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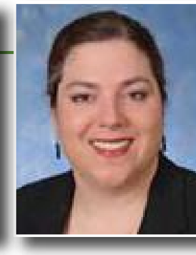

Managing Disclosure Liability Issues

With the high price of real estate today, proper disclosures are essential to diminish potential liability. Though caveat emptor — buyer beware — may have been the rule of the day in the past, that is not the case now. Today, in most standard residential purchase and sale transactions, buyers are entitled to disclosures. While there are no national guidelines about what real estate professionals need to disclose, if you follow a few logical rules, you should be able to avoid liability.

First, a seller or agent is not going to incur potential liability by making too many disclosures. At worst, the disclosures may drive away a buyer that would otherwise file suit at a later time. If there are inspection reports or prior disclosures, no matter how old, provide them. If there is a problem later, not providing an old report can be damaging to you and the seller.

In California, a seller is required to disclose all things that materially affect the value or desirability of the property. Deciding what affects the value is not a subjective test, and it does not matter if the particular item bothered the seller. Good examples include church bells, schools and railroads. Some people love them, but some people hate them. Squirrels, chickens and many other things that may seem minor can — and have — cost sellers and agents a great deal of money in litigation.

Many agents and brokers want to provide full service to their clients. However, this can lead to problems with disclosures. Many times, agents and brokers act as scriveners in filling out disclosure documents. In doing so, they make the mistake of asking the client for answers and filling out the documents for them. Lawyers use this activity against agents and brokers. Once there is a dispute, a seller will claim the agent or broker either filled out the paperwork improperly or gave bad advice and thus was at fault. If you decide to do this for your client, consider tape-recording the conversation (with the client's permission), so there cannot be any dispute later. Keep in mind, however, a tape can both hurt and help. If you give bad advice, the tape will be the winning piece of evidence for the other side.

Permits and permit histories are a large part of any disclosure packet. Many agents and brokers will pull permit histories from the city or county and include them in the disclosure packet. However, you should be aware that many permit histories are incomplete, and most agents and brokers do not have the required expertise to review and comment on these packages. If you pull the history and provide it, make certain that you include a proper disclaimer that you have not reviewed it for completeness.

Another disclosure that ends up in litigation is the disclosure of lot and house size. If the disclosed numbers are estimates, state that. Be sure that you properly attribute any such information to its source. As a buyer's representative, recommend that your clients independently verify any information they consider important with the appropriate source. If a buyer needs a specific amount of acreage or space, suggest, in writing, a survey or house measurement.

It is important that when you act as an agent or broker that you remember your role. You are not acting as a building inspector, an appraiser, a lawyer, a surveyor, the building or planning department or a contractor. If either a buyer or seller asks you a question that another professional should answer, refer them, in writing, to such a professional. Again, make sure you properly attribute information to the source.

Make sure that you are up to date on the local disclosures. Each area may have supplemental disclosure forms. If you are acting in a location with which you are unfamiliar, make sure you know the disclosures normally used in the area.

Your client is looking to you as a professional, and you need to advise your clients to get inspections if necessary. If you find something suspicious, you need to point it out. This would include a room with a 6-foot ceiling advertised as a bedroom, water marks high up a basement wall, and doors that do not open or seem crooked. Agents and brokers always say "location, location, location." To keep yourself safe, remember: "Document, document, document." Always give advice to your client in writing.

If your client is a seller, there is a very simple rule when they ask a question: If the client asks, "Should I disclose … ?" your answer is always, "Yes." Remember that it is not a subjective test, so if it is something your seller is asking about, then it is important to disclose. If you say "no" and the issue becomes a problem later, you will be held responsible. If your clients do not want to disclose after you advise them they should you need to make an important decision. You now know something that may be material. You can (1) stop working with the seller; (2) disclose it yourself; or (3) work with your manager and legal team to see if you can confirm, in writing, to the client that you advised the seller to disclose and the seller refused to do so. It is important to keep management involved.

Keep in mind that diligence in making the proper disclosures can seem tedious and time-consuming, but if you follow logic, you will be more likely to avoid the potentially much more tedious and time-consuming legal disputes that can arise if you do not disclose.

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