MISREPRESENTATION AND CASE STUDIES
Welcome

Welcome to the Misrepresentation course presented by Mckissock LP.

This course is designed to fulfill continuing education requirements for Real Estate Agents.

The objective of this course is to examine the pitfall of misrepresentation with the purpose of helping agents not to innocently fall prey to its dangers.

This course identifies procedures set up to protect them and examples of what can happen when they are not followed.
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At the completion of this workshop, you will be able to.

- Identify skills required of real estate agents
- Understand the difference between misrepresentation and negligence
- Recognize the traps & pitfalls of misrepresentation
- Identify the legal terms associated with misrepresentation
- Discuss misrepresentation in its various forms
- Access information from the Internet regarding the subject matter
- Identify the pitfalls of misrepresentation
- Recognize the legal ramifications of an action or inaction.
- Recognize the importance of proper disclosure
At the completion of this workshop, you will be able to.

- Identify the various types of relationships in real estate transactions
- Understand the necessity of knowing the laws in your state
- Recognize the importance of disclosure in avoiding misunderstandings
- Understand business ethics and how they apply to real estate
- Follow policy procedure to mitigate risk management
- Identify the duties of an agent
- Follow damage control procedures
- Adhere to the Code of Ethics as it applies to misrepresentation
Consumers

Introduction

“It was a dark and stormy night…” …and the real estate agent was showing a property to an anxious customer. They walked out onto the large lot on which the house sat to look at the single detached garage. The buyer remarked that the house was perfect for his needs but he really wanted a double (or larger) garage. The agent suggested that if the house met his needs he should consider building the garage of his dreams. “Do you think I could do that?” responded the buyer. “Of course, look at the size of this lot, there’s plenty of room,” was the reply of the agent. And there was lots of room. And it seemed a reasonable response. Reasonable all the way through closing, move in, and spring when the buyer sought a building permit for the “garage of his dreams!”

When the local building department turned down the request for a new structure, the buyer was shocked, disappointed, dismayed, alarmed, angry, and looking for someone to take responsibility for his decision to buy. It takes no imagination at all to be able to guess who the ‘fall guy’ was to be. It was the agent who had been so confident that the buyer could do as he pleased with his own property. However, under the property ran sewer lines, water lines, gas lines and utility lines that would be covered by the new cement slab for the garage! To move them would cause an expense so great that, to the buyer, the perfect property was now worthless. Can you guess the outcome?

It’s an old story having occurred almost twenty-five years ago, but it is a true story. The story itself may not be so amazing, but what is truly amazing is the fact that this sort of story is still repeated today, again and again. That is why a study of misrepresentation and negligence and what it entails is so important.
What should the agent have done? How could he have reduced the risk in this situation, not only for himself, but for his customer as well? The answers will be as varied as the participants in this course. Also having an effect on the answers will be the jurisdictions where those agents practice and the interpretations of those laws which vary from area to area. We’ll spend the next several hours trying to develop answers and methods that will reduce the risk to you and to your buyers and sellers.

**Today’s Average Consumer**

It has been said by some, “You’re not in real estate until you have been sued!” If you believe that, you clearly recognize that real estate is a risky business. If you have ever been sued, you’ll agree that it is a most unpleasant experience. It is time-consuming, expensive, and emotional. It affects relationships, and can have ill effects on your reputation and career. What the above statement implies, but doesn’t say is, “At some point you will make a mistake that may cause someone harm.” In other words, at some time you will fail to meet the expectations of someone you are dealing with. Generally speaking, disagreements won’t arise unless an expectation is not met. Most litigation claims arise out of misunderstandings of relationships and property condition. It is therefore a wise business practice to learn how to meet expectations but doing that is impossible unless you know your customers (consumer) and clients.

Today’s consumer is very much different than the consumer of even a few years ago. The National Association of REALTORS® publishes a yearly compilation of interviews with buyers and sellers from around the nation. The latest survey reports homebuyers to be older, wealthier, and more knowledgeable than in the past. The idea that purchasers are more sophisticated these days is not in question. In fact, today’s technology has opened up huge markets and vast sources of information for people everywhere. The typical user looking for a home on the internet is younger (39 years) than the person not using the internet in their home-search (53 years).¹ Eighty-four percent (84%) of all buyers of new and used homes used the Internet to at least begin their home search. Nearly 80% agree that the
Internet is useful in the process.\(^1\) What is telling about this fact is that ten years ago, the typical buyer finding the home they purchased on the Internet accounted for only 2% of all customers and in 2007, 29% found the home they purchased online.\(^1\) That is an almost fifteen fold increase!

**Characteristics of Today’s Consumer**

We can say that access to information is one of the most far-reaching changes about today’s consumer. What are some of the other characteristics?

- **More demanding:** With faster access to information – at any time of the day, buyers are looking for quick answers. Expectations are higher.

- **Less loyal:** Unless you already have an established personal relationship with today’s buyer, loyalty is an issue. The weaker the relationship, the easier it is to be lured away to another source of information and aid. At the outset of a relationship, the buyer looks to the agent only as a source of information.

- **Less trusting:** Everyone hears “horror” stories and gossip from friends and is more likely to place credence in such information, thereby making today’s consumer more wary.

- **More cynical:** Everyone who buys property wants the best “deal” they can get. Sometimes the prospect of making a bargain-buy can outweigh the importance of entering a real estate purchase with eyes-wide-open. This might lead a buyer to ignore important facts or disclosures that could certainly lead to trouble later.

- **Looks for an advocate:** The buyer today is looking for someone to watch out for his/her interests. A buyer wants someone who is going to be “on their side”. Even if the various agency relationships are fully explained, the buyer may not fully understand all the ramifications. It is imperative that a buyer understand an agent’s responsibility to treat all parties in a transaction equally and fairly.

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\(^1\) “Profile of Home Buyers and Sellers – 2007” National Association of REALTORS®, (NAR), 500 New Jersey Ave. NW, Washington, D. C.
More likely to litigate: Almost everyone would agree that today’s society in general is more litigious than it used to be. One can sue for almost anything – far-fetched or not. Whether this is caused by increased cynicism or accessibility to broader amounts of information could be debated. Today, a real estate transaction is almost 15 times more likely to end in litigation than it was in 1996. And, believe it or not, 250 times more likely than 30 years ago! About 15% of all complaints actually go to trial. That means about 85% settle out of court and oddly enough the amounts of the settlements seem to be about the same as the commissions paid on a transaction!

What the Consumer Expects

As we get an idea about today’s consumers, we would do well to understand what the consumer expects of the real estate agent. The NAR, in its annual survey lists the following attributes and skills as important to homebuyers. These are in ranked order from most to least important to the buyers.

- Honesty and Integrity – valued by 97% of customers
- Knowledge of the purchase process – 94%
- Responsiveness – 92%
- Knowledge of the real estate market – 91%
- Communication skills – 85%
- Negotiating skills – 84%
- People skills – 79%
- Knowledge of local area – 77%
- Skills with technology – 36%²

It is interesting to note that while 80% of homebuyers agree that the Internet is useful in the process, only 36% believe that technological skills are very important when it comes to the actual real estate agent.

² Ibid
What Consumers Want From Their Real Estate Agents

At a recent gathering of real estate agents (approximately 200 persons) other expectations were discussed. These are included here as they can be important in developing relationships and fulfilling expectations. (These are not in ranked order.) What others can you think of?

Exclusive representation: Whether you are a buyer's agent or not, the consumer wants to know that you have their best interests at heart. Make the disclosure of the relationships involved very important.

Availability 24/7: The Internet is, so why shouldn’t you be? (A suggestion: take a good course in Time Management!)

A knowledgeable Agent: It cannot be expressed strongly enough that the real estate agent, in almost every case this instructor has reviewed, has been held as the expert. Whether it has been questions of representation or property issues, a real estate agent must keep themselves informed.

Want to know you care: Every one wants to be cared for. Agents are taught to be empathetic in order to help build trust and confidence between themselves and the customer. It is, however, a fine line to walk when discussing representation and property issues. To become too caught up in a buyer’s enthusiasm could lead to carelessness on your part.

Results oriented: This has been alluded to previously, but bears repeating. Fast action on the part of the agent is no excuse for inattention to the proper details.

Likeability & compatibility: This almost goes without saying. If you are working with someone with whom you don’t get along, you may be inviting trouble later. Think referral!

Reduce risk of making a mistake: The fear of making a mistake, i.e. paying too much for a property or not buying something better is a big deterrent to having a successful sale. If a mistake is perceived by a buyer, buyer’s remorse could become a big problem. Many, many litigation actions are simply a result of buyer’s remorse.
Assured that it is not about the money: An agent desperate for a commission is not hard to spot. Most people perceive that real estate agents make big “bucks” and do it very easily.

Crunching the Numbers on Agent Benefits

Now that we are getting an understanding about the expectations of an agent on the part of consumers, we should take a look at how today’s consumer views the benefits of using an agent. You will begin to understand why misrepresentation and negligence become such important issues in our industry. In the “2007 Profile of Homebuyers and Sellers,” The National Association of REALTORS® discovered the following about perceived benefits of using a real estate agent. These are in ranked order from greatest to least.

- **Helped buyer understand the process – 57%**
  This points out the need for education of the buyer whether a first time buyer or a seasoned buyer. What does this tell you about how you should structure your first appointment? Do you plan your appointments as though they were a presentation?

- **Pointed out unnoticed features/faults with property – 47%**
  It is interesting to note this benefit of using an agent was number one for seasoned homebuyers while it was second for first time buyers. What does this tell you about reliance on you as an agent?

- **Improved buyer’s knowledge of search areas – 40%**
  In most areas of the nation, real estate agents control the inventory especially if there is a multiple listing service. Even if listing information can be found online through the local MLS, a buyer still wants verification.
Negotiated better sales contract terms – 38%
As agents, negotiating skills are extremely important and one of the best assets we have to “sell” to clients.

Provided a better list of service providers – 37%
Whether it is a home inspector, contractor, lender, or title agency what is your firm’s policy for recommending outside services?

