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Maylie & Grayson is a full service law firm providing representation to real estate brokerages, licensees, local Realtor® organizations, developers, builders, lenders and investors, providing services in all aspects of real estate including transaction review, land use planning, licensing, mediation, arbitration and court matters.

Avoiding Legal Potholes

As part of our practice, Maylie & Grayson represents real estate brokerages, licensees, and errors and omissions insurance carriers. In the course of this work, we regularly defend clients from claims involving misrepresentation, negligence, and other alleged breaches of a licensee's professional duties and obligations. This article will identify several common claims and address measures that can be taken to reduce risk.

Disclosure of Property Condition & Repairs

Failure to disclose known material defects, or properly describe a property's condition or repair history, may expose brokers to claims. One such claim involves a broker's negligent misrepresentation of the condition or age of a roof, heating system, or other feature. Brokers should be cautious in making representations about a property, particularly when relying on the seller's unverified statements regarding property condition or repairs. Brokers can reduce risk by basing representations on reliable and documented information, such as copies of repair receipts, or by referring clients to consult with experts, such as contractors or inspectors, or other information sources.

Adjacent Property Uses

Many claims arise out of erroneous descriptions regarding the use of adjacent parcels. Examples include "wetlands," "green space," and other descriptive terms with meanings which imply limitations on the development or use of adjacent property. Brokers should exercise caution when using such terms, or refrain from describing how adjacent properties may be used. For example, we frequently see instances where brokers state that adjacent properties are "green space" or "wetlands" and may not be built upon, only to discover later that they were incorrect. More specifically, the location of the green space may have been misdescribed, or wetlands mitigation may have occurred, resulting in a parcel's subsequent development. Accordingly, brokers should either conduct their own research, or preferably, refrain from providing such characterizations and refer clients to governmental agencies or other sources.

Property Boundaries/Square Footage

Another common source of potential liability relates to property boundaries and square footage. Misunderstandings as to a property's dimensions can result in claims of misrepresentation. By identifying boundaries, even in approximate terms such as "the oak tree," or relying on measurements of square footage obtained from a previous broker or property owner, a broker runs the risk that a boundary will be incorrectly identified or square footage misstated.

It is good practice to cite the source of square footage or property dimensions on listings and promotional materials. Brokers may wish to recommend that a buyer engage a surveyor or measurement expert to determine the exact boundaries of a property or square footage of a structure. Such advice should be confirmed in writing or, at the very least, documented in the transaction file.

Title Matters

Buyers often ask brokers to explain the meaning of CC&Rs or easements found on a preliminary title report. Interpreting such issues can be risky, as they may be outside the scope of professional real estate activity. Brokers can avoid risk by referring the client to the title company or the client's legal counsel, and documenting the recommendation.

Summary

Regardless of the type of claim, several measures can be taken by licensees to minimize exposure to claims. In particular:

- 1) Disclose, disclose, disclose.
- 2) Document advice given to clients, especially when the client declines to follow it.
- 3) If in doubt, refer clients to experts or other information sources.

This column contains general information only and must not be construed as legal advice. Questions may be submitted directly to Maylie & Grayson by fax at (503) 775-1765, by email at joelgrayson@mayliegrayson.com or by mail at 7959 SE Foster Road, Portland, Oregon 97206.