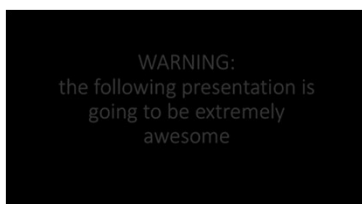


RISK MANAGEMENT



Disclosure

- Unless licensed to do so, we do not practice law!



What is Risk Management?

- Identifying everything in your real estate practice that may create legal risk
- Establishing a comprehensive system for dealing with those risks



What's the Big Deal?

- 1 in 10 real estate professionals will have a claim brought against them
- 1 in 6 will face the possibility of financial burden
- Average claim requires \$6,000.00 to defend
- What's your E & O deductible?
- 90% of this amount goes to attorneys involved

Who is Involved in a claim?

- 70% are disgruntled buyers
- 13% are unhappy sellers
- Who do they sue?
- Anyone related to the transaction!

Ten Ways to Land in Court

1. A poor inspection
2. Failure to refer and defer to experts – don't become the expert
 - a. Licensed and insured contractors
3. Engaging in casual. . . . Dual agency
4. NOT putting it in writing
5. NOT checking for permits
6. Letting issues dangle at the closing
7. Improper termite work
8. Improper disclosure



Continued – Ten Ways to Land in Court

9. NOT asking about roof leaks, window leaks, drainage. . .
10. NOT asking about mold, fungus & mildew

- What about Chinese Drywall?
- Have you been cooking Meth?



How to react to a claim

- DATE the claim when it is received
- REVIEW the pertinent facts with management- create a written timeline of all events
- EXPLAIN what happened in writing
- ANALYZE objectively, without emotions
- DECIDE how you are going to react



Don'ts of an E & O Claim

- Don't ignore the situation
- Don't attempt to handle it without your Broker
- Don't admit liability or pay any money
- Don't agree to attend any meetings without your Broker
- Don't sign or accept releases without meeting with your Broker



What do you think are the leading causes of real estate lawsuits?



Top Seven Real Estate Law Risks for Agents.....by CRES Insurance Services

1. Failure to disclose
2. Breach of Duty
3. Breach of Contract
4. Negligence
5. Bodily Injury/Property Damage
6. Failing to keep client data secure
7. Misleading clients



NAR – Hot Topics in Risk Management

Video -

- <https://www.nar.realtor/videos/hot-topics-in-risk-management> 5:11



Flood Affirmative Disclosure

DPOR Virginia Real Estate Board
Division of Professional Regulation <http://www.dpor.virginia.gov/Consumer/Disclosure/Forms>

DISCLOSURE STATEMENT FOR RESIDENTIAL PROPERTY WITH REPETITIVE RISK LOSS

NOTICE TO PROSPECTIVE PURCHASER

The Code of Virginia (§ 55.1-708.2) requires the owner of residential real property who has actual knowledge that the dwelling unit is a repetitive risk loss structure to disclose such fact to the purchaser.

For purposes of this disclosure, "repetitive risk loss" means that two or more claims of more than \$1,000 were paid by the National Flood Insurance Program within any rolling 10-year period, since 1975.

Accordingly, you are advised that the dwelling briefly described as:

Property Address/ Legal Description _____

Is known by the Owner to be a repetitive risk loss as defined above.

Owner _____ Date _____ Owner _____ Date _____

The purchaser(s) acknowledge receipt of a copy of this disclosure statement.

Purchaser _____ Date _____ Purchaser _____ Date _____

Cybersecurity: What You Need to Know

NAR Video 3:41

Cybersecurity Checklist: Best Practices for Real Estate Professionals

- A. Email & Password Hygiene
- B. Other IT-based Security Measures
- C. Law, Policy & Insurance Considerations

For more information about cybercrime and cybersecurity, please visit [NAR's Data Privacy and Security page](#). Questions can be directed to NAR Legal Affairs at 312/329-8270

What is a Team and how could they be at Risk?



What is a Team?

Two or more individuals, one or more of whom is a real estate salesperson or broker, who

- (i) work together as a unit within the same brokerage firm,
- (ii) represent themselves to the public as working together as one unit, and
- (iii) designate themselves by a fictitious name.



