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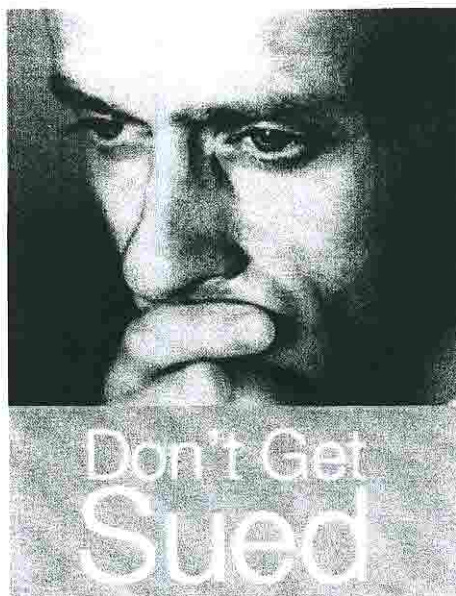
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*Real estate professionals are getting sued today more than ever. Here are some tips for protecting yourself.*

Properties aren't always what they seem, as a South Florida buyer recently learned after purchasing a two-story home that was listed on the MLS system as "CBS/frame-stucco/mixed." Assuming that meant the first floor was concrete block and the second floor was frame-wood stucco, the buyer made an offer, signed a contract and closed on the home.

After moving in, the buyer learned that his assumptions were incorrect, and that the home was primarily frame-wood stucco. Even though he had a home inspection completed prior to buying the home — and even though the report specifically stated the actual makeup of the home — the buyer slapped both the seller and the listing agent with lawsuits.

At the heart of the issue was an MLS listing that incorrectly characterized the home's construction, a buyer who didn't thoroughly read through his home inspection report and a listing agent who submitted erroneous information to that MLS system. Because the latter included an indemnification clause stating that the seller must supply accurate information, the associate was

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released from the lawsuit. However, the seller countered that he never saw the MLS data, which is often compiled and submitted by the real estate licensee after the listing agreement is signed.

The lawsuit was long and drawn out and eventually ended with a negotiated settlement between the associate and the seller (based on the seller's claim that he didn't see the MLS data) and another negotiated settlement between the buyer and the seller.

Such cases abound in today's real estate industry, where accurate descriptions, meticulous record keeping and diligent follow-up, along with fact checking, are absolutely essential not only to success, but also to proper risk management.

For example, it's extremely important that when taking listings, real estate associates describe the property as accurately as possible. As a result of this specific case, the Palm Beach Board of Realtors began requiring that data sheets be signed by the sellers prior to the property's being entered in the MLS system.

By and large, groups like the National Association of Realtors have found that buyers file the majority of lawsuits against real estate associates and that the bulk of those suits concern fraud or misrepresentation regarding the property. That includes physical property conditions and surrounding issues such as zoning, proposed development and highways — all of which can affect a property's value.

To avoid becoming the defendant in one of these lawsuits, you'll need to employ effective risk-management tools in your day-to-day business. Here are a few key points:

### **Shift Your Risk**

When I give orientation speeches to new associates, I discuss one of the cheapest forms of insurance available in the business: risk shifting. Simply put, an associate needs to know when to say, "You need to get that information or representation from someone else." I give the example of the associate who, when talking to a prospective buyer, is asked, "Does this house have termites?" Most professional real estate associates would answer with, "I don't know. You'll have to get a professional inspection company to conduct an inspection and answer that question." By doing so, the associate has effectively shifted the risk to the termite inspection company and not ventured his or her own opinion.

#### **Risky Business**

If managing risk and dealing with lawsuits hasn't crossed your mind much as a real estate licensee, you may want to rethink your position. Here's just a sampling of the issues that could get you into hot water, according to an online listing of National Association of Realtors "Legal



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Sign Ordinances/  
Restrictions  
Stigmatized Property  
Trademark Infringement  
Vicarious Liability

Take this concept and apply it to every aspect of the transaction, particularly when a buyer asks for information about the property of which you're not 100 percent sure. When those questions come up, ask yourself: "Am I truly the best one to give this information, or should it come from someone else?" Too many associates don't risk-shift when they should, and it ends up costing them both money and time down the road.

