement or if the broker may be potentially liable. Likewise, if you are acting as an agent, you are obligated to keep the broker informed.

Notify the Builder/Developer. If you are acting as a broker/agent and there is a problem with construction, you should notify the builder/developer. You may be able to resolve this quickly with a builder or developer if it is new home construction.

Notifying the Responsible Subcontractors? If you are the builder and a claim has been made against you, or if you believe there is a serious problem with the work of a subcontractor, you must involve the subcontractor early. First, because their work may be defective, and the subcontractor should have an opportunity to go on site and repair it. Sometimes this solves the problem completely.

Additionally, by notifying the subcontractor (in writing), you will know whether you can present a "unified front" in defending the claims by the homeowner, or whether you are going to have an adversarial relationship with the subcontractor. It is better to know this early, rather than taking a position which is later going to be contradicted by the subcontractors. Often, contractors and subcontractors resolve issues together because they have had long term business and personal relationships.

Notify your Insurer? If the claim involves personal injury, you or your company likely have some form of comprehensive general liability (CGL) insurance or other coverage which can protect you. You may have coverage for other types of claims. You

may also have some coverage through errors and omission coverage for the brokerage firm. You need to immediately notify your in-house counsel (if you work for a large company) or your insurance agent, and in turn your insurer, to let them know about a serious claim. The advantage of this is that it allows your insurer, rather than you, to incur the attorney's fees.

When Do I Call My Lawyer? If you believe the claim is potentially serious, or if your "little voice" says you have a problem, it is a very good idea to get your attorney involved early in the process. It may only require a couple of phone calls with your attorney to "bounce ideas" off him or her or to review a draft letter to the customer or the appropriate Minnesota or Michigan state agency. (See discussion below).

A Claim Has Been Made Against Me.

The Better Business Bureau. Homeowners often make claims to the Better Business Bureau (BBB). The BBB has no enforcement powers (unless the parties have contractually agreed it does), but does keep records of claims made against you. Generally, it is not worthwhile to ignore the BBB, because your avoidance of its requests for information will be put in your file, and if anyone contacts the BBB, you will look like a "bad guy."

If a homeowner has made allegations to the BBB, they have usually made similar allegations in a lawsuit or in a complaint with the Department of Labor and Industry (Minnesota) or the Michigan Department of Licensing and Regulatory Affairs (Michigan). Accordingly, it is generally a good idea to write a response to the BBB claim.

The BBB usually indicates that your response has been put in the file and that they encourage you to engage in mediation and discussion with the homeowner.

Minnesota Department of Labor and Industry and Michigan Department of Licensing and Regulatory Affairs (LARA), Construction Codes Division. If you receive a letter from one of these departments, you must respond. These government departments have power over builders and broker/agents.

For Builders: Builders can be reprimanded, fined, suspended, or have their licenses revoked. (Minn. Stat. §§ 45.027, subd. 6-7; 326B.082; 326B.84; Michigan Department of LARA.[5]

For Realtors: The state departments can suspend or revoke your license (Minn. Stat. § 82.82; MCL 339.602(b); MCL 339.602(d), or criminally charge you (Minn. Stat. § 82.83). Remember you have a license (Minn. Stat. § 82.58; MCL 339.602[6]) which may act as a hammer these departments hold over you.

[5]https://www.michigan.gov/lara/0,4601,7-154-89334_10575_17394_77374---,00.html (Disciplinary Action Reports)

[6]http://www.legislature.mi.gov/(S(2dqtr4iwv3wo0jlsnm4afok0))/mileg.aspx?page=getObject&objectName=mcl-339-602

Ignore Notices at Your Peril. There are many default cases where contractors and realtors have been fined or have had their licenses revoked because they chose to ignore a request for information from an investigator at the Department. (Minn. Stat. § 45.027; Michigan Department of LARA; MCL 339.508(2)[7]

If you ignore the letter, everything you do after that point will be pushing water uphill. That is, you will have set a bad tone with the Department, and you may be seeking to reverse an enforcement decision. Rather than dealing with the merits of the homeowner's claims, you will be attempting to explain why you ignored the Department's letter. Put simply, it is "stupid" not to respond to the Department.

Additionally, you should contact your attorney immediately if you receive such a letter. Do not call your attorney on the day your response is due because it may be too late.

Your Duties. If you decide to respond to the Department without contacting an attorney (which is a mistake), you need to be aware of the dangers in doing so. Again, there are numerous decisions where the Department has severely fined or removed a license because of a misstatement made to the Department. You are expected to make completely truthful statements and if you improperly shade the facts or make a misleading statement to the Department, they come down on you extremely hard. You want to make sure that your statements are not only truthful, but defendable. There are numerous grounds for the departments to impose sanctions. Minn. Stat. § 326B.84.

