

MINIMIZING RISKS IN REAL ESTATE TRANSACTIONS

By

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IMPORTANT DISCLAIMER

This presentation is based on my experiences as a real estate educator and expert witness/consultant and should not be construed as legal advice or all-inclusive. The information contained herein is not a substitute for legal advice. I am not an attorney.

- I will be providing you with some ideas and teaching tools to aid students in recognizing and managing risks.
- Based on experience, I believe it is crucial to include **Critical Thinking** and **Risk Management Awareness** in your course content.
- This will help keep your students out of the cross-hairs of litigation.

MY PROCESS AS AN EXPERT WITNESS/CONSULTANT

- My job – to determine if licensee(s) and/or the broker fell below the standard of care.

Standard of Care – accepted manner in which the average licensee performs his/her duties within the parameters of the day-to-day practice of real estate with respect to codes of ethical conduct, relevant real estate laws and Commissioner's regulations, including educational and licensing provisions.

- I begin by reviewing all existing contracts, disclosures and reports.
- My overall aim – to determine if the licensee(s) and/or broker were looking out for the best interests of their clients as well as being fair and honest with their customers.
- **Key Questions**
 - Who was the client and who was the customer?
 - Was this a dual agency situation?
 - Was the broker properly supervising?

- I review all available documents, such as:
 - Disclosure Regarding Agency Relationships
 - TDS – Transfer Disclosure Statement
 - SPQ – Seller Property Questionnaire
 - AVID – Agent Visual Inspection Disclosure
 - RPA – Residential Purchase Agreement
 - RLA – Residential Listing Agreement
 - Natural Hazards Report
 - Home Inspection
 - Termite Report
 - Condo documents

- What am I looking for?
 - Material facts
 - Red flags
 - Inconsistencies
 - Missing mandatory documents
 - Undisclosed dual agency

- Examples:
 - Limited and/or further inspections in Termite Report
 - Suggestions for other inspectors, such as drainage specialist, noted in Home Inspection.

THE LISTING DISCLOSURES

- All mandatory, regional and local disclosures should be included.
 - Past and present inspections if available.
 - Condo documents, including minutes.
- The Agent's Inspection Disclosure/AVID.
- **Question** – What does the Listing Agent do if the Seller partially discloses and/or omits known material facts and/or red flags in the TDS?

BUYERS & DISCLOSURES

- Regional differences regarding when Buyers receive the Disclosures - before or after the offer is accepted.
- Sellers should be advised to be thorough and honest.
- Buyers and their Agent should review and discuss all the Disclosures before removing any or all Contingencies.

THE BUYER'S AGENT

- Did the Agent read available documents and disclosures?
- Were any red flags and/or material facts discovered and discussed with the Buyer?
- When was the Agent's Disclosure/AVID completed?
- Was the Agent's Disclosure/AVID thorough and factual?

SOME COMMON PITFALLS

- Dual Agency is a minefield for litigation.
- A house is marketed as totally remodeled and updated with permits. Both the TDS and Listing Agent's Disclosure contain no mention of reports, finals, etc.
 - None of this is pointed out to the Buyer by the Selling Agent.
 - After escrow closes, the rains come and the house leaks like a sieve.

- Repairs – Who did the work?
- Regarding condos, the Purchase Agreement states that the Seller will provide 12 months of minutes. Oftentimes, minutes are missing.
 - The Selling Agent does not read and note any red flags in the minutes provided and does not ask for the missing ones.
 - The Buyer is left in the dark.

REACHING AN OPINION

- In addition to the documents, I review all Depositions and Exhibits.
- Lastly, I prepare a Timeline based on everything I have discovered to help connect the dots.
- I discuss the strengths and weaknesses of the case with the attorney.
- I offer suggestions on how to move forward.

RESOURCES

- N.A.R. Code of Ethics
- C.A.R. Q&A's
- DRE website, Bulletins and PowerPoint presentations
- Agent and Broker websites
- MLS printouts of subject property

TRENDS & CONCERNS

- **Paperless Transactions** - Electronic programs help Listing Agents make disclosures easily available. Typically, accessed as part of the MLS Listings.
 - HomeLight Listing Management – www.disclosures.io
 - Glide – www.glide.com
- Managing risks in a paperless environment:
 - Advise clients, in writing, to read everything.
 - Follow up with a telephone call to review what was sent.
 - Send written confirmation detailing the call. Questions?
 - Document in writing if clients refuse to review documents.
 - Brokers should have formal system to supervise agents.

SUGGESTED TEACHING TECHNIQUES

- The exercises I developed lend themselves to group discussion.
- With your background and expertise, I am confident you will be developing your own exercises for your students.
- The Appendix includes some additional exercises I have used teaching Critical Thinking in Real Estate Practice.

SAMPLE EXERCISE

- The Listing Agent sends you, the Buyer's Agent, 125 pages of disclosures and advisories by email two days before the removal of your client's Inspection contingency.
 - Carefully detail your course of action, including any advice you would offer your client.

ANOTHER EXERCISE

- Gerry calls Agent Maria to set up a listing appt. after he and his wife decide to get a divorce. They want to sell ASAP because it is part of their community property. During the appt., Maria gives them all the “paperwork” as well as a realistic asking price. They plan to call her in a few days to list the house.
 - Gerry stops by Maria’s office to sign the Listing Agreement. Does Maria have a valid listing? Explain.

CLIENT VS. CUSTOMER

- **Who** is my client?
- **Who** is my customer?
- **What** are the rights of the client?
- **What** are the rights of the customer?
- **What** actions must I take to protect these rights?
- **What** actions must I take to protect myself?
- **Where/What** are the risks in this transaction?

LISTING INFORMATION GUIDE

- Excerpted from a booklet published by C.A.R. in 1984 in response to Easton liability.
- **Five-Step Procedure** to help Licensees comply:
 1. Facts and Assumptions
 2. Inquire
 3. Inspect
 4. Point Out
 5. Recommend

IN CONCLUSION

- Remember the following acronym during the day-to-day practice of real estate for yourselves and your students:

ARM

- A – anticipate risks
- R – recognize risks
- M- manage risks

COMMENTS & QUESTIONS

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