

EPISODE 1196**[INTRODUCTION]****0:00:00.0**

Whitney Sewell (WS): This is your Daily Real Estate Syndication Show and I'm your host, Whitney Sewell. Today is a Highlights show that's packed with value from different guests around a specific topic.

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[INTERVIEW 1]**0:00:24**

WS: Our guest is Mark Roderick. Thanks for being on the show, Mark.

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Mark Roderick (MR): Thank you very much for having me, Whitney.

0:00:29

WS: I'm excited to have Mark on the show. He is a crowdfunding attorney who has represented entrepreneurs and their businesses successfully for more than 25 years. He represents companies across a wide range of industries, including the technology, real estate, and healthcare industries. He writes and lectures on the topics of raising money from investors, franchising laws, and business contracts. Mark, thank you again for being on the show. I love having experts that's been in the industry for many years and it's very valuable to the audience and to myself. Tell the audience a little more about your background and what your focus is.

0:01:07

MR: I have represented entrepreneurs for a long time. I always joke, I started practicing law in 1840. I've been representing entrepreneurs ever since in all this stuff that entrepreneurs do. One of the things entrepreneurs do a lot of is trying to raise capital, particularly real estate entrepreneurs. I always say that if you're speaking to a real estate guy and he's not looking for money, call 911 because he's probably not breathing. This is capitalism. After all, capital is the lifeblood of American business. Real estate in particular needs a lot of it. It's a very capital-intensive industry. Among lots of other stuff like buying and selling businesses, I have helped lots of folks raise money since 1840. That's why when the JOBS Act came on the horizon, I said, "This is transformative and disruptive and super cool. That is going to be an exciting space." For a few years, I spend all my time helping people raise money using one

form of crowdfunding or another. That basically means real estate syndication and that is the title of your show.

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WS: I appreciate your time laying that out because you are definitely an expert and somebody we want to talk to. Every conference I go to, I get questions about this, of how other people in the industry are doing this, how people raise capital for other syndicators how they're compensated, and how we do that legally? There are tons of things we could talk about, but I'd love for us to dive into that a little bit. Some things we need to know, as we're raising capital for other investors, how do we do that legally and make sure they're doing it legally, and then when we become the operator, what that looks like as well.

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MR: You were kind enough in our pre-recording conversation to ask me whether you could ask that question and I said, "Absolutely." It's an important question. It's a question that lots of clients ask me from both sides of the aisle, so to speak. It's a super interesting question. I will warn you in advance that the answers are not very satisfactory and you will understand what I mean. The good news is that you and your readers will know, at least at a high level, everything there is to know about the topic once I'm finished talking. It's not going to leave you with a warm satisfied feeling. The first thing I'll do is tell you and your audience that I maintain this blog. On my blog, I write stuff about legal issues, trying to answer questions that my clients ask. That question gets asked a lot. Not too long ago, I wrote a blog post on this topic called Using Finders in Crowdfunding. If anyone wants more information, they could look at that blog post, which is necessary because it's written and well-thought-out. It's going to be perhaps more detailed and has more information than you are about to read.

Raising money for people and being paid for it. The first part of the issue is, "Can you raise money for other people?" The answer is, "Absolutely." Do your darndest. It's the second part that is legally difficult. How do you get paid? Let's have a basic hypothetical. Let's say one of your buddies is raising \$2 million to buy some multifamily project and you know a few investors who might contribute \$500,000 of it. You say to him, "I'm happy to bring these folks into the deal. Obviously, I want to be compensated for it in some ways." This is the legal issue around that arrangement. The legal issue is broker-dealers. In the Securities Laws, in particular, under the Exchange Act of 1934, anybody who was acting as a broker or a dealer has to be registered as such with the SEC. Being registered as a broker-dealer is a big deal. It's not a little deal. There are broker-dealers out there that it's an expensive and time-consuming process to get licensed as a broker-dealer.

When your friend is raising money from these investors, he's selling securities, everyone in the syndication business understands that from a technical, legal perspective, your friend is selling

securities to people. The definition of a broker in Section 15 of the Securities and Exchange Act is anybody who deals with securities for the account of another as part of the business. Who are you thinking of? You're thinking of Morgan Stanley and other folks like that. If you are compensated, even in that little transaction by your friend for raising money to bring him, investors, you are, or at least maybe, acting as a broker. If you are acting as a broker without being licensed as a broker, it's more commonplace. There are people called real estate brokers. People go out and sell your house, they get a 6% commission.