Contacting the Enforcement Officer Directly. Both written and verbal information given to the Departments must be accurate and truthful. Contractors have lost their licenses, not only for written misstatements, but also untrue statements to enforcement officers. While your first impulse may be to pick up the phone and call the enforcement officer to try to quickly resolve the matter, this rarely works. A written response is almost always required and you should coordinate with your attorney in making an appropriate (and truthful) response.

The Minnesota Attorney General. The Consumer Division of the Minnesota Attorney General also has enforcement powers. Homeowners can write letters to the Consumer Division of the Attorney General's office. Once again, if you ignore these requests for information, you are subject to sanctions and referral of the matter to an Assistant Attorney General's office and/or the Department of Labor and Industry. If you receive such a letter, this is usually a sufficiently serious issue that you want to make sure you have your attorney "in the loop."

As with the Department of Labor and Industry, you are usually better off making a written response to the Attorney General's request for information. A verbal explanation is rarely sufficient to satisfy the consumer fraud division's inquiries.

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[7]http://www.legislature.mi.gov/(S(jlkm1sp32zeijyxerlbb0jfr))/mileg.aspx?page=getObject&objectName=mcl-339-508

The Michigan Attorney General. The Consumer Division of the Michigan Attorney General's Office also has enforcement powers. Homeowners can write letters to the Consumer Division of the Attorney General's office, although the Office encourages homeowners to file complaints with the Michigan LARA, Bureau of Professional Licensing if the issue is against a licensed contractor (the Office prefers to handle issues concerning non-licensed contractors).[8]

Your Legal Duty: Alternative Dispute Resolution (ADR). In many cases, before a lawsuit can be commenced ADR must be completed.

Minnesota.

Minnesota laws require homeowners and homebuilders to engage in an alternative dispute resolution process designed to resolve disputes out of court.

Within six months of discovering loss or damage, the homeowner must give written notice to the vendor or builder under Minn. Stat. § 327A.03(a). The homeowner must then allow the vendor or builder thirty days to inspect the property. (Minn. Stat. § 327A.02, subd. 4(a)). Within fifteen days of completion of this inspection, the vendor or builder must provide homeowner a written repair offer. (Id. at § 327A.02, subd. 5(a)).

If the homeowner and the vendor or builder agree to a repair plan and the vendor or builder complete the repair work according to the plan, vendor or builder must provide the homeowner with a list of repairs made as well as a notice of the homeowner's right to pursue a warranty claim. (Id. at § 327A.02, subd. 4(c)).

If the vendor or builder fails to perform the initial inspection within thirty days, fails to make a repair offer, or fails to perform the agreed upon repairs, the homeowner may promptly commence an action. (Id. at 327A.02, subd. 6).

If the homeowner and the vendor or builder, after notice and inspection, do not agree on the scope of repair, they must engage in statutorily-mandated alternative dispute resolution. (Id. at § 327A.02, subd. 5(c)). In such an instance, the homeowner cannot bring a claim until either: (1) the completion of dispute resolution; or (2) sixty days after a written offer of repair is provided to the homeowner. (Id. at § 327A.02, subd. 7). Minn. Stat. § 327A.051 governs the mandatory dispute resolution process.

Commencing an Action under MCIOA.

MCIOA (Minnesota Statutes Chapter 515B): Note that 2017 Minn. Laws, Ch. 87, Sec. 7 provides that the approval and mediation requirements below apply only to common interest communities created on or after August 1, 2017. However, Ch. 515B, as published by the Revisor's Office, does not currently contain this applicability statement. The Revisor's

[8] https://www.michigan.gov/ag/0,4534,7-359-81903_20942-44670--,00.html

office has the authority to make certain edits to legislative acts. But, it may not alter the sense, meaning or effect of a legislative act. See Minn. Stat. §3C.10, subd. 1.

Before instituting litigation or arbitration involving construction defect claims against a development party, Minn. Stat. § 515B.3-102(d) requires an unit owners' association to: (1) mail or deliver written notice of the anticipated commencement of the action to each unit owner informing the owner of the nature of the claims, relief sought, and manner in which the association proposes to fund the cost of pursuing the claims, and (2) obtain the approval of the owners of units to which a majority of the total votes in the association are allocated. Id. Votes allocated to units owned by the declarant, an affiliate of the declarant, or a mortgagee who obtained ownership of a unit through a foreclosure sale are excluded. Proxies cannot be used unless the unit owner executes the proxy after receiving the notice described above and the proxy expressly references that notice. Id.

As a condition precedent to any construction defect claim, Minn. Stat. § 515B.4-116(c) requires all parties to submit their claims to mediation. The applicable statute of limitations and statute of repose is tolled from the date a party makes a written demand for mediation until the latest of the following: (1) five business days after mediation is completed, or (2) 180 days. Mediation is not required if the parties have completed home warranty dispute resolution under Minn. Stat. § 327A.051. Id.

