Six Risk Management Tips for Real Estate Brokers/Agents

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For the majority of our legal career, we have represented professionals and assisted them with navigating the stressful waters of an errors and omissions claim or lawsuit. Believe it or not, nearly all of our professional clients did nothing wrong, but they were sued because they are seen as the ones with "deep pockets." That simply means they have insurance. But having insurance does not make the experience any less stressful or traumatizing. Most professionals take litigation personally and view it as an attack on their character, judgment, and ethics. We cannot stop lawyers from filing lawsuits, but we can recognize the riskiest situations and prepare for them.

Below are our thoughts and observations as to the top six reasons a claim is made and how a real estate agent/broker can mitigate the risk.

1. New Agents and Lack of Experience

We suspect real estate courses do not teach someone how to be a real estate agent any more than law school teaches someone how to be a lawyer. On a similar note, licensure does not equal preparedness or competency. We bet seasoned brokers and agents cannot stand people saying their job is so easy that anyone can do it! In about half of the cases we have defended, the claim involved a new agent who has closed fewer than ten (10) transactions. Thus, in our opinion, agents are more likely to see a claim or lawsuit arise within this time frame. Perhaps, claims and lawsuits are part of the learning curve.

What can we do to lessen the likelihood of a claim against new agents (and really, all agents)?

> **First and foremost, training.** It may seem redundant, time consuming, or annoying to conduct weekly training meetings, but taking the time each week to remind agents of policies, procedures, rules, and regulations can make a world of difference. It does not have to be a long meeting, and it does not have to be a chore. The key is making it fresh and interesting and viewed as a social event that provides fun interaction with colleagues. Think of it as a standing "date" each week you look forward to, and ask yourself how you can get your agents excited to meet with you? Perhaps new topics each week presented in different formats by different people. Also consider breakfast one week, lunch another week, and happy hour another week. Offer incentives for participation and allow attendance by Zoom. The goal is to have all agents feel part of a team that they contribute to and want to be a part of.
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> **Second, oversight of the transaction.** As the broker, you are responsible for almost everything your agent does, even if you were not aware of the agent's actions, and even if you did not give the agent express permission to act: if the action concerns "real estate services," chances are the broker is liable too. Is there a transaction check list or flow chart? Is there someone reviewing documents to ensure every document is properly executed? Is there a clear understanding of what constitutes "real estate services" and what an agent is permitted – and not permitted – to do? If not, perhaps there should be.
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> **Third, documentation.** In today's electronic world, it is easy to send a quick text or email yet very difficult to transfer them to a hard file. In line with the oversight function, we recommend that, at the end of a transaction or client relationship, a file review for completeness be

conducted, ensuring the inclusion of any text messages and emails related to the transaction or client relationship. This not only helps the broker ensure everything required by the Real Estate Commission (MREC) is retained, but it also helps to ensure all documents are preserved in the event a claim is made or litigation arises.

2. The Pitfalls of the "Working with a Real Estate Broker" Form and Dual Agencies

In Mississippi, a Working with a Real Estate Broker Form is required and must be completed at the licensee's first contact with a client. The form must be signed and dated by all parties, and the licensee must retain a copy and give a copy to the client. It is important to understand the form and discuss it with the client so the client understands the agent's role in the transaction.

The real estate agent has a duty to act solely for the benefit of the principal in all matters connected with the agency. In matters involving a dual agency, the broker/agent must act with a heightened sense of duty and conduct to assure the agent serves both masters' interests fully, noting an agent may never act to the detriment of his principal. Yet, Mississippi allows a dual agency relationship. Dual agency situations are a high-risk endeavor.

Think about it. If you represent the seller, you owe a duty to act fully for the seller's benefit, which, more likely than not, means you want to get the highest price for the property. Meanwhile, if you represent the buyer, you owe a duty to act fully for the buyer's benefit, which, more likely than not, means you want to get the lowest price for the property. These two "allegiances" are in conflict. And, even if a broker has different agents for the buyer and seller, the broker has responsibility for everything the agents do. Under traditional agency law, knowledge and information acquired by an agent transacting the principal's business is imputed to the principal, even if not communicated by the agent to the principal. What a mess that can bring!

We recommend you avoid dual agency relationships, but we recognize there are instances where it cannot be avoided or clients demand it, perhaps to lower commission costs. Dual agency situations require more attention to ensuring full disclosure is given and that the clients understand the role of the broker/agent and what the dual agent may and may not disclose. As the broker, you may want to consider a policy that addresses in more detail the dual agency relationship and how to handle the commission split. Additionally, the broker should pay careful attention to any dual disclosed agent transaction and make sure no changes to the law have occurred since the last dual agency transaction.

3. The Property Condition Disclosure Statement

In our experience, errors – or alleged errors – in the Property Condition Disclosure Statement (PCDS) are the number one basis for a claim against the broker/agent. Except for certain sales, a PCDS is required for all home sales transactions involving a licensee. The licensee must fully inform the client of the duties and rights associated with the PCDS. Every question should be answered by the client. While the PCDS is not a warranty of the property's condition and is not intended to be part of the sales contract, nearly every lawsuit involving a real estate transaction has an allegation arising from the PCDS. And, while the licensee is not liable for any error, inaccuracy, or omission in the PCDS unless the licensee had actual knowledge of the error, inaccuracy, or omission, nearly every claim arising from a PCDS will allege the licensee knew of the error or omission.