Window to the Law: Team Legal Issues

NAR Video 4:14



Team License Requirements - Virginia 2019

Business Entity License must be obtained

A Real Estate Team now functions as a real estate salesperson –

- Requires a business entity salesperson license
- Allows consumers to search online at DPOR for a Real Estate Team

Team Advertising - Names

- Avoid misleading consumers
- Firm name must always be clearly and legibly displayed in all advertising
- Avoid using confusing terms, such as realty, real estate, associates, partners, company, sales, limited, and properties.
- Use of the terms “team” or “group” is less risky.

Teams – Advertising Disclosures

Licensee Electronic Media Advertising

- Licensee's name
- Firm name
- City and state of place of business
- States of Licensure

Business Cards

- Licensee Name
- Firm Name
- Contact Info

Licensee Print Advertising

- Licensee Name
- Firm Name

Signs

- Firm Name
- Firm Telephone Number

Team Compensation



- Brokers may only pay licensees, whether individuals or entities.
- So, if agents in your firm form a team with a business entity salesperson license from the Real Estate Board, the broker may pay the entity directly, and the team can disburse the funds according to their team agreement.
- There is no requirement for the broker to pay the team directly, however, and brokers can also continue to pay the team members individually.

Teams & Agency

- Agency relationships – Dual or Designated?
- Agency Disclosure
- Additional Disclosures
- Best Practices



Teams -Keeping Client Confidences

- Different work spaces
- Separate Team meetings
- Limit access to client files
- Training
- Written Policy

Licensed vs. Unlicensed Activities



Why is this important?

UNLICENSED ACTIVITY

\$335,100

Court-ordered victim restitution
in DPOR-assisted criminal
prosecutions

209

Criminal warrants obtained by
DPOR for unlicensed activity

Licensed vs Unlicensed Activities

Scenario #1 Open House

You have an open house scheduled from 1-4. On your way to the store to get cookies for the open house, your car breaks down.

You know you're not going to be able to make it to the house by 1 and your sellers have been difficult so far. Can you call your unlicensed assistant who lives right around the corner from the listing and ask her to walk over and just sit at the house until you can get there around 1:30?

Licensed vs Unlicensed Activities

ANSWER Scenario #1 Open House

No.

The VREB has clearly said that holding a house open is an activity that requires a license. Even though it will only be for a few minutes, having your assistant sit there will violate the regulations.

Licensed vs Unlicensed Activities

Scenario #2 Answer the Phone

Your unlicensed assistant is screening your calls for you while you are in a meeting. A call comes in from someone who has a few questions. Which of these can your assistant answer if you give consent in advance?

1. What is the list price of the home?
2. What school district is it in?
3. Can we move into the property before settlement?

Licensed vs Unlicensed Activities

ANSWER Scenario #2 Answer the Phone

Questions 1 (list price) & 2 (school district) are fine, but your assistant should not answer whether the seller would be willing to accept certain addenda or contingencies as part of a contract.

Licensed vs Unlicensed Activities

Scenario #3 Duties

The following REQUIRE a real estate license –

- a. Showing property, holding an open house & recording earnest money deposits.
- b. Showing property, negotiating a contract & assembling closing documents.
- c. Showing property, holding an open house & negotiating a referral fee.

Licensed vs Unlicensed Activities

ANSWER Scenario #3 Duties

C.

Showing property, holding an open house & negotiating a referral fee all require a real estate license.

Licensed Activities

- Showing Property
- Holding an Open House
- Answering questions on transaction-related legal documents
- Discussing, explaining, interpreting, or negotiating a contract, listing, lease agreement, or PM agreement with anyone outside the firm
- Negotiating or agreeing to any commission, commission split, management fee, or referral fee.

Unlicensed Activities

- Performing general clerical duties
- Submitting listings and changes to MLS
- Following up on loan commitments after contracts have been ratified
- Having keys made for listings
- Placing signs on properties
- Acting as a courier service
- Scheduling appointments

Unlicensed Activities

- Preparing contract forms for approval by licensee
- Preparing promotional materials and advertisements for approval by licensee
- Obtaining required public information from governmental entities
- Ordering routine repairs as directed by licensee
- Performing any other activities undertaken in the regular course of business for which a license is not required
- Are compensated for their work at a predetermined rate that is not contingent upon the occurrence of a real estate transaction

MISREPRESENTATION



What is Misrepresentation?

Misrepresentation

A Real Estate agent or broker makes a FALSE REPRESENTATION of a material fact which he knew or should have known to be false – upon which the broker intended the purchaser to rely or which was relied on by the purchaser resulting in damage to the purchaser.

