

Disclosure issues

REALTORS® have to be familiar with a wide range of laws, but one of the most complicated areas involves disclosing property condition issues. For a listing agent, deciding whether something must be disclosed to a prospective buyer is not always easy. This is especially complicated because listing agents have greater disclosure obligations to purchasers than their seller clients have to purchasers.



Q: A property owner died in his home and was not discovered for several days. As a result, the property had a very bad odor. The owner's heirs, who were selling the property, hired a company to remediate the issue but the odor came back after several days. A new remediator attempted to fix the problem but the odor again came back. This process was repeated a third time but was unsuccessful.

During the time period of these remediation attempts, a purchase contract was entered into and a home inspection was completed. The inspection did not note any odor and the purchaser did not say anything about the smell.

As the listing agent, do I have to disclose the issue?

A: This is a sad situation that raises serious disclosure issues.

A listing agent must disclose to prospective purchasers all "material adverse facts pertaining to the physical condition of the property which are actually known" by the listing agent. Something is "material" if it could affect the decision of a reasonable person as to whether to purchase.

Reasonable people could disagree, but I believe the listing agent must disclose the issue to the purchaser. It would be difficult to argue that the odor couldn't affect the decision of a reasonable person to purchase ("material"); it pertains to the physical condition of the property – something is causing the odor; it is adverse;

and the agent has actual knowledge of the issue.

Q: Isn't there a specific law that exempts disclosing that someone has died in the property?

A: Section 55-524 of the Code of Virginia states:

"...no cause of action shall arise against an owner or a real estate licensee for failure to disclose that an occupant of the subject real property...was afflicted with human immunodeficiency virus (HIV) or that the real property was the site of:

- 1. An act or occurrence which had no effect on the physical structure of the real property, its physical environment, or the improvements located thereon; or*
- 2. A homicide, felony, or suicide."*

Normally, there is no requirement to disclose a previous owner's death to a prospective purchaser. However, in this case the death did have an effect on the home's physical structure and environment. Therefore, I believe it is discloseable.

Q: Doesn't it matter that the buyer ordered an inspection and nothing was noted about the issue?

A: Just because a buyer doesn't discover a material adverse fact doesn't mean the listing agent doesn't have to disclose it.

Q: What if the sellers forbid me from disclosing this issue?

A: Again, reasonable people can disagree as to whether this is a material adverse fact pertaining to the physical condition of the property. However, if the listing agent believes it is, he must disclose it despite the sellers' command.

Generally, listing agents have a duty of confidentiality to their clients and they may not disclose certain information without client permission. However, the duty of confidentiality does not apply when the listing agent is compelled by law to make a disclosure. The law requires listing agents to disclose material adverse facts pertaining to the physical condition of the property regardless of their clients' direction.

Q: If a qualified professional states he eliminated the odor on the third try, would the listing agent have to disclose anything related to the previous remediation attempts?

A: Listing agents must disclose existing material adverse facts, and not repair or remediation history, unless that history itself suggests an ongoing problem.

For example, if a qualified contractor repairs a roof leak and no further leaks occur there is nothing to disclose. However, if the roof continues to leak even after multiple repairs, then the repair history is relevant and requires a disclosure.

In this case the problem keeps coming back, so the remediation history suggests an ongoing problem that would likely have to be

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disclosed. That being said, if the problem were actually corrected by a qualified professional then no disclosure would have to be made.

Q: In discussing this situation with several REALTORS®, one said that he tells his sellers not to tell him about these things so he doesn't have to disclose them to purchasers. Should REALTORS® tell clients not to tell them problems with the property so they don't have to disclose them?

A: This is an age-old problem. Yes, the listing agent has greater disclosure obligations than does the seller, and it could potentially be an advantage for the seller to use a listing agent who knows nothing. However, listing agents should never counsel sellers to keep property condition issues to themselves lest they be passed on to the buyer. When the buyer ultimately discovers the problem, he'll never believe you didn't know. Imagine yourself on the witness stand trying to convince the judge you were ignorant after you confess to urging the seller not to tell you anything so you could keep the buyer in the dark. Not going to be a pretty picture.

The course that makes the most sense for both seller and listing firm is either to (i) address the problem up front – fix it; or (ii) disclose it and adjust the buyer's expectations accordingly. Anything else courts complaints, suits, and very unhappy consumers. ●

QUICK REVIEW

What are material adverse facts pertaining to the physical condition of the property? Also, when does a licensee actually "know" something for disclosure purposes?

The Code of Virginia obligates listing agents to disclose to prospective purchasers all "material adverse facts pertaining to the physical condition of the property which are actually known" by the listing agent.

Material. Something is material if it could affect the decision of a reasonable person about whether to buy.

Adverse fact. Contrast this with "defect." Consider the example of a residence having polybutylene pipes and fittings that haven't leaked yet. Their existence is probably an adverse fact (buyers will want to check it carefully, especially the fittings) but not a defect if everything is properly functioning now. In short, at least consider that "adverse fact" may be more broadly construed than "defect."

Pertaining to the physical condition of the property. The statute provides that "the term 'physical condition of the property' shall refer to the physical condition of the land and any improvements thereon, and shall not refer to: (i) matters outside the boundaries of the land or relating to adjacent or other properties in proximity thereto, (ii) matters relating to governmental land use regulations, and (iii) matters relating to highways or public streets" (section 54.1-2131B).

Actually known by the licensee. When do you actually know something? First, remember that only material issues are subject to the obligation to disclose. Remember that receipt of the entire inspection report probably imposes a duty to read it and determine what is and is not material. The report you receive may conflict with a prior report, and may be prepared by a "super-picky" inspector. With dueling inspectors, try to put the two together, which resolves a large majority of all conflicts. If the two still don't agree, a third opinion may be necessary.