Shortened buyer’s home search – 35%

Negotiated better price – 32%
One of the major fears that a buyer will experience is “paying too much.”

Provided better list of mortgage lenders – 21%

Narrowed buyer’s search area – 18%

Expanded buyer’s search area – 18%

This is a good list of what a homebuyer expects of an agent and we will expand on this list in a later chapter when we develop a list of duties of agents. Think about this list for a few moments before you proceed with the rest of this chapter. What expectations or benefits, if not met by the agent, could be cause for action in the form of threatened or actual litigation by the customer?

As you study the list and after you become familiar with some of the case studies to be presented in another chapter, you will probably come to believe that a failure in any one of these expectations could present a disappointment. Failed expectations are the leading cause of litigation or threatened suits following the closing of a real estate transaction.

3 Ibid
Today’s Average Seller

Just as buyers have become more sophisticated through easier access to information, so too, sellers are more knowledgeable and have higher expectations today than they did in the past.

Given that most sellers will become repeat buyers – many will have already found a new property before listing their present home – there are fears and expectations that will be foremost in their minds.

Once a new home is found, the completion of the sale will usually be dependent on the amount of money realized from the sale of the existing home. Affordability is affected directly by the size of the down payment on a new loan, so the net proceeds of a sale (cash realized after all expenses are paid) have a direct bearing on the success of the new purchase. It is therefore reasonable to expect that a fear for the seller would be selling the property for not enough money.

Likewise, a new sale, which is made contingent upon selling an existing property, will have a time limit. In fact, a contingency is not valid unless there is a time frame for removing the contingency and proceeding with the purchase. Most contingencies will carry a performance clause to remove the contingency should a second acceptable offer be presented. The length of time to market and sell a property then becomes a major concern, expectation and fear of most sellers.
What Sellers Want From Their Real Estate Agent

The desires of a buyer and seller are at opposite poles; for example, a buyer wants to pay as little as possible and a seller wants to sell for as much as possible. These differences, however, don’t mean the expectations are necessarily that diverse. Emphasis on the importance of various attributes may differ slightly.

Honesty and integrity will always top the list of desirable traits. Knowledge of the industry and the marketplace are also important. Responsiveness and communication as well as negotiating and people skills are traits expected by both buyers and sellers. Of course, in these “electronic” times, technological skills are important to both. The NAR cites the following in their 2007 survey as “Most Important Factors in Choosing a Listing Agent.” Percentages in parentheses reflect the buyers’ survey.

- Reputation of real estate agent – 38% (22%)
- Agent is honest and trustworthy – 20% (28%)
- Agent is friend or family member – 14% (17%)
- Agent’s knowledge of the neighborhood – 11% (12%)
- Agent’s association with a particular firm – 5% (4%)
- Agent has caring personality/good listener – 5% (10%)
- Professional designations held by agent – 1%

Sellers generally look for a wide variety of services from a real estate agent in the listing of their properties. As previously pointed out, one of the major concerns or priorities is having the seller’s time-line met. The NAR report reveals the primary reasons for a homeowner wanting to sell. If you were to study that part of the survey you would find that nearly all of the reasons carry with them a certain amount of urgency; factors such as necessary relocation for reasons of employment, health, changes in family needs or divorce, or not being able to afford the current mortgage (refer to the 2006-2008 mortgage “crisis”).

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4 Ibid
Once we learn what motivates the seller it becomes easier to understand what homeowners most want from their agent. As you read through the following list try to determine in which areas the failure to meet a clients’ expectations could cause future disagreements and possible risk of litigation.

What Seller’s should expect from Their Real Estate Agents

Seller’s expectations of their real estate agent are ranked in order from greatest to least:

- Help sell the home within the established time-frame
- Help find the buyer
- Help seller market the home
- Help price the home competitively
- Help seller find ways to fix up home to get a better price
- Help with negotiations and dealing with buyers
- Help with paperwork/inspections/settlement services
- Help see homes available for seller to purchase

As you can see, when listing a home for sale, the seller cares least about finding another property to buy. One reason for this could be that another home has already been placed under contract. If you are the selling agent on that property count yourself fortunate – it should motivate you to sell the home more quickly.

\[\text{Ibid} \]
Possible Areas of Conflict

Where did you identify possible areas of future conflict with a seller that could result in a higher risk of threatened or actual litigation? On the list of the eight top expectations we can identify at least five areas:

- **Selling the home within the established time-frame**: Selling a house too fast or too slow could become a problem. Not selling fast enough calls into question your marketing services: were you able to actually deliver what was promised? Selling too fast may leave the seller wondering if they could’ve gotten more from a future buyer.

- **Helping the seller market the home**: If a marketing plan is outlined in the listing presentation, it should be fully implemented and carried through. For example: many sellers expect their property to be “Open” for buyers. If a marketing tool such as this is not a part of your plan, don’t promise the seller that it will be.

- **Pricing the home competitively**: The seller’s original motivations and emotional attachments often play a very big role in how a home is priced for sale. If a home sells very quickly a seller is likely to think that the property was priced too low. Pricing a home is very emotional for a seller and it is not unusual for a seller to have a preconceived notion of what his home is worth. “The house down the street sold for ten thousand more and mine is in much better shape!” One of the most difficult tasks of a listing agent is to give the seller a realistic sense of their property and its place in the competitive market. If a seller wants to list a property at “their” price and that price is not supported by the market analysis, why would an agent want to waste his/her time and money on a marketing project that is likely to fail from the outset and inviting possible conflict later?

- **Help the seller find ways to fix up his/her home to get a better selling price**: “Staging” is a term that has become popular in the real estate lexicon. Clearing clutter, changing to neutral colors, and cleaning are all a part of staging a home to make it show better. However, if repairs are to be made, care must be taken in recommending contractors so that any such work is performed not only to codes but to satisfy disclosure regulations. Repairing possible lead based paint, for example, should be done according to recommended procedures only.
Help with paperwork/inspections/settlement service: What is your firm’s policy for recommending services and service providers? Do you hold to the policy? Improper paperwork (some paperwork actually constitutes legal documents); cursory or inadequately performed inspections and sloppy title or escrow services may all lead to future disputes and litigation.

When thinking about the long list of expectations of both the seller and the buyer, all disagreements, misunderstandings, failed expectations, and dissatisfaction could be reduced to one simple factor: failure to communicate effectively. In a later chapter we will discuss communications and equally important: how to document your conversations.
Pitfalls of Misrepresentation

Introduction

A Man called Noah! (No, that’s not his real name, but it fits!)

This is an old (true) story, but not as ancient as the one of biblical proportions. However, when the agent was sued it seemed like a biblical epic!

The agent was looking for a condominium for a traveling salesman – a single man. He noticed a condo in an old report, the listing of the “perfect” condo - which had expired. Wanting to be ethical, instead of contacting the seller directly, the agent decided to have the original listing agent arrange a “one-time-showing” on the property. It was perfect and all was a go. So the seller, the agents and the buyer sailed to closing. Everyone was happy…until the day after closing (of course!). As the buyer was on his way out the door for his usual weekly trip out of town, he noticed a musty smell and upon investigation found the basement had a foot of water in it. An undisclosed defect – aha, the culprit was easy to identify – undisclosed seller problem. Not so quick!

A chain of title (abstract) was ordered by the plaintiff’s attorney. The abstract revealed that the property had been owned by a real estate agent fifteen years and four owners prior to this sale. That was really nothing special until the attorney, upon closer scrutiny, found that the buyer’s agent and the previous owner/agent now worked together in the same office! Aha – fraud must be afoot; or at least negligent misrepresentation. The fact is the previous owner/agent did not know the buyer’s agent was selling that particular property until she was called for a
deposition. Further, the facts showed the previous owner/agent had installed a “French drain” in the basement and around the perimeter of the condo to abate the occasional flooding caused by a major irrigation ditch a half block from the condo. It seemed that the basement leaked only when the ditch leached water into dry soil – and it was a dry year!

After much negotiation and mediation the complaint was settled out of court. The sale was rescinded and the buyer went off with another agent to find a new condo. The agents paid their broker’s deductible (about twice the commissions) and the broker’s deductible on the insurance was increased. A lesson was learned by all involved.

The buyer found another condo (with another agent – no second chances once litigation begins) in a fairly new mid-rise project. Exactly three weeks later, water pipes in the unit directly above the buyer’s unit burst and his new condo was flooded! That is why he gained the nickname Noah! Suggestion: stay away from this person in a thunderstorm!

This story points to the main reason for education on the subject of misrepresentation. As in most professions, the majority of real estate agents are honest and fair in their deals. On the other hand, the traps of misrepresentation and negligence are very easy to fall into unknowingly and innocently. The more an agent understands the hidden dangers or pit-falls of real estate, the more successful he or she can be.

In this chapter we will begin the study of the legal terms involved in misrepresentation, negligence and other acts (or, non acts) which are likely to pose problems in transactions that could result in legal action costing money, time, embarrassment and even license forfeiture. First however, the instructor must make a disclaimer (call it risk reduction).

(Disclaimer: The instructor of this course is not an attorney nor is he licensed to practice law in any jurisdiction. The course is offered only to engender awareness of the possible actions and causes of misrepresentation in real estate transactions. It is not intended to be legal advice. Should you have specific questions regarding any statements or opinions in this course, you are encouraged to contact the appropriate professional in your own jurisdiction.)
Definitions

**Act:** Anything done or performed; doing.

**Act of Omission:** Failure to do something; especially a neglect of duty; leaving something out; involves the breach of a legal duty to take a positive action; usually unintentional.

**Forbearance:** Specifically denotes the act of intentionally not enforcing one’s duty, see also: fraud.

- In the first case in Chapter 1, can you determine if the misrepresentation was simply a neglect of duty or would it be a case of forbearance?
- In this writer’s opinion it could be a matter of omission or even negligent misrepresentation. It was not an intentional act if the agent did not know about the utility lines crossing the property. That, however, is a matter for the courts to decide.

**Agency:** The legal relationship between a principle and his/her agent arising from the contract in which the principle hires an agent to perform on the principle’s behalf. This carries with it fiduciary duties.