Types of Misrepresentation

- Fraud
- Negligent information
- Negligence
- Case Study – Situation #2 – Broker Barb

M1

What are the consequences of a lawsuit?

- Payment of actual damages
- Payment of punitive damages
- Rescission of the transaction
- Loss of commission
- Disciplinary action by Board of REALTORS
- Loss of your real estate license
- Additional costs

Why is this important?



Regulatory Risks REALTORS® Face

1. Fair Housing and Civil Rights



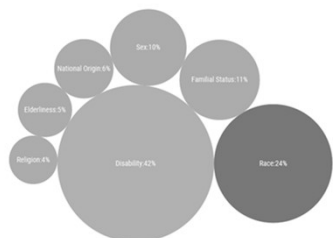
Fair Housing - Protected Classes

- Race
- Religion
- Color
- National Origin
- Sex
- Disability
- Familial Status
- Elderliness – VIRGINIA 1972
- Sexual Orientation – VIRGINIA 2020
- Gender Identity – VIRGINIA 2020
- Veteran Status – VIRGINIA 2020
- Source of Funds – VIRGINIA 2020



Virginia REB Analysis

Fair Housing Complaints by Protected Class



Long Island Divided

Inside the Investigation

2:29

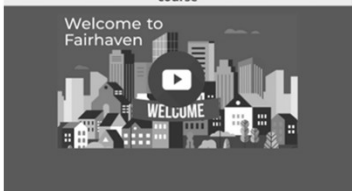


How do you avoid Allegations of Discrimination?

- Don't assume you know the buyer's preferences
- Provide equal services to all
- Educate buyer and seller about fair housing laws
- Never work with a discriminatory seller
- Display evidence of and commitment to compliance with fair housing laws
- Educate yourself concerning consequences and penalties of non-compliance
- Remember, Fair Housing is a right, the law and it's good for business!

What is Fairhaven? What can it do for you as a REALTOR®?

Watch Lynn Grimsley, WAAR President Elect and Instructor share her thoughts on NAR's Fairhaven course



3:09

[HTTPS://Fairhaven.REALTOR](https://Fairhaven.REALTOR)


Fair Housing

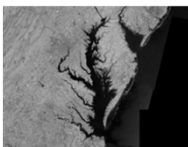
Questions to Remember:

- Is this something that will limit their housing choice based on a protected class?
- Is it something that could be perceived to limit their housing choice based on a protected class?

Regulatory Risks, cont.

2. Environmental Issues

- Chesapeake Bay
 - Air Pollution
 - Waste Management
 - Water Control Law & Water Resources Statutes
- 



3. Agency Relationships

Regulatory Risks, cont.

4. Lead Based Paint

- New Renovation Requirements
 - www.epa.gov/lead



Regulatory Risks, cont.

5. Molds

6. Antitrust Laws

- Price/term fixing
- Territorial Assignments
- Boycotts
- Association meetings
- NAR Antitrust Video 16:38



Regulatory Risks, cont.

7. RESPA – (Real Estate Settlement Procedures Act)

Rebates & Referrals Video 2:26



Regulatory Risks, cont.

7. Do not call list – Window to the Law 4:43

8. Do not email - Can-Spam Act – VR Legal Lessons 5:37



So how do you do business without getting sued?



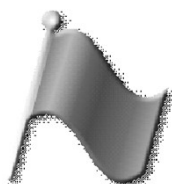
How NOT to get Sued -

1. Document Statements and Events

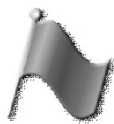
- Disclosure Forms
- Waivers
- Develop good note-taking skills
- When in doubt, write it down!

How NOT to get Sued -

2. Look for Red Flags

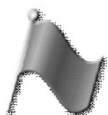


What are Red Flags?



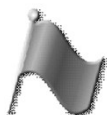
Potential Defects or Problems which a Reasonably Careful Agent Should Have Recognized and communicated

Red Flags



- Wet Basement
- Water Under foundation
- Water in other parts of the house
- Termites/Moisture
- Pests
- Structural – Exterior
- Sewer/septic
- Age of Equipment

Red Flags



- Environmental
- Physical Defects
- Title Problems
- What people say – neighbors talk to buyers!
- Field Practice
- Case Study – Situation #1: Broker Bob

How NOT to get Sued -

3. Tell the Truth

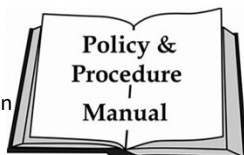
- About what you know
- About what you don't know
- About Agency Relationships



How NOT to get Sued -

4. Follow your Company Policy Manual

- Use approved forms
 - Approved by the State
 - Approved by the Association
 - Approved by your Broker
- Be prepared
- Utilize your Management Team
- Systemization



How NOT to get Sued -

5. Correct any Misinformation Immediately

Good Communication is the Key!