If you just open your shingle one day and say, "I'll help you buy and sell houses, pay me off 6% commission," and you're not licensed as a real estate broker, you get in trouble. The same is true but at a higher level for acting as a securities broker without being licensed. If that happens, if you are acting as a broker, whether from ignorance or just because, "I want to do this no matter what the law says," there are two possible consequences. One, which is what everyone thinks about is very unlikely to happen, and that is the SEC knocks on your door and sends you to jail or does something to you. It's very unlikely to happen because the SEC probably has to devote most of its manpower these days to Elon Musk alone. The SEC has very limited manpower. It's probably not coming after Whitney Sewell on the basis of a \$2 million real estate transaction. That is one thing that could happen but is unlikely to happen.

The thing that is more likely to happen is this. You bring your friends in, your buddy pays you a 5% commission for bringing in this \$500,000. You take away \$25,000. The deal goes south. One of those investors, who didn't need to be one of your guys, but any of the investors in the deal gets wind of what happens and happens to have a brother-in-law who is at a cocktail party one day and speaks with someone like me and describes the situation. I say, "That's interesting." If they used an unlicensed broker in that transaction, then that was an illegal offering and everybody has the right to get their money back. The brother-in-law's ears perk up and before you know it, someone's filing a lawsuit against you, the unlicensed broker, and your buddy, the guy who used an unlicensed broker. Everyone is really unhappy and you're very sorry you took that \$25,000. That is, in the big picture, what the law is and what can go wrong.

The primary reason that all this is very unsatisfying is that these transactions happen all the time, as you personally know and as everyone in the real estate industry knows. They happen every day. Lots of private real estate deals are funded in this way with compensation going back and forth and nothing ever happens. It is a funny and unsatisfying situation that the SEC knows this is going on. Every now and again announces to no particular purpose, that it knows it's going on and doesn't like it and shakes its finger and says, "There will be dire consequences if you continue to do this," but doesn't do anything. It doesn't bring any enforcement actions.

The industry just toils on with all these finders out there taking commissions and lawyers like me pontificating, “You can’t do that,” and nothing happens. The shoe never drops. It can be very frustrating. It’s certainly frustrating for me. I hear from people all the time. My client will be approached by somebody, by an unlicensed person that says, “We’ve got \$1 million,” pays 5%. I say, “Are you a broker?” They say, “What’s that?” I say, “You’re supposed to be a broker.” They say, and I’m sure they’re telling the truth, “Mark, we’ve been doing this for 25 years and you’re the first person who’s ever raised this question with us.” That’s very frustrating for my client. When I’m whispering to my clients here, “You can’t do this.” The client’s looking around and saying, “Everybody does this.” It’s unsatisfying for that reason.

Let me move to the next level. It is possible in some situations to construct an arrangement that is legal. Let me give you two examples of arrangements that are legal. The first, a promote, in general. In general, because this is a very gray area, you could take a promote for bringing people into the deal. Let’s say your buddy is taking a 30% typical promote. He says to you, “If you bring in \$500,000, I will give you 5% of my promote,” whatever it is, 5%, 10%. In general, and don’t ask me really to explain why because I couldn’t because there is no why, is that would probably be okay. A promote on the one hand is okay. Immediate cash commission, on the other hand, is not okay. That’s one pretty legal thing you can do.

The other thing you can do is there are such things as a legal finder’s agreement. For example, if you’ve never done this before, you’re not in this business, this is not how you make your income generally but you’re talking to your buddy, he says, “I have this multifamily thing. Do you know anybody?” You say, “I do know somebody. I went to college with so and so and he’s made \$1 trillion selling some pharmaceutical company or something like that. I’ll introduce you to him. If he makes an investment, you pay me.” If that is done properly and your role is limited to a one-time introduction, you don’t try to sell the deal. You don’t make an investor presentation to your buddies. You’re just making it an introduction, that arrangement can be legal. Those are our two things that can be legal.