**Special Agency:** The listing agreement establishes an agency relationship in which the agent is hired to do a specific task; i.e. list the property and procure a buyer. The agency expires at the end of the task.

While the concept of agency and fiduciary responsibilities are generally universal, each state will have its own laws and regulations governing agency and disclosure. You must become knowledgeable in your state’s laws and how to apply them.

**Buyer’s Agent:** Buyer agency or Buyer Brokers have become more popular in recent years as buyers look for exclusive representation in a transaction. Regardless of the employment arrangement, it is still required that all parties be treated honestly and fairly.
A recent decision in a western state could have had far-reaching consequences for buyer’s agents. The Broker had a home listed and one agent had two customers interested in it. They both made offers at the same time. The buyer who did not get the home sued. The court said an agent couldn’t represent two people at the same time, regardless if it is the same property! Imagine you could only have one customer at a time. Upheld on appeal, the state legislature had to become involved to rewrite the law allowing an agent to represent more than one customer. In this case, the agent would have to refer the second buyer on the same property.

**Dual Agent/multiple representation:** Dual Agency is not a recognized term in Nevada; multiple representation is the term considered correct in Nevada.

A dual agent is one who represents more than one party in a transaction. The agent has a fiduciary responsibility to both parties. The nature of the relationship prohibits the agent from acting exclusively for one or the other principle (the buyer or seller. The agency can only be established by mutual consent of both principles.

**Agency Disclosure:** A signed, written explanation and agreement of employment which is to be signed by the buyer and/or seller (depending on your state’s laws), in which the agent is hired to represent the principle.

**Bona Fide:** Literally means “in good faith.” A bona fide transaction is one conducted with all honesty and sincerity.

Refer to the initial case in the first chapter (the hidden utility lines). The agent was honest and sincere, yet he still made a misrepresentation. We’ll see throughout this course that misrepresentation does not necessarily have to do with dishonesty.

**Breach:** The term “breach” most often applies to the violation of a law or obligation. In real estate, such an act would be considered a breach of duty, especially concerning the duties owed to clients a customers; a violation of a legal or moral obligation or the failure to act as the law requires. See also negligence.

**CC & R’s:** Stands for Covenants, Conditions, and Restrictions and usually are placed on a property at the beginning of the development. CC & R’s place conditions on the uses, sizes of buildings, colors, landscaping, the storage of vehicles, livestock, and any number of things that may affect the future use of the
property. They may contain anything as long as it does not run contrary to existing law (for example, discrimination against a protected class would be an illegal restriction.)

Think about the “hidden utility line” case. What would a review of the CC & R’s have shown about the lines?

Caveat Emptor: Literally, “let the buyer beware.” The doctrine of caveat emptor places the burden of discovery of defects on the buyer. There are few places in the nation where one would find a predominant reliance on this doctrine. The idea of caveat emptor does not relieve the real estate agent from duties of disclosure.

CERCLA: The Comprehensive Environmental Response, Compensation and Liability Act passed by Congress in 1980. This was the act setting up superfund clean up sites across the nation. It was updated and known as the Superfund Amendments and Reauthorization Act (SARA.)

Can you think of a time when you would want to have knowledge about where to find information on this legislation?

Client: The client is the person who hires and pays the real estate agent and to whom the agent owes fiduciary responsibilities. Duties in this type of relationship are defined by law, particularly agency law, and carry specific responsibilities.

Concealment: Not disclosing something such as a material fact; preventing or hindering the discovery of a fact; a cover-up. The act of removing from sight or notice: hiding.

Encouraging a seller to paint a ceiling stained from water caused by a roof leak would be an act of concealment. In fact, could probably be viewed as a fraud. Be careful!

Customer: A prospect with whom there is no legal relationship. There is however, an ethical obligation to treat the customer with honesty and fairness. If the buyer agrees that you may represent the seller in the transaction by accepting the seller’s agency arrangement, you still have duties of disclosure. A customer would become a client when he/she signs a Buyer Broker agreement.
**Damages:** The amount of money owed to a person who has been judged to be harmed by an action (or inaction) on the part of another.

In the hidden utility case, what do you think would be fair damages for the buyer?

**Default:** In the verb form, it can mean failure to perform a duty or promise. It can also mean an omission.

- What are the duties you are obligated to perform under your state’s listing contract and agency agreements?
- Remember, if you make a promise, written or oral, be sure you perform!

**Due Diligence:** This refers to taking the time and care to discover facts pertinent to the transaction. It could include facts about environmental, zoning, social, physical, legal, financial, or any number of considerations that would have an effect on a person’s decision to buy or sell real estate.

- Real estate agents are expected to be knowledgeable about almost everything, so discovering any type of defects becomes very important.
- In the case of Noah, where do you think the responsibility for due diligence rested?
- Think about the responsibility of discovering the facts in the example below. Do you think there was an actionable cause when the developer discovered the additional expense?

In a recent commercial land sale, the buyer of the property was planning to build a strip mall and so assumed the duty of due diligence. The period allowed was six months. Following closing, the developer discovered that portions of the land required huge amounts of fill dirt to make the property suitable and to meet codes. It was very costly. In fact, the buyer stated if he had known of the extra expense he would not have consummated the purchase. The cost of the land actually doubled because of the extra expense!
Fraud: An intentional act to mislead another through purposeful omission of known facts or: to cheat another so that the other person suffers a loss. Fraud not only can be cause for civil action, but may also be cause for criminal proceedings.

Justifiable Reliance: As a licensee, the agent is holding him/herself out as an expert in real estate. By virtue of the license, it means a member of the public is justified in relying on the agent for all matters pertaining to real estate. The expectation is that true and correct facts will be imparted in the buying/selling process.

In Idaho, a broker had made statements to a buyer based on representations the seller had made. The broker was sued by the buyer for misrepresentation and the broker claimed he was only the conduit for information from the seller. The court ruled in favor of the buyer saying “The real estate agent will be liable to the buyer if he knew or should have known that the seller’s representations were inaccurate, or if he could have, by reasonable investigation, determined the accuracy of the representations.

Liability: Refers to an obligation owed. A real estate listing contract, for example, creates a liability to perform on the part of the agent. A purchase contract causes an obligation for all parties in the contract to perform. It may also mean to incur a fine or penalty (as in an adverse judgment in a law suit) “The real estate agent was held liable to the buyer for repairs to the home.”

Material Fact: Facts about a property that, if known, would logically have an impact on a buyers’ decision to purchase or a sellers’ decision to sell something that may affect the value of the property. A material fact could be physical, environmental, or any number of factors that might affect value. Be careful here though, for example, ethnic make-up of a neighborhood is NOT a material fact.
Misrepresentation

To portray something improperly, incorrectly, or falsely; basically, making a statement that is not true. Misrepresentation can be unintentional or intentional (fraud) and can be oral (many times it is nothing more than an off-hand remark) or written. It can also be silence – the omission of facts. If material facts are relied upon to make buying or selling decisions, and they are wrong or incomplete, with the result of harm to the buyer/seller, a case for misrepresentation could be made. The harmed party has only to perceive he/she has been harmed!

Take a look at the hidden utility case and the story of Noah. Was there misrepresentation in either case? If there was, how did it come about? Who should be held liable?

Unintentional Misrepresentation

Also known as negligent misrepresentation. The intention to deceive is not present in the action or inaction. It is usually the result of a mistake or inattention to details, a lack of care in performing one’s duty. Courts have held that agents may be held liable without having had actual knowledge that a statement of material fact, was or was not true. If the representation is innocent, it may still be actionable, as courts have held the agent has a duty to determine the truth or falsity of a statement before it is made. Beware!

Intentional Misrepresentation

By any other name, this is fraud! It is the withholding of facts, for example, that would likely affect a buyers’ decision to purchase. Remember that actions of fraud may carry punitive damages (like a fine for lying), which can be trebled. Always tell the truth.
Components of Misrepresentation

The following are components of misrepresentation. Please remember as you read these, they are general statements and interpretations can and probably will vary from jurisdiction to jurisdiction.

1. A false statement
2. It is material to the transaction
3. The maker of the statement is aware the statement is false
4. There is a disregard as to whether the statement is true or false
5. The intention is to make the hearer take action or no action
6. It is relied upon by the hearer
7. That reliance causes the hearer damage

Negligence

Negligence is the act of not exercising the care required by law to protect the interests of another person(s) who may be harmed. In real estate, you will find that almost every document you sign will obligate you to perform in a professional manner. Negligence can occur when for example, an agent relies on statements from a seller and the statements prove to be false or incorrect. Some courts have held that the agent has the duty to determine the veracity of the statements, especially if the truth was easily discernable. (see also: reckless disregard)

Be sure to watch out for statements made by a seller that seem to be contrary to what you have observed by inspecting the property yourself.

Opinion

An opinion is the expression of one’s own thoughts or beliefs. It is not considered a “formal” opinion unless it is put in writing. There can be a fine line between opinion and fact so be careful what you say. If you are expressing an opinion, make sure it is understood that it is your opinion and not fact! It would probably be prudent to not offer an opinion, but rather supply the customer with the facts and let her form her own opinions!
Oral Contract

A self-defining term in that a contract is not in writing. Generally an oral contract is still a promise to perform, but you should never make such promises unless they are in writing. Different jurisdictions will have different interpretations so try to avoid oral contracts.

Reckless Disregard

Being utterly careless of the consequences of one’s actions and the effect they would have on others. This is generally considered to be a conscious act, particularly in regard to omission of facts, much like property defects.

Statement

A statement is defined as a declaration setting forth facts and particulars. A statement may be in the form of an oral or written statement. An untrue statement would most certainly be construed as misrepresentation, if not fraud. Making a false statement means concealing a material fact, making a fraudulent representation, or making use of a fraudulent document (forgery).

Stigmatized property

A property in which, or about which, something has happened in the past that would affect its value, marketability, or appeal (e.g. a murder).

What are some of the things you can think of that would stigmatize a property? Do you know what you may and may not disclose?