How NOT to get Sued -

6. Disclose Disclose Disclose



Disclosure of Brokerage Relationship

- When to disclose?
- How to disclose?
- What if the relationship changes?



Disclosure of Brokerage Relationship

- When to disclose –
 - Disclosure is required when you have a substantive discussion about a specific property with a buyer or seller who is not the client of another licensee
 - Not later than the time when specific real estate assistance is provided



Disclosure of Brokerage Relationship

- How to disclose –
 - Disclosure shall be made in writing at the earliest practical time
 - Disclosure must be conspicuous, printed in bold lettering, all capitals, underlined or within a separate box.



Disclosure of Brokerage Relationship

- If the relationship changes –
 - the licensee must disclose in writing to all clients and customers involved in the transaction
- How long should disclosures be kept?
 - Copies of any disclosures relative to fully executed purchase contracts must be kept for three (3) years.



Types of Agency

- Disclosed Dual Agency
- Buyer Agency
- Limited Service Agency
- Designated Agency
- Sub-agency



Dual Agency Dos and Don'ts



• Do:

- Disclose all material facts about the property
- Treat the buyer and seller honestly
- Provide information about the property and neighborhood within U.S. Department of Housing and Urban Development (HUD) guidelines
- Convey all of the buyers questions to the seller and get answers in writing
- Disclose the buyer's ability to buy and the seller's ability to sell.

Dual Agency Dos and Don'ts



Do (cont.):

- Explain real estate terms and procedures
- Explain closing costs and procedures
- Help the buyer obtain financing
- Help the buyer arrange for property inspections
- Assist in the standard purchase agreement
- Work diligently to complete the sale after the purchase agreement is accepted

Dual Agency Dos and Don'ts



• Don't:

- Work to the detriment of either party
- Discuss the motivation of either party
- Disclose the price the seller will accept or the price the buyer will pay
- Disclose terms other than those in the agreements
- Say anything that would hinder the bargaining position of either party
- Legal Hotline Question

Buyer Agency

- Employed by and represents the buyer in a real estate transaction
- Should include a written Buyer Representation Agreement
- Should fully explain what the buyer expects of the licensee and what the licensee will do for the buyer during the period of representation

Continued – Buyer Agency

What limitations should an agent place on their responsibilities under the terms of the agreement?



Limited Service Agent

- The following disclosures must be made in addition to the previously stated disclosures:
 - Disclosure of limited service is required in writing
 - A list of the specific services to be provided to the client
 - A list of the specific services provided by a standard agent that the limited service representative will not provide.

Limited Service Agent

- Licensee representing a client to a transaction and dealing with an unrepresented party or a party represented by a limited service representative may:
 - Provide the other party with information to the transaction
 - Assist in securing a contract
 - Enter into an agreement for payment of a fee for services performed or information provided

Limited Service Agent

- Entering into an agreement for payment does not
 - Create a brokerage relationship
 - Create liability for the agent except in the case of gross negligence or willful misconduct

Risk Management and the REALTOR® Code of Ethics



Risk Management and the Code of Ethics



Article 1 – You pledge to protect and promote the interests of your client. You are obligated to treat all parties honestly.

Article 2 – Avoid exaggeration, misrepresentation or concealment of pertinent facts

Article 3 – Cooperate with other brokers except when cooperation is not in the client's best interest.

Article 4 – Disclose ownership interest

Risk Management and the Code of Ethics



Article 5 – Disclose any present or contemplated interest to all parties

Article 10 – Fair Housing article

Article 11 – Don't work outside your area of expertise

Article 12 – Be honest & truthful in advertising & marketing

Article 13 – Don't practice law if you're not a lawyer

Recap: 5 Rules of Thumb on How to Avoid Risk

- Disclose all adverse material facts that you are aware of pertaining to the physical condition of the property.
- Avoid giving legal advice!
- Keep client's data safe
- EMD's
- Follow advertising guidelines



Questions?
