Many deals involve the services of brokers. The broker's role depends on whom he or she represents. If the broker represents a landlord, his or her role is to advertise the client's property for lease, upon the terms determined by the landlord (with the advise of the broker), and to represent the landlord in connection with the business terms of the lease. A broker representing a seller performs a similar function, consulting on the proposed sale price and locating prospective buyers. Brokers representing tenants and buyers do searches from available properties suitable for their clients, evaluate prospective property, advise their clients of the detriments and benefits of various prospective locations, and give advice and support to the client in connection with the business terms of the proposed transaction. A thorough broker will examine the lease or sales contract, as the case may be, and give his or her opinion on the various terms.

Some deals that do not involve brokers should. This is especially true when the client is a tenant or a user, rather than a developer or investor in real estate, and does not know the market or understand how real estate deals are done. A good broker knows the market and has a
sense of what business terms should be negotiated in a given situation. In other words, he or she provides the business and financial information to the client that the client might otherwise expect the lawyer to provide, and that is generally outside the lawyer’s area of expertise.

When I am contacted by a client, or referred a matter, and particularly when the client is not sophisticated in real estate transactions, the first question I ask is whether he or she is represented by a broker. If the answer is no, then my next question is whether the client is confident that the deal is a good one. Often, the answer I get is not encouraging. In those cases, I suggest that the client consult with a broker, and I advise the client that it may still be possible for the broker to be paid a commission by the landlord or seller, as the case may be.

I like brokers, and have many friends who are in that line of work. Some of my clients are brokers, as well as property owners, and my wife was a commercial real estate broker. I have had many referrals from brokers, and sometimes I work only with the broker in connection with a matter and never meet or even speak with the client. In those situations, the client obviously has sufficient confidence in the broker as well, so that he or she does not feel it necessary to deal directly with me.

Despite my own comfort level with brokers, I am well aware that there is a great deal of mutual suspicion between the brokerage and the legal communities. Much of the problem arises out of the way brokers and lawyers customarily are compensated. Whereas lawyers generally are paid on an hourly basis, brokers are usually paid commissions. Hence, brokers tend to be more entrepreneurial and lawyers tend to be more conservative. The broker’s role is often perceived by lawyers as one seeking compromise over disputed items so that the deal may be concluded, and the lawyer’s role generally is perceived by brokers as one steering his client away from all risk. Brokers often view lawyers as deal killers.

Like most general perceptions, these suspicions may have some basis in truth. Of course, there are brokers who put the parties together and disappear, leaving the parties and their lawyers to finish the deal. There are other brokers who stay involved, but do not read the contract or lease, have no knowledge of the issues inherent in those documents, and contribute nothing to the negotiation. Finally, there are brokers who are knowledgeable about the documents, read them, and participate in

5. I acknowledge that many of the ideas presented in this section, as well as in other sections of this book, were learned from Steve, for which I express my gratitude.
the negotiations. Those are the brokers who truly represent their clients’ interests, and in effect, put those interests ahead of their own and recognize that it is better to retain the client and merit another deal or referral than to take the commission and leave the client holding the bag.

Another issue between lawyers and brokers is that lawyers suspect, and it is often the case, that brokers are drafting documents that are really within the purview of the practice of law. What constitutes the practice of law or, more to the point, the unauthorized practice of law, is a hot issue and creates certain hostility between the two professions. On numerous occasions, I lectured about leases in courses offered to brokers with a broker client, Steven H. Podolsky. We would ask how many of the brokers drafted lease language. Many hands always went up. We then explained that, when lease language is ambiguous, courts frequently resort to a rule of construction that provides that a document is construed most strongly against the drafter, and if the broker drafted ambiguous language and his or her client lost a lawsuit construing that language, the broker’s errors and omissions insurance would not cover the situation because it does not cover the unauthorized practice of law by brokers. I think we put enough concern in those brokers’ minds that many of them no longer drafted lease language. Of course, the same principle applies to contracts.

Many, perhaps most, lawyers do not consult the broker involved in the deal. Those lawyers have only a partial, possibly distorted view of the transaction. The broker will have worked with the client, perhaps for months, and will know intimately the goals and objectives of the client, whereas the lawyer may be called in only after the deal is cut and be confronted with documentation which may or may not reflect the client’s desires. The lawyer may find many objectionable provisions in the documents, but be wholly unaware that the client or the other party has some peculiar issues that make the client’s bargaining position either particularly strong or particularly weak. The broker is much more likely to know those facts than the lawyer. If the lawyer is focusing only on the documents and not on the goals and objectives of his or her client, or on the bargaining position of the parties, the lawyer is doing the client a grave disservice.

In addition, document review and negotiation may take a long time. Sometimes the delay is because the lawyer is busy and cannot get

to the matter right away, but on other occasions, the wait is a result of
the length of the document and the necessity to give it a very careful
review. The negotiations may be protracted, since it may take some
time to reach a meeting of the minds on issues one of the lawyers
deems important. Brokers generally want to get the deal done quickly,
which is perfectly understandable. It is not unusual for the broker to
give a sense of urgency to the matter, and to press the lawyer to be
prompt and diligent in his or her review and negotiation. This can
sometimes be disconcerting to the busy lawyer, but it does help get
deals done promptly.

For all these reasons, a good broker can save the lawyer from ter-
rrible embarrassment, or worse.

Representing a client in any transaction is a team effort. It involves
the efforts not only of the lawyer and broker, but also many other pro-
fessionals, depending, of course, on the transaction. These other pro-
fessionals may include the insurance agent, architect, contractor, envi-
ronmental engineer, roofer, structural engineer, heating and air
conditioning contractor, tax consultant, and many others, depending
on the nature of the transaction. For example, if the deal involves the
purchase of a shopping center, the property will have to be carefully
examined during a due diligence period by various experts to make
certain that its condition will not cause unanticipated expense. I will
discuss due diligence in greater detail in Chapter 7. In any case, many
brokers believe they should be the leader of the team, and often they
have a legitimate right to that belief, but I believe that it is irrelevant
who the leader is. If it is truly a team effort, the parties should work
together to achieve the real objective, which is to serve the client’s
interest.

Although lawyers and brokers “make decisions” as to various mat-
ters, the ultimate decision maker is the client. It is, after all, the client’s
money. The role of all the professionals involved in the deal is to seek
to narrow the issues and to present open issues to the client for deci-
sion. Each decision must be an informed one, based on sound advice.
The lawyer and broker should strive for a meeting of the minds on
their recommendations to the client, but if they cannot agree, they
should each present their points of view as dispassionately as possible
so that the client understands the alternatives and can make the deci-

4  Chapter One
The relationship between the lawyer and broker can be an excellent learning experience for each. A young lawyer can learn a great deal from an able and experienced broker, and lawyers have, in my opinion, a responsibility to help educate brokers about the intricacies of the legal documents involved. The lawyer who does so may find a grateful partner in many future transactions referred to the lawyer by that broker. It is in the broker’s interest to work well with the lawyer, as well, since referrals can go both ways.

In sum, the lawyer should approach his or her dealings with brokers openly and assume, until proven otherwise, that the broker is ethical and is as concerned as the lawyer about getting a good and fair deal for the client. If proved wrong, the lawyer must then work to protect the client from the broker, in addition to the people on the other side of the deal.