Some examples of stigmatized properties would include:

- A house that has had a fire and been successfully repaired
- A home in an area where land use is in rapid change (encroachment of commercial or industrial use, for example.)
- A home where a murder has been committed
- A neighborhood where burglary is a common occurrence
- A home that is in an area known for foundation settlement
- Megan’s Law (It's important to know your state’s laws concerning disclosure)
- A home that “everyone” knows is haunted
It is important to check individual state laws and statutes regarding what disclosures can and cannot be made about stigmatized properties. What must be disclosed in one state may be prohibited from being disclosed in another.

We will be discussing the above definitions as they apply to case studies and to your real estate practice in the coming chapters.
Case Studies and Applying the Law

Introduction

If you go on-line, you already know that the entire world opens up to you. We have already discussed the effects of this vast source of knowledge on the buying and selling public. The levels of knowledge and sophistication have never been higher. And as a result, neither have the demands of the consumer. To say that a much higher level of professionalism is now required by people availing themselves of the services of a real estate agent would, at the least, be an understatement. Aside from real estate advice available for free on the Internet, free legal advice abounds! It is one place a tort attorney can “farm” with very little time or investment.

When you are finished with this course, go to the Internet and choose any search engine you prefer. Type in the words “real estate misrepresentation” and see what pops up. This instructor chose Google and stopped browsing the pages of available information at number 101! You will be amazed at what you find. You’ll be further amazed at the number of law firms represented. There is little doubt that our society has become more and more litigious as people are less and less willing to take responsibility for their own actions. True, there are times when litigation is justified, but the myriad of websites found also proves that litigation is invited.

The courts today have also become more consumer-oriented than ever before. The likelihood of a court finding in favor of a consumer is greater now, as you will discover in some of the cases we will be studying. There appears to be a current
trend away from the traditional caveat emptor theory of consumerism towards a philosophy of “caveat licensee” – let the licensee (that’s you!) beware.

**Effects of Litigation**

Why do real estate agents seem to be targeted for litigation and what can the effects of litigation be on one’s career? Let’s take a look; see if you can add to the lists we are about to discuss.

You get your license, find an office and start to solicit your first listing or sale. It’s an exciting time, but no one has told you yet that you could be the target of litigation! All the training you receive can never prepare you for that first threatened law suit. This is not to say it is a foregone conclusion that you will be sued, but there is a reason why real estate agents become a target – some of those reasons are the fault of ourselves and some the fault of others. How many can you add to this list?

Real estate agents are:

- Perceived to make “big bucks” – huge commissions
- Perceived to have “deep pockets”
- Are expected to be knowledgeable in just about “everything”
- Thought to have unlimited Errors and Omission insurance
- Are easy targets
- Usually are good sales people and poor record keepers
- Handle a tremendous number of details including but not limited to:
  - Inspections
  - Appraisals
  - Documents
  - Financing considerations
  - Open Houses
  - General marketing
  - Disclosures of all sorts
  - Smooth closing
  - Successful move in/out

It is a fact that almost all real estate litigation takes place after the closing of the sale. Once a customer or client has been wronged (real or perceived) the move towards court begins. The effect this can have on an agent, whether broker or sales person, can be devastating. The following are good reasons to avoid such situations.
Litigation could:

- Be grounds for rescission of the sale
- Necessitate refund of your commission
- Cause additional loss of money (deductibles or expenses not covered by insurances)
- Cause loss of other business
- Cause loss of reputation
- Be grounds for license revocation
- Cause loss of productivity
- Cause loss of time
- Be very stressful

Now, let’s take a look at some more actual cases and the results of litigation. As you study the cases, attempt to identify the legal principle or theory that you would apply from our list of definitions.

**Case #1 - From Connecticut**

**Miller v. Ryan – 2003 Hartford Superior Court**

**The Situation:** Ryan was a buyer’s agent and sold a home belonging to Miller. Ryan assured Miller that the buyer had a commitment for mortgage financing. Miller relied on Ryan’s assurance and purchased another home. The buyer was eventually disqualified for financing and Miller sued Ryan.

**Answer these questions before proceeding:**


2. What principle or theory was at stake?

3. How would you have handled the situation?
This is a case about Agency and the responsibilities owed to the seller. Ryan was sued for negligence and misrepresentation. The issue in this case is whether Ryan, as a buyer’s agent has the duty of care in obtaining and communicating information to a person who was not a client. Ryan entered a motion to strike the counts of negligence and misrepresentation arguing that he owed no duty of care to the seller. (Remember, the seller was the listing agent’s client and the buyer was the client of Ryan).

Court’s Decision

What the court said: The court denied Ryan’s motion to strike the counts of negligence and misrepresentation holding that while a real estate agent did not normally owe a duty of care to a third party, when Ryan voluntarily offered information, he owed a duty of care not to misrepresent material facts. The alleged harm was foreseeable and the court concluded there were sound policy reasons for holding real estate agents responsible for negligent conduct. As to the misrepresentation claim, the allegations were essentially the same as in the negligence count and Miller alleged insufficient facts for a claim of misrepresentation.6

What did you list as the principles or theories under question?

6 Case cited from “Digest of Real Estate License Laws and Current Issues 2006”, published by Association of Real Estate License Law Officials (ARELLO), Littleton, Colorado www.ARELLO.com
Case # 2 - From Florida:

Warfield v. Stewart, et.al.

The Stewarts sold their home to the Warfield family and had an Exclusive Right of Sale Listing Agreement with agent Hall of VIP Realty. The Stewarts and Hall asserted that the property could be remodeled and added to and that there were no property defects. During the course of dealing with the Warfields, Hall provided all the agency disclosures required by law, one of which stated that VIP would act as the “transaction broker” representing both parties and that they would deal fairly with the Warfields. They pledged to disclose all known facts that would materially affect the value of the property that were not readily observable. A Seller’s Real Property Disclosure Statement was supplied to the buyers. Following closing the Warfields found they actually could not improve and add to the property (prohibited by an earlier zoning variance) and that there were several other physical defects. The Warfields sued claiming the disclosure statements constituted a contract, including the covenant of good faith and fair-dealing and alleging a breach of contract. VIP and Hall filed a motion to dismiss the contract claim. They argued that the brokerage relationship form is a statutory disclosure required of all Florida licensees that simply sets forth the duties of a real estate agent under Florida law. As such, the disclosure did not create a contractual relationship with the Warfields.

Before you proceed, answer these questions:

1. What were the principles or theories at stake?
2. Was Hall obligated to disclose property defects?
3. Who was the principle in the transaction?

This is a case about disclosure and whether disclosure documents establish a contract. Remember that the seller was the principle because of the Listing Agreement. The Warfields were told that VIP Realty would represent both parties fairly. Warfields did not have a buyer broker arrangement, as VIP was to act as the
“transaction” broker. Being a transaction broker allows the broker’s salespeople to sell to a buyer.

Court’s Decision

What the court said: Upon first glance, the court would agree with VIP Realty and Hall that a disclosure statement does not contain the elements of a contract. The judge held, however, that while not a traditional form of contract, the disclosure did obligate the brokers to perform certain services for the Warfields, for which acts the licensee would be compensated to the exclusion of other brokers with whom the Warfields may have chosen to work. He then ruled that the breach of contract claim should not be dismissed as a matter of law because the disclosure did establish consideration and a mutuality of obligations between the brokers and the Warfields. The Warfields did adequately claim a cause for breach of contract, including the covenant of good faith, fair dealing and disclosure.7

How did you answer the questions concerning this case?

Case # 3 - From Washington

Yemel’Yanov v. Tomlinson

Mr. Y. bought a house adjacent to a golf course from Mr. Song. Once, when he was looking at the property, he noticed a golf ball in the street and asked the agent “whether the balls fly here?” The agent responded that she “didn’t know, maybe.” Following closing Mr. Y. filed suit against the seller, listing agent and his agent for injuries from golf balls hitting the house and yard. Mr. Y. contended that the seller and the agents should have disclosed there was a constant rain of golf balls from the golf course that had the potential for damaging the house and injuring persons in the yard. The seller did not regard errant golf balls as a problem, although he was aware of golf balls finding their way to his yard during the summer months. He did not remember them ever doing any damage.

Think about it and answer these questions:

1. What are the principles or theories in this case?
2. What were the obligations of the seller and agents?
3. What obligations, if any, did the buyer have?

This is a simple case about property disclosure and the duties of the seller and the agents. It is also about due diligence by the buyer.

Court’s Decision

What the court said: The court granted a summary judgment for dismissal for all the defendants. It did not decide whether the golf ball “problem” warranted disclosure. It did hold, however, that Mr. Y. waived disclosure of the problem by failing to follow up after he noticed the ball lying in the street. The court held that
a “reasonably diligent buyer would have conducted a further inquiry in the potential problem once he was alerted to it.”

What were your answers to the questions about this case?

8 Case cited from “Digest of Real Estate License Laws and Current Issues 2005”, published by Association of Real Estate License Law Officials (ARELLO), Littleton, Colorado www.ARELLO.com
Case # 4 - From New York

Jablonski v. Rapalje

Jablonski purchased his new home through his real estate agent who also worked for the listing broker. Upon inspection of the property, the buyer noticed the smell of excrement and urine in the attic. Before signing a purchase agreement, the buyer submitted a list of questions about the property to the seller and the seller answered. The condition of the attic was not addressed by either buyer or seller. Upon a subsequent visit to the property the buyer once again noticed problems in the attic: the presence of droppings and an odor. It appeared that the attic had been swept. At one point he was told the mess was from family pets. The buyer had an inspection performed on the property and there was no mention of the attic “problem.” When asked again about the attic, the selling agent reported that the cause of the droppings and odor was a bird that had gotten in through a broken pipe which would be repaired prior to closing. Following closing, the buyer discovered the attic was actually home to a seasonal bat colony. He then filed suit against the seller, the broker and the salesperson. The defendants filed a motion for summary judgment for dismissal and it was denied, they then appealed.

Think about this case.

Consult your Definitions and try to determine the issues of this case.