[INTERVIEW 2]

0:13:56

WS: Our guest is Robert Borr. Thanks for being on the show, Robert.

0:13:59

Robert Borr (RB): Thanks, Whitney.

0:14:00

WS: Robert is a licensed real estate and securities attorney in Florida. His practice focuses on real estate matters including syndication to litigation. He is also a licensed real estate school

instructor, real estate broker, and title insurance agent. He educates his clients to provide a traditional in-house counsel role to those who do not need a full-time attorney on staff. Robert, thanks for being on the show. I'm looking forward to getting into the matter of securities, what that is and what people need to know about all that when they're getting into the syndication business. Before we do that, tell the audience a little bit about who you are and how you got into this business.

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RB: I'm a quintessential real estate nerd. You heard all the licenses that I've gotten in instructing and things like that and that is how I fell into that syndication. I was auditing an investments class for a post-license continuing education course. It happened that there was a prominent syndication lawyer who was moving over to Florida in the classroom there. We were working in the back together and going through the workbook on some of the problems. She looked over and she said, "You might make a good securities attorney." I said, "Do I get a gun? What is that?" She explained her business to me and the part that she did in real estate. It was fascinating to me because I'd seen these investment models before. I'd seen a lot of things done wrong. Things that are called joint ventures or things that are called what you will, but they end up being securities.

It's an interesting niche area of law because once I got into it and I started doing contract work with her firm. I came to find that there were a lot of cases where it falls into the definition of security and attorneys don't know that. Even investors don't know that, especially in these local REIAs. They're selling a joint venture packet. Let me show you how to use my form to raise private money. I'd go sit in these seminars as they are and cringe when I'd see things go up on the screen. Ever politely, I try to talk to the presenter afterward and say, "You might want to check out this book or you might want to get a little bit more education because I don't think what you're doing is necessarily on the up-and-up." That's the story of me walking through the securities because I don't set up funds.

I have a lot of funds that I'm quasi-general counsel for. What I've found is that sometimes they'll get set up and the people set them up and say, "You're good," and they'll provide some support. It's not their focus at a boutique firm that does syndication startup to necessarily provide the different support in different aspects in real estate. The background I have in real estate has been helpful in making sure that we put the right risks or different risks in that somebody might not think about. I have a good idea of the numbers when I'm looking at somebody's investment. I can say, "These numbers work," or "They don't work." It's obviously not my job to give them business advice, but I'm not going to put somebody in a situation where they're going to fail or I think they're going to fail.

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WS: I appreciate that. It's helpful that you understand the numbers and that you understand the investing side of it and what that should look like to help give us some advice from your experience. You've seen something on the screen or you see things like that at conferences that would make you cringe. Can you give us an example?

0:17:30

RB: I've seen it more on the local level than I have at one of the major player conferences that you would go to that's focused on syndication. Typically, in these local REIAs, I'll see somebody stand up and they'll call themselves a transaction engineer. You need to go find private equity and I've got a whole form of packets and joint venture agreements and notes that you can use. I look at these things and I go, "Is this all you're giving to your investor?" I always hear the phrase, "Other people's money." Let me show you how to use other people's money. Those are investor funds. That's what other people's money is. An investor fund isn't a security. Ignorance of the law is no defense.

There are a lot of cases that I've been pulled on as litigation counsel where I've looked through and it'll be a series of notes that someone will have given to a certain individual to work through. I go, "Do you realize this is a securities violation? This isn't just you trying to recover on a note." Lawyers look at me and they go, "What is that like?" It's Chapter 517.302. It's a felony what they did. They can go to jail for this and we can push them in that direction by properly amending the complaint and bringing it that way. It's important for people to know what they're doing to educate themselves and understand and comply. Even the investigators here in the state of Florida, I worked with them. I tried to get them educated and make sure that they know where to look and what to look for and file administrative complaints. I've done a handful of those.

I would say that it's something that has huge ramifications if you don't do it right. You have everybody on your show in preparation for this. They have great information. Don't try to skirt the rules. Don't try to come up with something clever that you think, "There's not a comma here, so I'm going to be able to do it this way." The definition of a sale is four pages long under Federal law. It's multiple slides. When I give a presentation on securities, I inevitably have a lot of upset people by the end of the presentation because they go, "What do you mean?" I'll quote a person who said, "I get a boot full of money from my partner and his friends and then I bring them a bigger boot full of money." I thought, "A boot full of money. That's an interesting term." I'm looking at that going, "No, that's wrong." Make sure you comply. There are different exemptions. There are ways to do it the right way and realize that when you're raising whether it be \$250,000 or \$10 million, you need to comply. It's important and you can get into trouble with this.