How can you lessen your risk of a claim arising from the PCDS? First, explain to the seller the purpose of the form and consequences that may arise from errors or perceived errors. Also, if the home has been

sold before, explain a prior PCDS may be available, and if information in a prior PCDS contradicts the seller's PCDS, it likely will cause an issue either now or after closing. Second, make sure every question is answered: this includes a review by the agent and broker. Third, if the broker or agent is aware of an inaccuracy in any of the answers or suspects an answer may not be correct or could be questionable or misleading, address the concerns with the seller and document the conversation. If there is a disagreement over whether information should be included, advise the seller to err on the side of caution and include the information in the PCDS. If the seller refuses to include the questionable information, explain to the seller you have a duty to disclose known material defects to any potential buyer. The information can be provided in the listing or in any communication with a potential buyer or the buyer's agent. Remember, your errors and omissions insurance likely will not cover intentional acts or fraud, so unless you want to be left holding the bag in a lawsuit, make sure your client understands the duties you owe to others in the transaction.

4. Errors in the Listing

The listing is an advertisement. Instinctively, it is designed to gain attention and draw a buyer in. While it includes "raw" data such as the number of bedrooms and bathrooms, it also provides an opportunity to give a narrative summary or "agent remarks" of what the agent likes about the property. Furthermore, while the listing generally states the information is deemed reliable but not guaranteed, it can form a basis for a claim against the broker/agent if the information is incorrect.

It is common for an agent to take the last listing and use it for a new listing. That is acceptable, so long as the agent verifies the information. Discuss the listing with the client and have the client confirm in writing that all information is correct. Put yourself in the shoes of an angry buyer: will you be able to explain where each piece of information came from and why you reasonably relied on it? The most common complaints arise from discrepancies in the square footage or lot size, two items that are easily verifiable.

Also, be reasonable in the advertisement and avoid puffery. Is the property really in a desirable section of town? Is it really "well kept"? Can the buyer add a playroom in the garage area? Has the property flooded even though the flooding has not caused damage to the actual home? To recover for negligent misrepresentation, a claimant must show (1) a misrepresentation or omission of a fact; (2) that the representation is material or significant; (3) failure to exercise reasonable care on the part of the defendant; (4) reasonable reliance on the misrepresentation or omission; and (5) damages as a direct result of such reasonable reliance. Thus, knowing the listing is a "representation" that can form the basis of a claim of negligent (or fraudulent) misrepresentation, be mindful of the information you provide. The basis for damages resulting from negligent misrepresentation is the lack of care, while the basis for damages resulting from fraud is the want of honesty.

5. Issues Arising During Due Diligence

Generally, the seller's goal is to get the home sold as quickly and for as much money as possible, while the buyer's goal is to get the best deal, and time may or may not be a factor. Regardless of whether you are the seller's agent or buyer's agent, as a broker or agent you never want to recommend just one professional to a client for any of the services that may be needed, such as repairman, home inspector, pest inspector, surveyor, lender, closing agent, etc. Remember the rule of three and always have three reputable recommendations for any given trade. And, if you have any affiliation with any of the recommendations (such as friend or relative), disclose those affiliations to avoid any appearance of impropriety or bias.

One issue that may arise is a buyer regretting entering into the contract: buyer's remorse before actually buying the property. Although the contract likely will have some conditions that must be met to close the transaction, thereby providing some "outs" for the buyer, avoid giving legal advice! You do not want to be perceived as "pushing" or "forcing" your buyer to go through with the transaction, but you also do not want to be perceived as aiding and abetting a buyer in escaping the deal. Simply recommend your buyer seek advice from professionals, whether legal advice on the ramifications of cancelling the contract or additional construction professionals to assess the condition of the property.

For the seller, an issue that may arise is a poor home inspection or issues that were not disclosed on the PCDS. Memories fade and mistakes happen, so it is possible a seller may have forgotten about a repair that did not seem to "materially affect the value of the home." That phrase, "materially affect the value of the home," can be subjective: what is not material to one person may be material to the other. Therefore, make sure the seller updates the PCDS with any additional information learned before closing. Again, err on the side of caution and put more information in the documentation. The goal is to make sure the seller has provided all information pertinent to the buying decision and the buyer has had the opportunity to obtain all such information.

6. Relationships by Contract vs. Relationships by Conduct

As professionals, we often get approached by friends and family with just a "quick" question concerning an issue they may be having personally. While we want to help our friends and family, it is also important to draw clear boundary lines to protect yourself from a misunderstanding as to an agency relationship. Otherwise, you could potentially find yourself in an agent-client relationship you never intended to be in.

The easiest and most straightforward way to enter an agent-client relationship is, of course, through an express, written contract. However, in most states, including Mississippi, parties can form a contract through their conduct and actions, which is known as an "implied contract" or "quasi-contract." Notably, the MREC requires exclusive agency agreements, exclusive right to sell agreements, and exclusive buyer representation agreements to be in writing. Even though failure to obtain those written documents may subject the licensee to disciplinary action by the MREC, such agreements do not have to be in writing in Mississippi to be valid and enforceable. In other words, such agreements are not subject to Mississippi's "statute of frauds," which is a statute that enumerates which contracts must be in writing and signed by the person to be charged to be valid and enforceable. In Mississippi, the basis for finding a "quasi" or "implied" contract is extremely broad, and courts have held such a contract is sufficiently formed when *any* conduct of one party allows the other party to infer a promise. Therefore, be mindful of any agreements you make with third parties or potential clients and ask yourself if a reasonable person would believe I am now this person's agent? Finally, always immediately confirm verbal conversations in writing, and invite the other person to correct any misunderstandings contained in the writing. The goal is to ensure you can prove what the terms to any agreement were – or prove no such agreement existed.

Conclusion

Believe it or not, you cannot 100% avoid a claim or lawsuit because what another person does is not within your control, and Mississippi courts give a plaintiff much leeway when filing a complaint. You can, however, control your own actions in the real estate transaction process and prepare for the worst-case

scenario of being accused of wrongdoing. Be mindful of your actions and document, document, document!

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