1. What principles or theories were at stake?

2. What was the responsibility of the seller & agent?

3. Was the buyer obligated to investigate further?

This is a case of misrepresentation of known facts. New York is a “caveat emptor” state and as such places additional burden on the buyer to “beware.” New York law imposes no duty on the seller or the seller’s agent to disclose any information concerning the premises when parties deal at arms length. The buyer also had an
inspection completed, which did not address the “bat problem”, and the seller/agents therefore sought absolution from wrongdoing.

Court’s Decision

**What the court said:** In upholding the denial of the motion to dismiss, the court noted that the theory of caveat emptor does prohibit actions that constitute the active concealment of known defects. The court also determined that a jury, looking at evidence from the buyer could conclude that the seller and the broker actively concealed the presence of the bat community. There was also testimony that the seller attempted to cover up the evidence of the bat colony by sweeping the attic and placing mothballs there. The court said there was evidence of fraudulent misrepresentation on the part of the broker and selling agent.⁹

How did you answer the questions concerning this case?

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⁹ Case cited from “Digest of Real Estate License Laws and Current Issues 2006”, published by Association of Real Estate License Law Officials (ARELLO), Littleton, Colorado www.ARELLO.com

Also see: “REALTOR® Your Interactive Magazine” NAR, January, 2008 issue at www.realtor.org/rmomag/NSF

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Case # 5 - From North Carolina

Willen & Willen v. Hewson

Hewson sold her small farm (22 acres) to the Willens having reported to them that the property was a peaceful and serene place suitable for rearing children. Hewson had lived on the property several years prior to having repurchased it only two months earlier. She was the seller and the selling agent. A neighbor reported to the Willens prior to the closing that there had been a few problems with vandalism and “kids” partying on the property after high school football games. Hewson retorted that sort of thing had happened only once or twice and claimed the neighbor was given to exaggeration. Following closing, the Willens found out differently. Vandalism and burglary were common events and caused them great concern. They not only had property destroyed, but one of them was assaulted. They installed security systems, fences and gates that did not solve the problem. The resulting lawsuit went to the Court of Appeals of North Carolina.

Take time to consult your list of definitions and answer these questions:

1. What issues did you discover might be raised?

2. What was Hewson obligated to disclose?

3. Does caveat emptor apply in this case?

Is this a “stigmatized” property because of the constant trespass and vandalism that was common knowledge in the neighborhood? It may have been, but that is not a question addressed by the courts. Remember the owner/agent had only owned the property for the last two months, even though she grew up there. This seems to be a case of deliberately withholding material facts.
Court’s Decision

What the court said: When the Willens first contacted Hewson following their troubles with trespass and vandalism, and after they had installed security systems which did not help the situation, she refused to call them. Hewson’s attorney responded by telling the Willens that the doctrine of *caveat emptor* applied. The court disagreed in deciding whether Hewson had defrauded the Willens. It found that Hewson was aware of the scope and severity of the trespass and vandalism problems at the farm. Hewson, however, purposely withheld the information. It was also found that she intentionally deceived the Willens when she was asked directly about the issue. Hewson’s conduct constituted fraud and unfair and deceptive practices.\(^{10}\)

What were your answers to the questions?

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\(^{10}\) Case cited from “Digest of Real Estate License Laws and Current Issues 2007”, published by Association of Real Estate License Law Officials (ARELLO), Littleton, Colorado www.ARELLO.com
Case Study Roundup

The following is a roundup of several court cases from around the nation. The source of this information is the North Carolina Real Estate Commission bulletin as published on the Internet at http://www.ncrec.state.nc.us/bulletin/bulletin.htm and is a compilation of information from the “California Real Estate Bulletin”, “Mississippi Real Estate Hotline”, and the “Washington Real Estate News”.

After reading these cases, see if you can identify the issues they raise.

Washington

From the State of Washington an issue arose, involving incorrect description of property boundaries. A listing broker supplied a selling broker with erroneous information. Information on file with the listing service clearly contradicted the listing broker's statements to the selling broker. In spite of this, the selling broker relied on the listing broker's description and transmitted the incorrect information to a buyer. Following closing, the buyer discovered the error and sued both brokers for misrepresentation.

The court ruled: In favor of the buyer, stating that the listing broker (even though he was the agent of the seller) was still liable to the third party (the buyer) for the misrepresentation. It ruled further that the listing broker was also liable for the actions of his subagent (selling broker) whom he authorized to transmit the incorrect information. The selling broker was also liable because he failed to exercise reasonable care and skill to discover the error.

Maine

A purchaser in Maine sued a seller for fraudulently representing that the lot he purchased had been approved for the installation of a septic tank. The purchaser had made no independent inquiry to determine the accuracy of the representation.

The court ruled: In favor of the buyer stating: “A plaintiff may justifiably rely on the fraudulent misrepresentation of a defendant, whether intentionally or recklessly, without investigating the truth or falsity of the representation. Reliance
is unjustified only if the plaintiff knows the representation is false or its falsity is obvious to him. (The NC commission points out that even though the defendant was the seller of the property, the same reasoning would seem to apply to agents of a seller.)

**Alabama**

In Alabama, a seller knew his house had a faulty septic tank and did not tell his broker. The purchaser of the property sued both the seller and the agent for not revealing this material defect.

**The court ruled:** In favor of the buyer. It said that although the broker did not have actual knowledge of the defect, the broker as agent for the seller was obligated to learn about any deficiencies and to inform prospective buyers of such defects.

**Texas**

A Texas broker was selling his own property and failed to inform the buyer that the foundation of the structure had settled and needed repairs. The purchaser eventually filed suit against the owner/broker.

**The court ruled:** In favor of the buyer, saying that a seller has a duty to reveal known defects to buyers. The NC commission states that the same would appear to be true and apply equally to agents of a seller.

**North Carolina**

The purchaser of a house and lot in North Carolina sued the builder claiming the builder had failed to disclose the house had been built on “disturbed” soil. The house was built over a large hole filled with debris and covered with clay.

**The court ruled:** In favor of the buyer stating: “Since this defect in the lot and the house was not apparent to the plaintiffs (the buyers) and not within the reach of their diligent attention and observation, the builder was under a duty to disclose the facts to the buyer. The commission points out that even though the seller was the builder, “the North Carolina Supreme Court held in a related case that a real
estate agent would also have come within the rule applied in this case if the agent knew or had reason to believe the builder had constructed the house on “disturbed” soil, yet withheld this fact from the purchasers.

**Note:** Be sure to check individual state laws for proper procedure in handling specific incidents, including the cases listed above.
Forms And Disclosures

The House That Moved – The People Who Didn’t!

This was the second sale on the same home. The first sale had fallen due to an inspection report that revealed some settling in the foundation in the 22 year old property. The listing agent, being seasoned in the business, had the sellers order an engineer’s report. The engineer reported verbally to the agent: “This house probably settled right after it was built – it’s not going anywhere in the next 22 years for sure!” Good enough for the agent as the engineer had a good reputation. The house sold again and the inspector’s report was made available to the buyers. The listing agent offered the verbal opinion from the engineer to the selling agent – everything was a go with the buyers who accepted the inspection at face value. After closing (imagine!) the buyers noticed some cracking in the wall near a fireplace. They threatened a lawsuit. The engineer was called upon to testify as to his report. He recalled that he had told the agent he recommended mud-jacking the foundation! And it was off to the races, as they say!

A couple of years, a lot of time, a lot of money, much gnashing of teeth, and a great deal of stress later the case finally settled out of court for a measly quarter of a million dollars!
The mistakes in this transaction should be obvious to you by this time in our course:

1. No written engineer’s report
2. Selling agent didn’t think the engineer’s report was relative since it was oral and so “off-hand”
3. Everyone in the transaction knew the engineer and trusted him
4. The buyers did not sign off on the inspection report (in writing)
5. There was no intent of misrepresentation, but it happened
6. Just about everything that could go wrong did go wrong – and the agents were both seasoned veterans in the industry

It is cases like this that make the discussion in this chapter necessary. You can never be in the industry long enough to not exercise the greatest of care in the use of forms and disclosures.

Case Review

In the last chapter we discussed cases from several states that were reported by the on-line bulletin of the North Carolina Real Estate Commission. At the end of their report they made the comment that those cases were not decided on the basis of NC law, but all agents should be aware of the principles involved. Those are:

- A real estate agent who intentionally or unintentionally gives a purchaser incorrect or incomplete information may be held liable for such statements even though the source of the incorrect information was the seller or another broker, and even though the purchaser could have verified the information himself.

- A seller and his agent have an affirmative duty to disclose to prospective purchasers any latent (hidden) defects connected with the property about which they are aware or should have been aware.

- Although a real estate agent owes his primary loyalty to his principal (usually the seller), the agent must treat all parties in the transaction fairly.
These caveats all relate to misrepresentation (and negligence), and most cases of misrepresentation or negligence would never happen if the agent were careful about disclosures in writing.

Before we proceed to documents and forms it should be reiterated that while the principles are generally universal (agency, for example) the implementation and interpretation will vary from state to state. Each agent must be familiar with his/her local laws and regulations.

Disclosures

In this chapter we will be discussing disclosures and how to use them. Some examples will be direct quotes from published forms and some of those will be from the National Association of REALTORS® and as such carry copyrights. It should be noted that forms which carry the REALTORS® logo are available for use by members only.

In a recent ruling, the Montana Supreme Court upheld Board of Realty Regulation discipline of an agent for unlawfully using a Montana Association of REALTORS® (MAR) buy-sell agreement copyrighted by the National Association of REALTORS® (NAR). The licensee argued on appeal, unsuccessfully, that identifying marks and numbers on the form did not afford copyright protections to MAR/NAR. The court found that the licensee was properly fined for violating a “license law provision that prohibits the use of the term REALTOR® by a person not authorized to do so or using another trade name or insignia of membership in a real estate organization to which the licensee is not a member.”


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Top Two Issues Leading to Misunderstandings

A wise real estate broker once advised, “All papers, in front of all people, at all times!” Aside from sage advice against dealing “under the table,” the broker states a good policy for disclosure in any real estate transaction.

