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6 best practices to help you avoid real estate lawsuits

Know how to respond to common questions

BY BERNICE ROSS

Hopefully, you have never been involved in any real estate litigation. If you want to keep the attorneys at bay, here is a list of behaviors to avoid -- as well as some best practices that may keep you out of trouble.

Even if you have adequate errors and omissions insurance coverage, being a defendant in a lawsuit can have a huge negative impact on both you and your business. Being deposed by a superstar litigator is your worst nightmare. Everything you say can be twisted and turned against you in a legal dispute.

Making matters even worse, you can do everything right and still end up in litigation. Sometimes you're just in the wrong place at the wrong time.

For example, there was one case where the seller failed to make a major disclosure about the property. The seller went bankrupt, so the plaintiff's attorney turned to the agents and the other people involved in the transaction. When the attorney discovered that the painting contractor had errors and omissions insurance, the contractor was named as a defendant as well.

Six best practices that may help you avoid a lawsuit

Below you will find six common sources of real estate litigation and six strategies that could help you to avoid being sued. Keep in mind I'm not an attorney and this should not be considered legal advice, and that people can file a lawsuit even if you didn't break the law -- for legal advice you should hire an attorney.

1. "What's that spot on the ceiling?"

I had an experience in which the brown spot on the ceiling turned out to be caused by a beehive with hundreds of pounds of honey. If you don't know the source you shouldn't speculate.

Best practice: Avoid diagnosing any issue regarding the condition of the property if you don't know the exact cause. Instead say, "I don't know what caused the stain on the ceiling. If you are interested in the property, then it's extremely important to hire a competent roofer and physical inspection service to thoroughly investigate the condition of the property."

In terms of what you put on your mandated written disclosure documents, avoid diagnosing there as well unless you can identify the condition with certainty. Instead, describe what you see:

Examples: "Brown stain noted on living room ceiling," and "Buckled sidewalk noted adjacent to ficus tree in front yard."

That said, it is important to disclose known facts about the condition of the property, as typically such disclosures are mandated by law. When in doubt, disclose. To protect yourself, it's smart to have your own inspector go through the property and to note where there are problems. You can give prospective buyers a copy of the report, and you should also make a note on the report telling prospective buyers that they should obtain their own inspections to verify the condition of the property at the time of sale.

2. "We don't need to disclose that inspection report."

Sellers often don't want to disclose previous inspection reports, especially if it caused a previous sale to fall apart. Failure to disclose these reports is always a bad idea.

Here's an example: A geological inspection on a house revealed that it could collapse during an earthquake. The first set of buyers walked away from the property. The listing agent failed to disclose the geological report to the second set of buyers. The house collapsed during the Northridge Earthquake and two people died. Needless to say, the settlement was several million dollars.

Best practice: When you have a transaction that falls apart due to the physical inspection, it's smart to disclose it to the buyer. If the seller won't disclose the report, walk away from the listing. It's simply not worth the risk.

3. "Where's the property line?"

While the seller may swear under oath that they know exactly where the property line is, that may not be the case. Example: The sellers said the fence was the property line, though they were actually off by one foot. That mistake cost them over \$200,000.

Best practice: When a buyer asks about where the property line is, say, "If you want the exact location of the property lines, you should hire a surveyor."

4. "How much will the seller really take for the property?"

Example: A luxury agent had a listing that was priced at \$2.4 million. When a journalist asked her at what price she believed the property would actually sell, she said \$1.8 million. When the seller read this in the paper a few days later, he filed a lawsuit for an unauthorized price reduction. The judgment was for over \$2 million.

Best practice: When a buyer asks you how much a seller will take for the property, there's only one correct answer: "The only way to know for sure is to write an offer."

In fact, you can't even represent that the seller will sell for the asking price, since in a multiple-offer situation the property could sell for over asking.

5. "Is this a good family neighborhood that has a low crime rate?"

You may believe that a property is located in a "great neighborhood," but there is subjectivity in that phrase, and neighborhoods are constantly changing.

Best practice: When buyers ask you about the characteristics of the neighborhood, such as crime, ethnic composition of the residents, and families who live in the area, provide the buyer with resources, such as links to online census, crime, and school and demographics data where they can study this information for themselves. You do not want to run afoul of Fair Housing laws by providing inaccurate information or appearing to steer buyers to or away from a particular neighborhood.

6. "It's a new property -- do I really need a physical inspection?"

If there was ever a time to have a thorough physical inspection, it's when a buyer purchases a new property. For example, in one of the new homes that we purchased, the plumbers hooked up the hot water to one of the toilets -- talk about being steamed!

Best practice: On all new properties, make sure that the buyer does a thorough physical inspection and walk-through prior to closing. The buyer has leverage before the transaction closes. Later, some builders aren't very good at following up on post-close problems.

Ultimately, your first line of defense is to always follow the Golden Rule: Never say anything negative about anyone, never represent what your buyer or seller will do, and never guess at the condition of a property.

Instead, have your clients use trained professionals to evaluate the property. Also, for additional peace of mind, ask the seller to consider purchasing a home warranty policy for buyers -- this selection process has its own checklist.

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