



Errors & Omissions Insurance for Real Estate Agents, Brokers, Appraisers, Property Managers, Consultants & Auctioneers.

Woe to the Real Estate Agent or Broker Who Takes the Legalities of a Real Estate Sale Lightly

Litigation is Expensive

Litigation is expensive, time consuming and emotionally difficult to handle. If litigation is filed against a real estate agent, that agent can easily spend upwards of \$100,000 defending a simple failure to disclose suit. A defendant must also spend a significant amount of time preparing a defense, including meeting with lawyers, responding to discovery and participating in proceedings. A professional who is sued for malpractice must endure the scrutiny that is given to the professional's work, which can be very difficult and uncomfortable.

We live in a very litigious society. This propensity to sue is best exemplified by a story I recently heard from a client. He was in a real estate class. The class was asked how they intended to get rich. Half the class responded that they would receive their riches through lawsuits.

Litigation pervades the real estate industry more than many other fields. Litigation involving real estate agents is prolific. However, most suits can be avoided if agents are cognizant of the law and their responsibilities under the expected standard of care.

Disclose, Disclose, Disclose.

At least 85% of the lawsuits that I have defended arose out of allegations that agents or parties failed to inspect property and/or disclose material defects. Many times failure to disclose lawsuits arose because the agent or seller did not want the deal to fall apart. Alternatively, the agent or seller was unaware that the material fact should have been disclosed.

If an agent is concerned about a deal falling apart because of disclosure, then by definition, the fact should be disclosed; a material fact is one that may affect the decision of the buyer in purchasing the property. It will be less expensive to disclose the material fact than to be sued and defend yourself in court. Agents or parties should disclose all facts that may affect the value or desirability of the property. **When in doubt, disclose.**

Under no circumstances should agents hide a material fact from a buyer. Even a listing agent has an obligation of honesty and good faith toward the buyer, which includes the duty to disclose material facts.

Conduct a Diligent Inspection.

When representing a party in a residential real estate transaction, it is statutorily required in some states (i.e. California) that real estate agents conduct a visual inspection and disclose all potential defects the agent observes. Even if it is not required, it is advisable that such an inspection be conducted.

When conducting the inspection, a real estate agent should take his or her time and walk through each room and all accessible areas of the property, including, **but not limited to**, the interior, exterior, garage and grounds. Write down every visual item which may be interpreted as a defect. Once you have prepared your list of disclosures, provide a copy of the list to the buyer and seller. Make sure the buyer signs an acknowledgment that he or she has received the list prior to the close of escrow.

Keep a Transaction Log.

Real estate agents should prepare and keep a transaction log wherein the agent documents occurrences affecting a transaction. Note meaningful telephone conversations and record inspections in the log. If an agent attends an inspection, the agent should note the attendance. Each time an agent provides a report, inspection document or any other document to his or her client or other party, the agent should make a note in his or her log.

If a lawsuit is filed, the buyer will claim that he or she never received the reports, while the agent will claim that the reports were provided to the buyer. If the buyer has signed off on receiving the reports, the buyer will be hard pressed to take such a position.

Generally, in a lawsuit arising out of a real estate transaction, the outcome of the suit comes down to one person's word against another's. For example, the buyer will allege that the agent knew of and failed to tell the buyer of a defect. It will be up to an arbitrator, court or jury to decide who is telling the truth. If an agent has documentation that was written contemporaneously (at the same time) as the events of the transaction, the agent will be able to support his or her defense.

Documentation.

In addition to keeping a transaction log, real estate agents should document all issues and disclosures in a transaction. For example, if an agent is providing a prospective buyer with an expert report, such as a soils report, the agent should provide the document and ask the buyer to sign the document to acknowledge receipt. The buyer can sign under language such as "Received, Accepted and Approved."



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Documentation.

If the reports are too voluminous to sign every report, an agent can prepare an index to the reports, which specifies the reports provided to the prospective buyer. The agent should ask the purchaser to sign the index, after the purchaser has had an opportunity to review the reports.

If additional disclosures are made late in a transaction, the agent should prepare a supplemental disclosure and request that the buyer sign it. The buyer should also sign off on receiving all reports, including a pest control report, roof report, general inspection report and any other reports provided to the buyer.

Recommend Inspections.

If an agent is representing a buyer in a transaction, the agent should recommend that inspections be performed. Minimum recommended inspections should include general inspection, roof, septic (if applicable) and pest control. If there are indications of defects at a property, an agent should recommend additional inspections.

Agents should put these recommendations in writing and ask the buyer to sign an acknowledgment that the agent made the inspection recommendations. If the buyer chooses not to pursue an inspection that an agent has recommended, note that fact on a supplemental disclosure form and have the buyer sign an acknowledgment.

Communicate with Your Client.

Although communicating with a client seems like elementary advice, it is amazing how many agents do not adhere to it. If agents communicate effectively with their clients, they can avoid a lot of problems and improve client satisfaction.



Reprinted with the permission of Shannon B. Jones, Attorney and Real Estate Litigation Expert. Shannon is an attorney/broker who has been defending real estate agents for more than 15 years.

Conclusion.

By following these simple steps, real estate agents should minimize the chance of being sued, better serve their clients and become more effective professionals.

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