One fact is for certain: you will run into “trouble” by not exercising the care required by law, necessary to protect the interests of other persons who might be harmed by your actions or inactions.

In this section of the chapter we will be discussing the top two issues that cause the most discussion, the most misunderstandings, the most failed expectations and the largest number of lawsuits. Those two areas are:

- Relationship disclosure (Agency)
- Property condition disclosure

In the year 2007, there were 232 cases involving agency and/or property condition disclosure. Of those cases, 34% of the disputes were decided in favor of the plaintiff against the agent/broker.¹²

What is significant about this fact is that 66% of the cases that were decided in the agent/broker’s favor could probably have been avoided by better disclosure and documentation. Imagine the savings in time, money and stress that proper disclosure and documentation affords!

In addition, agency issues and property structural issues will see an increase in litigation activities over the next few years.¹³

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¹² “2007 Legal Scan – Legal Issues Facing Real Estate Professionals” National Association of REALTORS® (NAR), 500 New Jersey Ave. NW, Washington, D. C.

¹³ Ibid
Agency (Relationship) Disclosure

In Chapter Two, we defined Agency as “the legal relationship between a principal and his/her agent arising from the contract in which the principal hires an agent to act on the principal’s behalf. This carries with it fiduciary duties.”

Obligations of a “seller agent”

☐ Act solely in the best interest of the seller (exceptions can and usually are made, with the seller’s consent, a part of the Agency Agreement and/or Listing Agreement)

☐ Obey promptly and efficiently all lawful instructions of the seller

☐ Disclose all relevant and material information that concerns the real estate transaction and that is known to the seller agent and not known or discoverable by the seller; unless the information is subject to confidentiality arising from a prior existing agency relationship on the part of the seller agent with a buyer or another seller

☐ Safeguard the seller’s confidences

☐ Exercise reasonable care, skill, and diligence in pursuing the seller’s objectives and in complying with the terms established in the listing agreement

☐ Fully account to the seller for all funds or property of the seller that have come into the seller agent’s possession

☐ Comply with all state and federal laws and regulations and rules

Never forget: The Listing Agreement establishes an agency relationship.
Seller’s Agent

The seller’s agent also owes duties to others. The agent owes duties to his/her broker and must follow company policy. Lack of care in this area could be disastrous in the event of litigation. There are also obligations to other agents and their buyers who will be considering the property for purchase.

The seller agent is obligated to the buyer to:

- Disclose to the buyer or buyer agent any adverse material facts that concern the property and are known to the seller agent, except that the seller agent is not required to inspect the property or verify any statements made by the seller.

- Disclose to a buyer or buyer agent when the seller agent has no personal knowledge of the veracity of any statements made by the seller regarding adverse material facts that concern the property.

- Act in good faith with the buyer and any buyer agent and comply with all federal and state laws, rules, and regulations.

**WARNING!** Be very careful with the last part of this obligation as it reflects laws from only one state. We have already studied cases from other states in which the agents were held liable for non-disclosure of facts to the buyer; in some cases the seller agent was expected to know about, or at least question, things the seller may not have disclosed if the seller agent has reason to believe, by observation, there is a property defect. Refer back to case studies: Warfield v. Stewart; Jablonski v. Rapalje; Willen and Willen v. Hewson. **KNOW YOUR STATE LAWS!**
Buyer’s Agent

Over the years there has always been misunderstanding about who represents whom in real estate transactions. Agency laws and rules of disclosure were designed to clarify the types of representation that the parties to a transaction are entitled to when they hire an agent. Gone are the days of: “You work for the seller – period!” While the laws have attempted to clarify relationships, they have also led to further confusion. For that reason we have seen the rise of the Buyer Broker.

The buyer’s agent is obligated in the same way to the buyer, the seller and seller agent as the seller agent and seller are obligated to the buyer and buyer agent.

Refer to the disclosure points for the seller agency from above. Substitute the word buyer every time you see the word seller and the word seller every time you see buyer. You now have a buyer agency disclosure with two notable exceptions.

- A buyer brokerage agreement should have written into it, a clause that allows the agent/broker to represent multiple buyers interested in the same property or similar properties to which the buyer may be interested without breaching any obligation to the buyer.
  - The reason for this should be obvious: no agent could make a living if he/she were restricted to representing only one buyer at a time.

- The agent is bound to disclose any adverse material facts that are known to the buyer agent and that concern the ability of the buyer to perform on any purchase offer.
  - What is important here is the disclosure of financing information. This instructor recommends getting, in writing, permission from the buyer to share financing information with the seller and/or seller agent. Privacy laws have become more and more strict, but problems with financing have a direct impact on the consummation of the sale. It is recommended that the buyer agent become an integral part of the financing transaction beginning with attendance at the initial loan application.
Dual Agency*

Of the ten largest damage awards in the years 2005 and 2006, a full 40% adjudicated questions of agency, specifically dual agency, breach of fiduciary duty and property disclosure.\(^{14}\) This number points to the perils of representing both sides in a transaction and whether it can be “safely” done. Extreme caution is required when in this confusing situation.

When acting as a Dual Agent:

- The broker/agent represents both the seller and buyer in the same transaction
- The fiduciary duties area is more limited: focuses on confidentiality and negotiations
- There is a great chance of conflict-of-interest
- Must have the informed consent of both parties to act as a dual agent. You must usually have that consent in writing

Other obligations will include: (Depending on your state’s laws)

- Disclosing to a buyer or a seller any adverse material facts that are known to the dual agent, regardless of confidentiality considerations (can you see the potential for conflict of interest?)

- Not disclosing certain information without the written consent of the person to whom the information is confidential, which may include the following:
  - The fact the buyer will pay more than the offered price
  - The fact the seller is willing to accept less than the asking price for the property
  - Factors motivating either party to buy or sell

Any information that a party indicates in writing is to be kept confidential

\(^{14}\) 2007 Legal Scan – Legal Issues Facing Real Estate Professionals® National Association of REALTORS® (NAR), 500 New Jersey Ave. NW, Washington, D. C.

*NOTE: Dual Agency is only legal in certain states. Be sure you are familiar with your stat-specific laws.
Other Types of Agency

Dual Agency is legal in most states and governed by state law. Be sure you are familiar with your state-specific laws. Because dual agency can create misunderstandings, it is important to make sure your disclosures are in writing and understood by both parties. Some states have adopted laws creating other types of relationships that take the place of dual agency.

Transaction Brokerage:

- A non-agency relationship with a consumer
- Duties owed to the consumer are generally less than the usual fiduciary duties
- In most states the agent still owes limited fiduciary duty to the buyer
- Terminology and interpretation vary from state to state

Designated Agent:

- Allows the broker (owner) to designate which agents in his/her office will act as agents of the buyer
- Those agents do not act as dual agents
- Give their buyer clients full representation with all the fiduciary duties required
- Must be specifically stated in state law

In-house Designate:

- Results when both agents involved in a transaction work for the same broker
- Designated by the broker as the exclusive agent of the buyer or seller for a specific transaction
- Cannot be assumed to be acting for other than who they are representing in the transaction
- May not be considered a dual agent
- Must be specifically permitted by state law

The National Association of REALTORS® is an excellent resource for the various definitions of the types of relationships available to clients and customers. The student should take time at this point to look more closely at those relationships at: http://www.realtor.org/rmoprint.nsf/; look for “Understanding Agency”
Property Condition Disclosure

How many times in your selling career have you heard an exuberant buyer (especially a first time buyer) exclaim: “I am buying a used home!” Never? That would not be surprising. “I am buying a new home!” is the usual proclamation of excited buyers and sometimes their expectations are exactly that - new – even if the house is old. That's why property disclosure is so important.

Seller Disclosure

Do you remember learning the definition of justifiable reliance? You should, because, more and more, the real estate professional is expected to “know everything!”

Recall the case from Idaho where the court ruled in favor of the buyer saying: “The real estate agent will be liable to the buyer if he knew or should have known that the seller's representations were inaccurate, or if he could have, by reasonable investigation, determined the accuracy of the representations.” This is a very onerous ruling for the agent and places additional burdens for disclosure of property conditions about which the agent may know nothing.

Requirements of disclosure on the part of the seller:

- Not intentionally conceal (fraud) a known defect in the property
- Disclose to the buyer material facts of which the seller knows the buyer is unaware

The requirements for the agent seem to be expanding and differ from state to state. In California, the state legislature adopted very strenuous laws regarding disclosure by agents.

Aside from increasing a seller’s responsibility for disclosure, they have gone a few steps beyond and imposed on the listing and selling agents a positive duty to make a competent and diligent inspection to determine whether there are adverse conditions (material facts) that would affect either the value or desirability of the
property. In addition, the legislature made this requirement independent of any inspection that the purchaser of the property may choose to have performed!

**Seller Disclosure Forms**

Nearly thirty states have forms for seller disclosure that are mandated by law. It is important that you investigate what your state requires. A typical seller’s disclosure will have the following characteristics:

- Name of broker
- Street address of property
- Legal description of the property
- Disclaimer, as follows:

  “This information is a disclosure by the seller of adverse material facts concerning the property as of the above date. It is not a warranty of any kind by the seller, the broker, or the salespersons and is not a substitute for any inspections the buyer may wish to obtain.”

Instructions for the seller to complete the form – **not** the agent!

- Seller agreement to have the information shared with prospective purchasers
- Statement that the seller has “made the disclosures and they are not the representations of the brokers or salespersons. This information is a disclosure only and not a warranty, inducement, nor contract between seller and buyer.”
- A list of the components of the property including any personal property that is left behind
- Sellers certification that the information provided is true and correct

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15 Quoted directly from “Seller’s Property Disclosure Statement – Montana Association of REALTORS® Standard Form” ©Montana Association of REALTORS® (MAR) February, 2004

16 Ibid
Buyer’s Acknowledgement

☐ “Buyer(s) understand that the foregoing disclosure statement sets forth only those items which the seller has determined to be adverse material facts. The disclosure statement does not provide any general representation concerning status of the property, nor does the fact that this disclosure statement fails to note any adverse material fact concerning a particular feature, fixture, or component imply that the same is free from defects. Buyer(s) may wish to obtain professional advice, inspections or both, of the property and to provide for appropriate provisions in a contract between buyer(s) and seller(s) with respect to any advice, inspections or defects. Buyer(s) are not relying upon this property disclosure statement for buyer(s) determination of the overall condition of the property in lieu of other inspections or advice.”