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WS: Your bio mentioned that you provide a traditional in-house counsel role to those who do not need a full-time attorney on staff. We talked about those that are getting started in the syndication business. Can you elaborate on maybe some of the common issues that people have when they're first getting started in the syndication business and help us to be ready to overcome those hurdles?

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RB: There's a difference there. There's one when you're starting up and then there's another one your ongoing. To be able to continue with the ongoing support, at least in the state of Florida because this is where I'm licensed, I can consult on any real estate issue and I typically work with smart people. They don't need to have an attorney sitting next to them and ask them every single question they need. Once I can train them a little bit to issue spots on different areas, whether it be in multifamily, you're going to have different strategies when it comes to non-paying tenants. Maybe different types of insurance claim issues that occur, those types of things.

Once I bring them up to speed and they know how to issue a spot, it becomes an easy phone call. It becomes a fifteen-minute, "Let me run these by you. Is this something that you need to look at?" Many times it's not, but they know when something could be a problem. It's refreshing to have clients that way because what you don't want is somebody with who you can't communicate or that you're afraid to communicate. "I don't want him to send me a huge bill. I don't want him to ruin my day by telling me that what I'm doing is wrong or this is a bad idea."

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WS: I hear people refer to some syndication attorneys as a no-man or a yes man. We don't want somebody that's yes all the time either.

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RB: That's true. I've worked with other looser legal compliance officers not always attorneys and their answer to everything is, "Yeah, sure. We can put that there." They want to know specifically why they can't as if the burden is back on me. Some of these times I simply say to them, "If you were in court and you were trying to explain this provision, you were trying to explain this situation to a judge or jury or even to opposing counsel, how do you expect that this gobbledygook is going to make any sense? You're off far into the weeds at this point and having a fresh look at the thing is important."

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WS: That's why we're paying somebody like yourself to help represent us as well if something happens.

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RB: Yes. I hope never to have to go to court. Keep them out of court. You don't need to be there. That's the interesting part when I turned around and I started doing review work for people that were going to invest in syndications. I would start looking through other people's PPMs and offering documents. It's a whole different perspective as somebody who started by drafting. I'm strictly complying with what the law needs to be. Now I'm looking at other people not strictly complying. It's the difference may be between being a plaintiff and a defendant sometimes. I go look these guys up on federal government, they're registered. I see that they have something here, but the problem is that they're using an exemption that doesn't exist. They've got an attorney. Tell them that I'd like to talk to their attorney or ask them. What I came to find out is that there were companies that were using old forms and they were rehashing the forms. In 2014, when the laws all changed, there were still 2014 forms out there and they're passing it on to their investors saying, "No, my attorney has reviewed all this." Maybe he did at some point, but not anytime recently.

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WS: That's interesting you bring this up. I haven't had anyone talk about that as far as reviewing documents for the LP or the passive investor when they're ready to go into a deal. Taking that PPM to somebody's private placement or memorandum to somebody like yourself and saying, "Could you review this?" Instead of taking that sponsor's word for it. Could you elaborate on that process a little bit for the passive investor that's reading that says, "I didn't even think about taking those documents to somebody like yourself, to an attorney. Is this accurate?" Can I take their word for what it should be?

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RB: It's interesting because they run the gamut. I've gotten 400-page PPMs that are in archaic English that doesn't make a lot of sense. A lot of those times, I'll set a limit. This is all by the hour work because there's no other fair way to do it. I'll normally say, "In these many hours, I can tell you whether or not this is legit or they're not." Sometimes I've called and talked to people and sometimes it scares them away. As soon as I say, "My attorney would like to give you a ring," all of a sudden, that person stops returning their phone calls and stops checking their email and they disappear. I would say a nominal fee compared to the investment that is normally being asked for, it's a good security blanket.

[END OF INTERVIEW]

[OUTRO]

00:25:19

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