Michigan

A contract may contain a provision requiring you to submit disputes to "alternative dispute resolution" (ADR) procedures. Proper ADR provisions (typically mandatory arbitration clauses) that comply with the law are common in consumer contracts, but consumers should always be aware of how arbitration clauses may affect their rights and remedies. With regard to builders, consumers should be aware that both their right to bring a legal action against the builder and the Department of LARA's authority to initiate a proceeding against a builder are limited if the contract requires the consumer to submit to ADR.[9]

Lawsuit.

Call your lawyer immediately.

If you receive a document that says "Summons" on the front page, it means you have been sued.

The Complaint can be short or long. You must respond in as short a period as 20 days or a default can be entered against you.

Do NOT throw the document in your drawer or the front seat of your vehicle and figure you will take care of it in a week or so. Inevitably, people forget, come to their lawyer at the last minute, or are too late to make an appropriate response.

[9] https://www.michigan.gov/ag/0,4534,7-359-81903_20942-44670--,00.html

If you don't contact your lawyer immediately, you can be harmed. You need to determine both the appropriate response and strategy. This may, and often does, include a counterclaim against the homeowner. Your failure to immediately give the Summons and Complaint to your lawyer may impede your ability to file a counterclaim or hamper your defense.

Arbitration. It is important to remember that if you receive a Demand for Arbitration," you have been sued. You need to contact your lawyer. If you don't' respond, there can be a default judgment entered against you.

If your agreement contains an arbitration clause, the homeowner must arbitrate their claims with you. If the homeowner sues instead, you can bring a motion to dismiss their claim, forcing them to arbitrate.

If you receive a demand for arbitration, you should immediately contact your attorney because you will be required to respond to the arbitration claim.

How Do I Prevent Problems?

Good Business Practices and Organized Files.

Keeping detailed files is essential.

I have heard many clients say they are in the business of selling or building houses, not doing paperwork. That is exactly wrong. A good realtor or builder not only closes deals, but keeps track of the paperwork. For most jobs, this paperwork is not crucial, but paperwork must be done for the situations where there are problems.

In an increasingly contentious world, a well-kept file can make all of the difference.

Written Agreements.

Law Requires It!

Brokerage Agreements. Minn. Stat. § 82.66, subd. 1; MCL 339.2517(3)[10] (Seller requires written agreement and disclosure statement), Minn. Stat. § 82.66, subd. 2; (Buyer requires written report); and Minn. Stat. §§ 82.66-67; (Dual agency requires written notice). Oral brokerage agreements are against the law!

Licensed brokers or real estate agents cannot sue to enforce an agreement, unless it is in writing. Minnesota: Minn. Stat. § 82.85, subd. 2; Hammann v. Falls/Pinnacle LLC, 2008 Minn. App. Unpub. LEXIS 351, at *4 (Minn. Ct. App. Apr. 8, 2008); MCL 566.132.[11]

[10]http://www.legislature.mi.gov/(S(qu4o15ekxp1xktol2hrlem0y))/mileg.aspx?page=GetObject&objectname=mcl-339-2517

[11]http://www.legislature.mi.gov/(S(folclbcrg5dhurcn2boau4eg))/mileg.aspx?page=getobject&objectName=mcl-566-132

Builder's Agreements in Writing and Required Notices. Minn. Stat. § 326B.809. Builders sell the most expensive thing most people will ever own – their homes. The Minnesota Administrative Code and statutes specifically require that all agreements, including change orders, as related to residential transactions must be in writing. Oral agreements violate Minnesota law and open the builder up to state-imposed sanctions. Minn. Stat. § 326B.845, subd. 1. Mich. Admin. Code R 338.1533(1).

The Importance of a Good and Detailed Contract.

Having a detailed and clear contract with the homeowner (and subcontractors if you are the general contractor) is the greatest shield you can have to a claim. If the contract lists your duties (whether as builder, realtor, or both), the homeowner cannot claim that you have a responsibility to "build a deck" when the contract says you do not. The homeowner cannot claim that you have provided warranties for work, when the contract provides otherwise. The homeowner cannot claim that it owns the copyright to his/her home when the contract provides otherwise.

Customers are making a huge purchase and most expect a long contract. Those that do not must be educated by builders/realtors. Homeowners need to understand that a detailed contract clearly indicates the parties' duties and can help avoid disputes.

Conclusion

You must maintain a cool and professional tone, document your work, and seek professional help when things get serious. It is that tone and detailed record keeping that can make the difference between the unpleasantness of a nasty homeowner and serious legal exposure.