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SEEING THINGS BY BARBARA NICHOLS

# Don't ignore flaws

**W**hat you don't see can hurt you—that is, if it's something you should've seen. Real estate sales associates are required to disclose any known or readily observ-

able property defects to buyers and sellers. Failing to disclose a defect that they knew about or should've noticed during visits to a property could lead to charges of negligent misrepresentation or fraud.

Likewise, a real estate practitioner could be held liable for negligent misrepresentation for providing a material fact to a buyer without actually knowing if the fact is true. For example, do you actually know that the roof was replaced three years ago, or are you just repeating what the seller told you?

In acting as a conduit of information between the buyer and seller, be careful to make clear which facts you've verified. And be sure you put all those disclosures in writing. Memories of verbal disclosures may be faulty when a buyer decides to sue.

Nor is ignorance a defense. If you, as a real estate professional, *should* have known about a material

defect that could influence a buyer's decision to purchase or cause the buyer to offer a lower price, and didn't disclose it, you may still be liable for innocent misrepresentation. The NAR Code of Ethics obligates REALTORS® to discover and disclose adverse factors reasonably apparent to someone with expertise in the areas authorized by their real estate licensing authority.

That doesn't mean you have to become a general contractor to stay out of court. No buyer expects you to climb into attics or crawl under houses. However, real estate sales associates do have a duty to use their powers of observation in a reasonable and orderly way to spot flaws or potential flaws that are clearly visible.

You should also avoid relying too much on inspectors' reports or contract clauses that limit your liability. They are no guarantee that you won't be held liable for disclosure errors. Likewise, simply advising buyers to investigate a property's condition doesn't eliminate your duty to disclose accurately and completely.

## Eyes wide open

So what clues should you look for when you're visiting a property?

■ **Start outside.** Is a retaining wall leaning? Does the front yard slope down toward the house? Is the cement or tile around a pool cracked and lifting? Are there horizontal cracks on walls near the foundation? Is the brick cracked on the chimney? Are patios raised above their entry doors?

■ **Now look inside the structure.** Are the floors unlevel or the tile cracked? Is there any sign of mold or mildew on walls or floor, or a moldy odor? Are there stains on the ceilings? Is the house warm even with the air conditioning on?

After you complete your first walkthrough, remind sellers, if you're their agent, about the importance of full disclosure. In addition, question the sellers about their disclosures if you observe po-

The number of lawsuits against REALTORS® involving disclosure of structural defects increased by 50 percent from the 1999-2000 period to the 2001-2002 period.

2003 NAR Legal Scan



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## 4 disclosure musts

1. Look over the house more than once: no one sees everything the first time.
2. Be sure buyers sign and date a receipt stating that they received the disclosure.
3. Don't hesitate to refer buyers to other experts based on the information contained in the disclosure forms.
4. Disclose "nonvisual" information you should know, such as prevalent problems in the area and its homes (example: residents typically get water in their basement on rainy days).

tential defects that they haven't noted. If you're the buyers' rep and see inconsistencies in the sellers' disclosure statement and your observations, discuss them with the sellers' agent.

### Pen at the ready

In some states, you're required to complete a property condition disclosure form. Whether or not you're required to, it's a good idea to write up your findings. But never analyze what you see; just note the defect. For example, if you note "stain on the ceiling," don't try to guess if it was caused by a broken pipe or a roof leak. Leave that to the expert inspector. It's also a good idea in your walk-through to concentrate on the major items of buyer concern—roofs, foundations, and mechanical systems—since they're most expensive to fix. Don't waste your time making notes about scratches on cabinets and loose doorknobs; nobody has ever sued over those. Finally, don't make a statement such as "the house is perfect." No house, not even a brand-new one, is.

Whether you represent the buyer or the seller, looking over the property and providing the findings in writing is a smart way to reduce your liability and protect yourself and your client. Make it your mantra to "ask, look, and recommend." Otherwise, what you don't see, and don't disclose, may hurt you in court.

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