☐ Buyer’s signature(s)

Notes of Importance: Remember that your state laws may vary. The quoted portions of the above disclosure are copyrighted by the MAR and may not be used in any form without permission. Do you think this would be an appropriate form for California, given the nature of their laws?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

17 Ibid
What should be Included

Features, Fixtures, and Components covered by Seller’s Disclosure should include the following with sufficient space for the seller to write further explanations if necessary:

- Roof
- Siding
- Insulation
- Basement
- Foundation
- Termites
- Electrical
- Plumbing
- Sewer or Septic System
- Heating System
- Water Source (public, private, water rights)
- Fireplaces and Wood Stoves
- Swimming Pools/Hot tubs
- Property Access

In addition, there are many other areas to consider for disclosure such as fences, property lines, structural additions, soil problems, flooding, zoning violations, neighborhood problems that might prohibit “quiet enjoyment”, proposed street or utility improvements that may affect property taxes, and a myriad of other items which will vary by location or region.
Other major areas of disclosure concern

Lead-based paint

The manufacture of most lead-based paint was stopped in 1972 and the use of it was banned in 1978. Any home built prior to 1978 is subject to HUD’s Lead-Based Paint Disclosure. Go to www.hud.gov to search for the appropriate disclosure. They also prescribe how to treat removal.

This is a significant issue when small children are involved. The paint, as long as it is intact, presents no hazard. However, chipping and peeling paint as well as paint dust (as from sanding) can be harmful to children. Chips of paint that contain lead may have a “salty” flavor and could encourage children to eat them.

Meagan’s Law:

Just about everyone knows that this law was designed to track sexual or violent offenders. However, the application of the disclosure rules varies from state to state. Be sure you check your state laws. The best way to approach this subject may be to provide the buyer(s) with a notification about the law with instructions on how to get information in your area.

HIV/AIDS:

If a property was owned by a person afflicted with HIV/AIDS, you cannot disclose that information. Fair Housing statutes prevent you from discussing the issue. Even if you are asked directly, it is recommended that you respond that you are not allowed to answer that question as HUD has determined it is not a relevant issue. Your firm should have a policy regarding this subject.

Mold Disclosure:

Again, be sure to check your state laws! Mold is becoming a bigger and bigger issue in property transfers. Not only can the presence of spores, fungi, and mold affect a person’s health, it could also make a property more difficult to insure against other hazards.
Other Environmental Disclosure Issues:

- Asbestos
- Radon Gas
- LUST (Leaking Underground Storage Tanks)
- Buried waste or soil contamination

Are there any “special” circumstances in your market area that would require disclosure? Aside from knowing your state laws concerning disclosure, it is imperative for a real estate agent to be aware of what is happening in his/her market area. New environmental concerns, property histories, issues regarding proposed improvements in public services, any other issues internal to the property or external to the property (surrounding areas/neighborhood) should be disclosed.

Get it in Writing

It is often said the three most important things in real estate are: Location – Location – Location! That always seems to be true. But, in a real estate transaction, the three most important things are: Disclose – Disclose – Disclose!

When you disclose, do it in writing. Recall the story at the beginning of this chapter. Had everything been disclosed in writing, including the engineer’s report, litigation may have been avoided. And, as you saw, it can happen to seasoned agents as well as new agents.

If your state, or your firm, does not have pre-made disclosure forms, here are some you might consider:

- Seller’s Disclosure Form
- Home Inspection Rejection by Seller (not having one performed)
- Home Inspection Rejection by Buyer (not having one performed)
- Mold Disclosure
- Meagan’s Law Disclosure
Lead-Based Paint Disclosure (required by HUD)
Inspection Notice
Acceptance by Buyer of Inspection
Purchaser’s Acknowledgement of Previously Owned Home
Buyer signs his understanding that the agents or their firms cannot guarantee or warrant the condition of the property and further, the buyer states they are purchasing based on their own independent inspection of the property.
Water Rights Disclosure (especially rural properties)
Buyer's Authorization to Release Financing Information to Seller
Duties and Risk Management

Introduction

With proper care and preparation, when you roll the dice you probably won’t get the dreaded card that reads, “Go directly to jail, Do not pass go!” That is, of course, if you don’t commit fraud, intentional concealment of material facts, intentional misrepresentation, or any other offense that could carry with it criminal charges as well as civil penalties. It sounds harsh, but it could happen! The overwhelming majority of real estate agents are honest and fair in their dealings so it is easier to fall innocently into a trap of misrepresentation or negligence than to purposely commit criminal offenses. This chapter brings us to our study of Risk Management and Duties of the agent.

There are many things to discuss with clients and customers in the selling and buying processes. The following list contains issues that must be discussed. Can you think of others that might be specific to your market area?

- Agency – types of representation
- Property Condition
- What is/is not included in the sale
- Costs of Homeownership (financing, taxes, utilities)
- Neighborhood information
- Property boundaries
Business Ethics

A good understanding of general business ethics and adherence to them will usually mean you are on the proper course. Those ethics may include, but not be limited to:

- Impartiality and Objectivity
- Confidentiality
- Due Diligence
- Openness and Full Disclosure
- Duty of Care
- Avoiding potential Conflicts of Interest
- Fidelity to Professional Standards (responsibilities)

If you are a member of the National Association of REALTORS®, you already subscribe to their “Code of Ethics”. It is interesting to note that the original code was adopted in 1913. It has been amended 32 times in the intervening years; 19 of those amendments came in each of the last 19 years!18 If you do not belong to NAR, the ethics remain the same and should be reviewed.

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Code of Ethics

Article 1

“When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant, or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly.”18

A “non-agency” capacity takes place when you are working with a buyer and the buyer has yet to sign a buyer-broker agreement or acknowledge the agency with the seller. Prospects certainly fall into this category.

Standard of Practice 1-5

“REALTORS® may represent the seller/landlord/tenant and buyer/tenant in the same transaction only after full disclosure to and with informed consent of both parties.”18

Standard of Practice 1-9

“The obligation of REALTORS® to preserve confidential information (as defined by state law) provided by their clients in the course of any agency relationship or non-agency relationship recognized by law continues after termination of agency relationships or non-agency relationships recognized by law…” Further: “Information concerning latent material defects is not considered confidential under this Code of Ethics.”19

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19 Ibid
**Article 2**

“REALTORS® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. REALTORS® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency or non-agency relationships as defined by state law.”

Make certain that you are familiar with your own state’s laws concerning confidentiality. (Refer to the aforementioned legislation from California and the court case from Idaho that place extra burdens on the agent.)

**Article 4**

“REALTORS® shall not acquire an interest in, or buy or present offers from themselves, any member of their families, their firms or any member thereof, or any entities in which they have any ownership interest, any real property without making their true position known to the owner or the owner’s agent or broker. REALTORS® shall reveal their ownership or interest in writing to the purchaser to the purchaser’s representative.”

**Article 6**

“REALTORS® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client’s knowledge and consent.”

If the agent has any interest in any third party company providing services, such as contractors, inspection services, painting company, etc., the agent must reveal that in writing. “Kickbacks” from businesses such as title companies or escrow agents are expressly prohibited by RESPA (Real Estate Settlement Procedures Act) unless the relationship is fully disclosed (Affiliated Business Arrangement) and the receiver of the service is given other options for the same service elsewhere.

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20 Ibid
Standard of Practice 12-4

“…When acting as listing brokers or as subagents, REALTORS® shall not quote a price different from that agreed upon with the seller/landlord.”20

Article 13

“REALTORS® shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.”21

☐ Please refer to the instructor’s disclaimer at the beginning of Chapter 2. The instructor is not an attorney.

☐ In many states, lawyers have unsuccessfully challenged real estate agents concerning the filling out of listing contracts and purchase agreements since they are “legal” documents. The legal profession generally regards the filling out of such forms as only within the purview of attorneys.

Know the laws of your state!

Notes on Ethics:

Whether you are a member or not, you should go to www.realtor.org, type “Code of Ethics” in the search bar and read the entire code. Remember that if you are not a member of NAR you cannot say that you “subscribe” to the Code of Ethics. (The NAR requires its members to complete two and one-half hours of ethics training every four years to maintain membership.)

21 Ibid
Duties of an Agent

In Chapter One, we discussed what sellers and buyers expect from their real estate agent. Chapter Three had descriptions of misrepresentation and negligence and in Chapter Four we discussed disclosure in myriad detail. At the same agent’s meeting we talked about in Chapter One, the attendees devised a list of “duties” of an agent. You will notice that the list fits closely with consumer expectation and ethics. Can you add others that might be specific to your area?

- Treat all parties honestly and fairly
- Disclose, disclose, disclose
- Listen and ask
- Educate the consumer
- Be reliable
- Follow through on promises
- Know current laws and their interpretations
- Look beyond your commission
- Be knowledgeable (about everything! – it’s expected)
- Watch out for the best interests of the client
- Perform thorough investigations (property related issues)
- Always use ethical behavior
Breach of Duty

All the duties we have listed should be clear. What might not be so obvious is that all of them are vague descriptions of actions a real estate agent should perform. Because they are vague, misunderstandings could occur which might in turn lead to allegations of misrepresentation or negligence. Remember that damages can be real or perceived.

- Occurs when confidential information is shared
- Occurs when wrong information is given (unintentional or intentional)
- Occurs when there is a failure to disclose
- Occurs when there is no effort to correct mistakes
- Occurs when interests of another party are placed above those of the client

How to Reduce Risk

Misrepresentation and negligence are preventable. There are positive action steps an agent can take that will reduce the risk of being misunderstood or perceived to have not met expectations.

Reducing risk means reducing liability and there are five major areas where we can concentrate to begin the process.

Area One: Policy

Does your firm have established written policies?

