

THE PAPERLESS REAL ESTATE TRANSACTION:

Understanding the Risks

By Lois Kadosh, MA

Throughout the country, real estate agents are celebrating the wonders of sending contracts and disclosures to their clients electronically. The paperless transaction has become an admirable and reachable goal with the unintended side effect of increasing risks in real estate transactions. In my opinion, this is an area that is ripe for litigation. Let me explain ...

All manner of real estate contracts are now accessible online. By subscribing to such a service, licensees may easily fill out the forms electronically and then send these documents to their clients – buyers and/or sellers – to sign online. Some of these systems even have tutor programs to help agents in completing the forms.

During a deposition, plaintiff attorneys often ask licensees how much time was spent with their clients discussing the contracts at hand prior to the execution of the documents to determine the client's degree of comprehension before signing on the dotted line. I venture to say that it takes a minimum of one hour for a fast talking agent to carefully review the contracts with the client prior to signing. On the other hand, when plaintiff/clients are asked the same question, many will say that no time was spent in discussion since they were instructed to sign and initial as indicated and return the fully executed contracts to the agent. It is all too common for a busy real estate agent to do business in this manner.

Typically, disclosures regarding a particular property are scanned by the listing agent and sent to the buyer's agent prior to or after an offer has been accepted by the seller – custom varies with respect to when these documents are sent to buyers. In turn, the buyer's agent forwards the disclosures to his or her clients.

In theory, this sounds wonderful since the disclosures are out there ready for review by client and agent. In reality, many agents do not carefully scrutinize these documents and discuss them with their clients.

Who has the time to read them? Pages upon pages – sometimes hundreds of pages, are sent to the agents for their perusal. Listing agents have done their job with respect to buyers who are not their clients once they have delivered mandatory disclosures as well as any additional disclosures that are deemed material to the transaction to the buyer's agent.

Now it is up to the buyer's agent or dual agent to advise his or her clients regarding the details and importance of these disclosures. It is very tempting for agents to send contracts and

documents to their clients with the suggestion that the clients contact them if they have any concerns prior to signing and returning the documents electronically.

In fact, defense attorneys often argue that if the client does not understand the disclosures and/or documents the client has an obligation to contact his or her agent with any questions. In my opinion, this does not relieve the agent of his or her fiduciary duty to the client. It is not realistic to think that buyers and sellers know the pertinent questions to ask. Real estate licensees get paid to help buyers and sellers sort out all the information that is delivered to them regarding the property.

This does not mean that licensees are expected to advise their clients outside of their expertise as real estate professionals. It does mean that they should point out any material facts and red flags within their expertise as licensees and advise clients accordingly.

As fiduciaries, real estate licensees have a duty to be looking out for the best interests of their clients. With respect to the terms and conditions within the contracts that their clients sign as well as the acceptance of disclosures, principals have a right to expect their agents to discuss and explain the details and possible ramifications of what they will be signing. The goal of the fiduciary is to help the client make informed decisions.

What should licensees do to manage their risks in the age of the paperless transaction? First and foremost, agents should maintain copies of all correspondence sent to clients, customers and third parties pertaining to the transaction. Here are some additional suggestions:

1. Agents should always include a cover sheet that details what documents are being sent as well as advising clients to carefully scrutinize everything received.
2. With respect to clients, licensees should always follow up with a telephone call after sending documents and/or contracts to clients to review with them.
3. Agents should then send written confirmation to clients reiterating the amount of time spent on the telephone as well as detailing the documents/contracts discussed and request they call if there are any more questions or concerns.
4. Agents should document in writing when clients refuse to spend the time to review pertinent documents/contracts and send a copy to the client.
5. Brokers should formally set up a system that demonstrates that their agents are fulfilling their fiduciary duties.

PRACTICING FULL DISCLOSURE: A Real Estate Licensee Alert

By Lois Kadosh, GRI

You cannot practice real estate in a vacuum; knowledge of real estate laws, codes of ethics, agency relationships and disclosures all merge together to give you the basis from which you may effectively practice your craft and continue to build your competence and confidence.

Licensees must not forget that a major part of their job is to advise clients within their expertise as real estate professionals. These clients, buyers and sellers alike, have a right to expect their agents to help them make informed decisions regarding the sale and/or purchase of real estate.

In practicing full-disclosure it is not enough to just hand your buyer-clients and/or seller-clients written disclosures and property inspection reports without a discussion about what you are giving them. Have you fulfilled your fiduciary duty by giving your clients these disclosures and urging them to read them? No, as illustrated in the following tale of woe.

In Practice: Let's begin with the premise that Rita is just seconds away from calling her attorney... Here are the facts:

The 45-year old subject property is situated on the side of a hill with a beautiful view of the city. At the Sunday Open House listing agent John puts all property disclosures, including an engineer's report, next to the flyers for buyers to read.

Rita, a prospective buyer who is new to the area, falls in love with the house and asks John to write up an offer for her. Needless to say, he is delighted.

Soon after escrow closes, Rita learns from a neighbor that a house that used to sit on the vacant lot next door to her property slipped down the hillside during the rainy season several years ago. Rita immediately calls her broker to get the facts. John confirms the story and says it was all in the reports that were available during the open house. Didn't she read them?

Rita hires an engineer to check out her property and during the inspection the engineer points out cracks that are just starting to emerge throughout the newly painted house. In short, she learns that her new home may be in harm's way and that it will cost a sizable amount of money to stabilize the property.

She asks John what he and the seller are planning to do about this problem. He stands by his original premise: All disclosures were readily available for review; Rita just hadn't taken the time to read them.

Typically, in cases like this, attorneys will analyze the manner in which agents handle themselves during a particular transaction. Specifically, attorneys will ascertain the licensee's legal and ethical duties toward the client and then determine whether or not he or she fulfilled those obligations within the standard of care.

Let's return to John's situation. First of all, was he operating within the standard of care? In other words, was he working within the framework of the day-to-day practice of real estate, codes of ethical conduct, relevant real estate laws, including educational and licensing provisions? Second, since John was acting as a dual agent in this transaction, did he meet his fiduciary duties to both buyer and seller?

To answer these two questions, keep in mind that a real estate licensee's obligations grow out of the kind of relationship he or she has with the buyer and/or seller. For example, a buyer's agent would owe the utmost loyalty as a fiduciary to the buyer. On the other hand, this licensee's duty to the seller would be limited to being honest and fair. Now, as a dual agent, John owed the utmost loyalty to both the buyer and seller.

Was John looking out for Rita's best interests, that is, helping her make an informed decision whether or not to purchase his listing? No.

Should he have volunteered the facts he knew regarding the property and the neighborhood before Rita made her decision to buy? Yes.

Did John fulfill his agency obligations by leaving disclosures and reports at the property without directing Rita's attention to the importance of these reports once Rita became his client? No. It is hopefully obvious that John is facing some legal problems.

In the everyday world of real estate, we are constantly challenged to do the right thing and it is up to each of us to land on the right side of the law every time!