### **Disclose, Disclose, Disclose**

Selling a property "as is" doesn't mean you're off the hook from a legal standpoint. Based on historical court cases, you still may incur liability if it can be proven that the seller knew, or should have known, about a latent or hidden defect in or around the

home.

And while Florida state law doesn't require sellers to fill out a property disclosure form, many brokerages have developed their own. These forms can be invaluable when used properly. Property disclosure forms should be filled out by the seller and given to the buyer before an offer is presented, for example, and signed by the buyer, acknowledging receipt of the form.

### **Don't Rely Solely on Disclaimers**

Information today is conveyed directly to the buying public by way of various Internet advertising methods. Even though you have a disclaimer on your listing sheet concerning the reliability of the information, potential buyers aren't always reading that information. There are plenty of lawyers out there who are willing to take up the gauntlet for these buyers in order to bring an action against listing associates who in some fashion — whether intentionally or not — misrepresent the property's condition.

Make sure that any representations you make about the property are put in writing in the contract. Don't rely on people's memory. When you're in court, memories fade or improve depending on the perspective.

### **Consider Mandatory Binding Arbitration**

Recently, I was involved in a dispute between a seller and buyers over the legal description of the property and what it included. They couldn't resolve it, so it went to mediation and resulted in the seller's retaining a small portion of the deposit and the buyers' getting the majority of their deposit back.

In this case — and especially in cases involving deposits — arbitration can work very well. Both parties realized that litigating the issue would be very expensive and time consuming (it could have taken years to resolve in our clogged court system). Through the mandatory binding arbitration process, the issue was resolved within four hours.

A mandatory binding arbitration addendum can be included with the contract. Currently, the FAR Contract has provisions for mandatory binding arbitration on the buyer and seller, except for disputes involving deposits. If the contract form you use doesn't require arbitration, a provision can be added by an addendum.

### **Watch Your Square Footage**

No one likes to make a purchase, only to find out that what he or she has ended up with is smaller than what was promised. Because of this, the square footage of properties has been an area of contention for years, mainly the question of whether the MLS system should require listing of square footages. The Palm Beach Board of Realtors, for example, has debated the issue, and



as its counsel, I've recommended that it not be required that the field for square footage on the MLS data sheet be filled out. That's because there are various methods by which the square footage of a home can be calculated — by living area, by total square footage under roof, by total area (including porches, decks, etc.). We've seen a lot of complaints from buyers who think they're getting a certain square footage of living area, only to discover, after the fact, that they don't have as much as they thought.

### **Don't Go It Alone**

As property prices, legal complexities and buyers' awareness of legal issues have all increased significantly, the homebuying process has become a lot more complicated than it was when I first got into the business in 1977. To deal with this, associates must build a team of professionals that at a minimum includes inspectors (without showing favoritism toward one over another), a real estate attorney and a mortgage professional to assist with financing. The fear, of course, is that the more people involved, the more likely something will go wrong. But I've found that it's just the opposite.

The more people on your team, the more likely the problems that are particular to a specialty are going to be addressed. You can't be all things to the buyer.

It's not enough to know how to fill out the contract form anymore because the signing of the contract signals the fact that your job is just beginning. The time to make sure everything is organized and running smoothly is the period between contract and closing, and things can fall apart pretty quickly if you don't keep a handle on all aspects of the transaction.

*Gary J. Nagle of the Law Offices of Gary J. Nagle in Juno Beach, has been a practicing real property attorney since 1977. He specializes in residential transactions and currently represents both the Jupiter-Tequesta-Hobe Sound Association of Realtors and the Palm Beach Board of Realtors. Since 1984, Nagle has served on the State of Florida's Realtor/Attorney Joint Committee, where he has held positions as chairman and vice chairman.*

### **Staying on the Right Side of the Law**



In Florida, about 75 percent of all lawsuits against real estate salespeople are filed by buyers. Failure to disclose significant facts about a property is right at the top of the list of issues over which lawsuits are brought. If the seller leaves town after the closing, it's usually the real estate associate and broker who become the targets of a lawsuit.

That means it's vital for Florida real estate

professionals to be sure they stay on the right side of the law. Here are some timely suggestions from attorney Joe R. Boyd, partner, Boyd, Lindsey & Sliger, P.A., in Tallahassee. Boyd, who is board certified in real estate law, has been general counsel to the Tallahassee Board of Realtors for 28 years, and is also special counsel to the Northeast Florida (Jacksonville) Association of Realtors.