- If it does, you should know them well.
- If it does not, you should encourage your broker to develop policy guidelines and put them in writing in a Policy Manual.
- If you work by yourself, policies should still be in writing; perhaps as part of your business plan.
Does your firm use developed and approved forms?

- If it does: do not alter the forms in any way to fit a particular transaction.
- If it does not and you decide to develop your own forms, be sure to have them reviewed by an attorney for compliance with statutes in your own jurisdiction.

Remember: you cannot use forms printed by real estate associations (such as NAR) unless you are a member.

Are you well versed in Fair Housing laws?

- If you are not: encourage your broker to offer training
- You may also want to read and study outside sources
- You need to be aware of what you can and cannot place in your advertisements
- You must always be careful about what you say
- For example: If a prospective buyer asks about the ethnic makeup of a neighborhood, what would be your response?
- Errors and Omissions insurance does not cover fair housing violations
- Always be consistent in applying policies
- Never waive policies for friends or relatives
- Treat everyone exactly the same

Suggestion: “It is against the law for you to ask that question and it is against the law for me to answer it.”
Area Two: Communication

Always remember you are not the decision maker; you are the facilitator of the transaction

- Learn how to be a good listener
- Repeat the question by paraphrasing it
- Ask questions for clarification
- You will not appear inept by asking for clarification; rather, it will be seen as caring about providing correct information
- Concentrate on what the speaker is asking, not on your reactions to what is being said

Be careful about what you say

- An opinion is an expression of a personal thought or belief; make sure it is perceived as such
  - If you verbalize an opinion, it is a good idea to put it in writing and give a copy to the client/customer
  - Make sure the client/customer knows you are making a judgment and not stating fact

- A statement is a declaration setting forth facts and particulars; be sure you know the facts to be absolutely true before stating them as facts

- Avoid using technical terms; your client/customer may not be accustomed to hearing the “lingo” of the industry and may not know what you are talking about

Keep a Telephone Log

Try using a lined-paper or spiral notebook to record all of your incoming and outgoing telephone calls

- This is not a hard task as you can make notes as you talk
- At the end of each day, photocopy your log and place a copy of your conversation in the file to which it pertains; should you be called on to prove a conversation, you won’t have to look through old notebooks
- Always save this type of documentation
- Set a policy for yourself for returning telephone messages; you can build a reputation by being consistent in your response. (The instructor recommends a
policy of returning all telephone messages within one hour, and all calls before the end of the workday.)

If your data base program allows it, keep the log in your computer as you are speaking to the client

Electronic communications

- Make a hard copy of all e-mail correspondence and place in the transaction file
- Keep a record of “Sent” messages in your computer

Confirm all conversations in writing via mail (or e-mail)

- Ask the person to whom you send the confirmation to respond to you if they have misunderstood the conversation
  - “This is to confirm our [telephone, etc] conversation of [date] when we discussed [subject] and I said…”
  - “If this is not your understanding of our conversation, please get back to me right away so we can clarify…”
  - This shifts the burden of understanding to the other person

Keep a copy of the confirmation in your file
Area Three: Disclosure

Discuss Agency

- Remember, the principles of agency law are the same everywhere as they are a part of common law, but each state will have its own laws and regulations.
- Be open about what the client can expect from you when they are your client.
- Follow through on duties you have as an agent and be sure to keep any promises you make.
- Always get acknowledgement in writing and place a copy in the file.
- Have your discussion about agency as early as possible; at first meeting is best (with both seller and buyer).

Provide the seller with a Property Condition Disclosure

- Always have the seller fill out the form in his/her own hand writing.
- Never fill out the form yourself and do not prompt the seller in his/her answers on the form.

Do a complete walk through of the property

- Make notes of your observations and save the notes in your file.
- Always recommend a home inspection.
- Do not be complicit in concealing any adverse material facts; you would be better off refusing to take the listing rather than inviting future trouble in this way – don’t set yourself up for fraud!

Provide interested buyers with a copy of the seller disclosure

- Even if the seller had a home inspection done, suggest that the buyer might want to have their own inspection performed, choosing their own inspector.
- This will take away any suspicion on the part of the buyer that there might have been concealment.
- Never suggest that an appraisal for a loan will point out defects – that is not the purpose of appraisals for loan purposes.
- HUD requires, for example, that a home be Safe, Sound and Sanitary; beyond those generalities, do not rely on the appraiser for a complete list of defects.
- Be very careful what you say to your buyers.
If you are asked a question outside your expertise, do not be afraid, or feel foolish saying, “I don’t know!”

You could also say, “Sorry, I can’t help you with that.”

Disclose what you must, but don’t be too ready to voluntarily offer information or advice.

Let the buyer make some of their own discoveries.

For example: don’t state opinions as fact like saying, “This is a quiet neighborhood.” That would clearly be a matter of opinion. Let the buyers discover that themselves. Suggest talking to the neighbors in a situation like this.

Be helpful in giving buyers sources for discovery.

Provide lists of places information may be sought: utilities, schools, tax office, etc.

Never, never quote square footage.

Your county tax assessor should have a record of the tax appraisal which usually lists that sort of information.

If you retrieve that type of information, make sure you have copies of the information.

Make statements like, “I haven’t calculated the square footage, but here is the information from ________.” Would you like to measure and calculate the size for yourself?”

Recommend the use of third parties to help minimize the risk involved in:

- Home Inspections
- If the buyer refuses a home inspection have them sign, acknowledging it is their choice
- Lenders
- Appraisers (usually the choice of the lender)
- Record keeping offices at your local government
- Boundary survey inspections
- Always provide the buyer with a copy of the preliminary title commitment and have them acknowledge it
- Be sure to provide a list of third party providers so the buyer may choose their own provider
- Make sure the businesses on your list are bonded and insured – ask them if they have E & O insurance
- Consider making a pre-prepared brochure listing various outside service providers
- Always disclose material facts
- Never disclose confidential information

○ What the seller might be willing to accept for price and terms
° Seller’s motivation for selling
° You may disclose such information only if the seller gives you permission which you must have in writing
° You will usually get the question, “What do you think I should offer?” Answer this way. “The asking price is _____; what would you like to offer?”
° What the buyer might be willing to pay
° Remember the buyer’s financial information is a matter of privacy
° Attend all meetings with the financing person, including loan application
° You will know exactly what is being said to your buyer
° It is then easier to get information to share
° Get the buyer’s permission in writing to share financing information/problems with the seller

Never conceal adverse material facts

☑ You would be subject to allegations of misrepresentation and fraud, or worse
☑ Don’t be afraid to walk away from a listing if the seller wants you to conceal material facts

Handle “stigmatized” properties carefully

☑ Discuss the “stigma” with the seller
☑ Be sure you report facts, not rumor
☑ Shift the burden of discovery to the buyer
☑ Determine if the stigma materially affects the value of livability of the property (all your buyers won’t be named “Munster” and not care about bats living in the attic!)
☑ Remember you cannot disclose the previous occupancy/ownership of a property by a person afflicted with HIV/AIDS (violation of Fair Housing laws)
Area Four Documentation

Set up a file for each transaction and document everything!

Location, location, location is important in real estate; Disclosure, disclosure, disclosure is important in a real estate transaction; Documentation, documentation, documentation is the most important item in a real estate file!

Create checklists

☐ Make them standard for all files; include:
☐ All listing/purchase agreements
☐ All disclosures
☐ Develop a “To Do” list for all transactions
☐ Copies of all correspondence
☐ Telephone logs
☐ Meeting notes
☐ Keep track of all showings and keep a copy
☐ Helpful if fair housing questions arise

Follow written office policy and standard procedures on all transactions

Confirm all conversations in writing

☐ Ask the seller/buyer for written confirmation of conversations and other information that is imparted orally
☐ Make sure they confirm they got your confirmation and read it
☐ Does not have to be formal letter, but could take the form of a memo or sent via e-mail – remember to place a copy in the file
☐ Never alter state-approved or office standard forms to suit a particular transaction
☐ The meaning and intent of the form could be changed and misconstrued by seller or buyer
☐ If you feel it necessary to deviate from the norm, always get the approval of your managing broker and, of course, keep written documentation
☐ Be careful about verbiage you write on forms; make sure the meaning is clear and cannot be misinterpreted; if not sure, have your broker review

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Develop standard letters for informing buyer/seller of actions being taken on their behalf – the list is endless!

- Open House policy
- Lock box policy
- Yard sign placement
- Proposed advertising/Flyers
- Information boxes
- Ask for “lock-in” confirmation from lender
- Always get lenders’ decision in writing

Discuss the “fine” print

- Go through pre-printed forms line-by-line
- Remember you are used to the forms, the client is not

Document all sources of information; especially from third parties!
Area Five: Damage Control

Should misunderstandings arise, there are actions you can take that will help to mitigate problems

- Notify your broker immediately
- Review the documentation in your file to see if the “potential” of the problem had been discussed

Always respond quickly

- The faster the better
- Respond even if you don’t have answers
- Don’t be afraid to say, “I don’t know, but I’ll get back to you.”
- If you say you will call back in one hour, call back in one hour – not one hour and fifteen minutes – even if you have nothing to report you can say: “I said I would call back in an hour, and I’m calling to let you know that I am still working on this but don’t have an answer yet.”
- The worst thing you can do is delay – it shows lack of interest in the problem

Learn how to solve problems – offer solutions

- Always be proactive and positive
- Your client will be emotional when making a complaint
- Be rational in your response
- You cannot be a good problem solver if you are emotional or react badly to a problem
- Break the complaint into smaller pieces and solve each piece
- Be empathetic
- A wise broker once said: “When faced with a problem or complaint, roll over and play like a puppy dog, no one kicks a puppy dog when it’s on its back!”
  Then make sure you take positive action!

In all you do in real estate, you should be prepared for all eventualities. As it is said, “Anything can happen.” We want you to be ready for that “anything” and to be able to make sure that the last handshake in your transaction holds!
Thank you for being a McKissock customer!

Please fill out the evaluation form. We value your input!

We hope you enjoyed the course, and if you have any questions, please don’t hesitate to call us at 1-800-328-2008.