

LEGAL LINES

Disclosure twists

A good practice is for the listing agent to disclose material adverse facts in writing on a separate document than the Residential Property Disclosure Statement.

By Blake Hegeman, *Deputy General Counsel, Virginia Association of REALTORS®*

My seller client told me that the roof is leaking in multiple places and the living room carpet is routinely soaked during rainstorms. Must he disclose this condition on the Residential Property Disclosure Statement?

This is a common question that confuses seller and listing agent disclosure obligations.

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.

Sellers have no duty to disclose material adverse facts pertaining to the physical condition of the property other than the limited disclosures in the Residential Property Disclosure Statement. However, the seller must not willfully conceal defects or induce a buyer to forgo an inspection through false means.

Because the seller has informed you, the listing agent, about the leaking roof and the resulting damage, they are now material adverse facts pertaining to the physical condition of the property that are known to you. Therefore, you must disclose the condition to buyer agents or unrepresented buyers. The seller, however, has no legal disclosure obligation to do so. A good practice is for the listing agent to disclose material adverse facts in writing on a separate document than the Residential Property Disclosure Statement. This will avoid confusion about who is making the disclosure. Again, the Residential Prop-

erty Disclosure Statement is a seller disclosure/disclaimer vehicle and is separate from a listing agent's disclosure obligations.

Do I have a duty to ask all my seller clients if their homes were previously used to manufacture methamphetamines?

No. The Code of Virginia requires the seller or landlord of residential real property who has actual knowledge that a property was previously used to manufacture methamphetamine and has not been cleaned up in accordance with state guidelines to provide a written disclosure of that fact to the prospective purchaser or tenant. (VAR Form 1500 provides a vehicle for that disclosure, and your local association or forms provider will likely have a similar form.)

Neither the Code of Virginia, nor the Code of Ethics, requires listing agents to discover if the house was previously used to manufacture methamphetamines.

In other words, you do not have to ask your clients about the home's methamphetamine history or contact the police department about every house you list. However, if your seller notified you that the home was an unremediated methamphetamine production facility or you discovered it by other means (e.g., through a newspaper article) you must advise the seller of his disclosure obligation. If your seller refuses to disclose, then you must disclose the information as a "material adverse facts pertaining to the physical condition of the property that is actually known" by you, the listing agent.

As a dual agent, am I required to disclose to the buyer "material adverse facts pertaining to the physical condition of the property of which I have actual knowledge"? My understanding is that as a dual agent I cannot advise either party on substantive transaction issues.

The dual agency statute states that the licensee cannot advise the buyer client as to the suitability of the property or its condition (other than to make any disclosures as required by law of any licensee representing a seller) and cannot advise either party as to what repairs of the property to make or request.

This would seem to relieve the dual agent of disclosure obligations — but it doesn't. Generally, listing agents have a duty of confidentiality to their clients and 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 seller agents to disclose material adverse facts pertaining to the physical condition of the property to prospective purchasers regardless of the agency model.

In fact, the statute section above specifically references this requirement: "other than to make any disclosures as required by law of any licensees representing a seller." In short, dual agents must still disclose material adverse facts pertaining to the physical condition of the property to buyers even though they represent both parties.

There was a mold problem that the seller fixed; are we required to disclose that?

The listing agent must disclose problems that exist but is not required to disclose repair or remediation history, unless that history itself suggests an ongoing problem. (For example, 10 roof patches in the past year would likely suggest that a bigger problem still exists.) It's not always easy to know whether a problem has been fixed, but if it has been, you need not disclose that fact.

The key with mold is to understand that the underlying moisture problem must be addressed successfully. If it has not, no amount of remediation of the mold itself will matter. If the moisture problem has been dealt with and the mold removed, there is nothing to disclose.



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