*Q. What are the most common types of lawsuits against real estate professionals?*

A. The most frequently filed lawsuits involve disclosures, agency issues, flooding and traffic problems, personal property and false representation.

*Q. Are lawsuits against professionals on the rise?*

A. In 1986, the Johnson vs. Davis decision by the Florida Supreme Court shifted the burden to sellers and real estate professionals to disclose any facts affecting the value of the property that buyers couldn't reasonably learn on their own. Since then, lawsuits and threats of lawsuits have been increasing. We also live in a society that often turns to the courts to settle disputes.

*Q. How often do real estate laws change?*

A. The laws change every year. Therefore, real estate professionals need to keep up with the changes in state and federal laws, as well as Florida's rules and regulations. You may be familiar with the legal requirements of the 1990s, but if you don't know the current laws, you may wind up getting sued.

*Q. What are the alternatives to a lawsuit?*

A. The cost of litigation keeps rising, which reduces the desire of buyers and sellers to file lawsuits. Also, there are easier, faster and cheaper ways to resolve disputes.

The first is mediation, where a mediator tries to negotiate a resolution. Arbitration involves an attorney or other trained facilitator who hears both sides of the matter and makes a decision. The third approach is called "med-arb," in which the two parties try to resolve the matter themselves with an arbitrator present. If they fail to reach an agreement, the arbitrator decides the matter.

*Q. How can real estate professionals avoid the most common lawsuits, such as failure to disclose?*

A. Realtors may be tired of hearing about the importance of disclosure, but they need to continually disclose, disclose and disclose. If there's any doubt about whether or not to provide certain information to a buyer or seller, I suggest it be disclosed.



It's always a good idea to try to identify potential problems early in the transaction — and not ignore them. If there's a serious problem with the seller's property, you want to know before a contract is signed. Otherwise, you could be in a situation where the seller has the buyer's money and you wind up in the courtroom.

*Q. What if the home appears to have mold, a leaky roof or other major problem?*

A. A Realtor should ask the seller to get a home inspector or other professional involved as soon as possible to determine the nature and extent of the problem.

It's important to know that a Realtor is not a guarantor of the condition of the property. A buyer who's concerned about such an issue can usually buy a home warranty or service contract, and the real estate professional should be sensitive to those needs.

*Q. How should Realtors handle the issue of agency?*

A. Regardless of the requirements set by the Florida Real Estate Commission (FREC), all real estate professionals need to know who owns their loyalty, as well as their duties and obligations to that person. And every other party to the transaction needs to know the exact same thing. It's when the parties don't know who is being represented — or if they each understand it differently — that misunderstandings arise that have the potential to become lawsuits.

*Q. How can professionals avoid lawsuits over personal property?*

A. These types of disputes occur when the buyer and seller have different ideas about what exactly is included in the sale. Many problems arise because a Realtor says some item is included in the sale, when actually it isn't. It can be large items, such as the washer and dryer, or a seemingly small thing like the remote control to the garage door opener. The best advice is that if you don't know with absolute certainty that something's included, then don't say anything.

*Q. What about false representation?*

A. These lawsuits occur when a real estate professional says something that turns out not to be true. One situation in which this commonly happens is when a buyer asks questions about personal property, such as the age of the refrigerator or dishwasher. In any transaction, you should make sure that you have the facts and convey the facts, and only the facts, to your customers. Assume nothing.

*Q. What else can you do to minimize lawsuits?*

A. One suggestion is to specialize in one particular area of real estate. If you sell condos, don't try to sell acreage; if you sell beachfront homes, don't sell shopping centers. Selling very different concepts can quickly lead to trouble. For instance, if you sell beachfront homes, you need to know about windstorm insurance, and if you sell retail centers, you need to know about transferable development rights and curb cuts. If you're an expert in one field, you probably aren't in another.

*Q. What final tips do you have to help Realtors stay on the right side of the law?*

A. It's important to document what you do, especially if you sense that a problem might occur in the future. For example, if you advise the buyer to order a roof inspection and he or she declines, you may want to have the buyer sign a statement documenting that decision. That statement could be invaluable if an unforeseen leaky roof were to result in a lawsuit.

*Richard Westlund is a Miami-based free-lance writer.*

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