

VICTOR O. SCHINNERER & COMPANY, INC. risk management reporter

Information and Risk Management Ideas for Real Estate Professionals

FIFTEEN STEPS TO STAY OUT OF COURT

This issue of *Risk Management Reporter* features an article written by Mark D. Stavros of Stavros & Associates (practice confined to representation of Realtors). These recommendations are best practices that real estate agents can integrate into their daily firm activities.

1. Document Your File

It is important to **document your file**—keep notes and records. Why is it so important? When you are sued by your clients possibly years after the transaction and they have “selective memory,” you have *documentation* on the advice and counsel you gave them (admissible evidence). It also helps you remember what you did and what you said. **Pride of authorship is the key.** Use confirming letters, “chron logs,” mobile phone logs, etc. Get **key points** in writing and do so before escrow closes. Treat your files as if you will get sued. Recognize that the statute of limitations for fraud is three years, and for breach of fiduciary duty it’s four years; *both from the date of discovery.*

2. Know Your Limitations

Learn to be comfortable with your uncertainty. **Know what hat you are wearing.** If you do not know something, say so and then get the answer from a qualified authority.

3. Do Not Misrepresent

Do not speak carelessly. As a professional, a real estate licensee must exercise a higher degree of skill and diligence than a non-professional. **Negligent misrepresentation** is a major cause of lawsuits. Specifically, the broker is charged with more than a layman’s knowledge of the real estate business.

4. Use Care in Recommending Inspectors

Recommend **expert inspections** from reputable and qualified specialists. Recommending a “licensed inspector” is incorrect. Advise that the inspection company or other consultant have E&O insurance. Provide choices for clients, and educate them before the inspection occurs. A home inspection is none of the following: appraisal, certification of any kind, FHA/VA inspection, or

a warranty. A home inspection is a resource for clients to make decisions of two kinds: 1) immediate; and 2) during course of ownership regarding maintenance. Urge the buyers to go on the inspection with the inspector. **If the buyers waive inspections, get your recommendation and their waiver in writing.**

5. Watch Your Fiduciary Duty

Do not be greedy. Your **fiduciary duty** comes before closing the deal. The broker owes the principal the same obligations of diligent and faithful

service that a trustee owes to the beneficiary of a trust. Specific fiduciary duties include: accounting for funds; undivided loyalty; good faith and fair dealing; full disclosure; and, perhaps most importantly, the duty to *advise and counsel*. Note: once the fiduciary relationship is established and a breach by the fiduciary is alleged, **the burden shifts to the defendant broker to prove** that fiduciary duties were not violated.

Employ determinative risk management and loss prevention tools from counsel experienced in real estate brokerage and sales law.

6. Observe and Document

You are required to make a reasonable, competent, and diligent *visual* inspection of the “accessible” areas of the property and to disclose to prospective buyers all facts materially affecting the value and desirability of the property [at least in California, when the licensee has reason to believe that such facts are not known to, nor readily observable by, a prospective purchaser]. In the transfer disclosure statement, do not volunteer conclusions as to the *cause* of anything you disclose and **do not diagnose**

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or **characterize**; just cite factual observations.

7. Keep Risk Management

Practices Current

Stay well informed. **Employ determinative risk management and loss prevention tools from counsel experienced in real estate brokerage and sales law.** Attend board/association seminars and read trade publications (e.g., in California, C.A.R.'s *Legal Q&As and Briefs*, DRE Bulletin, etc.).

8. Avoid Multiple Contracts

Do not jump the gun. Avoid situations that could lead to two contracts on the same property. Exercise the utmost care with **multiple offers**, backup offers, and contingencies.

9. Beware For-Sale-by-Owner Properties

These properties raise red flags. Is the seller doing something besides saving a commission? Have you unwittingly become the seller's agent?

10. Do Not Act as a Lawyer

Do not give legal advice, such as telling the buyer or seller that they should or should not initial the arbitration clause. Arbitration is a decision for the principal. Another example—do not attempt to explain the legal ramifications of the liquidated damages clause. Risk management tools are available to eliminate both of these problem areas. Consider referring your client to an attorney where appropriate. Answering questions like “what does this mean” carries liability.

11. Stick to What You Know

Stick to **your specialty**. Even the best agents cannot be all-knowing about all properties. You will be considered to know more about the area of your specialty. This applies particularly with

agents' services relative to short sales, REO properties, and foreclosures.

12. Review Title Reports

Review **preliminary title reports** carefully and as soon as possible.

13. Use Standard Forms and Procedures

The supervising broker should monitor your contracts to ensure that what you have written is clear. An important general rule affecting any contract is that vagueness is construed against the party responsible for the ambiguity.

14. Disclose Agency Relationships

Disclose **agency relationships** as soon as possible. The law requires disclosure, but you control the timing. Recognize that although dual agency is permitted in some states (e.g., California, via Civil Code Section 1090), dual agency is one of the greatest magnets for liability. As one observer aptly put it: “Although the buyer and seller may acknowledge **dual agency** in writing, mere disclosure of this does not resolve the ‘schizophrenic obligations’ of a broker.”

15. Act on a Claim Immediately

What to do if you become aware of a claim:

- talk to your broker/attorney;
- get as much information from the claimant as possible;
- attempt to resolve or settle early;
- avoid making admissions;
- do not write on original documents; and
- provide a **detailed narrative** memorandum to your attorney and be candid about facts that show you were possibly at fault.

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If necessary, use mediation, and get appropriate legal advice. Make prudent **business decisions**—remember “justice” can be a very expensive commodity.

Risk Management Reporter thanks Mark D. Stavros, Esq., of Stavros & Associates, for permission to reprint his article [revised for nationwide use]: 1261 Nautilus Street, La Jolla, CA, 92037; (858) 454-7997; email: stavroslaw@san.rr.com.

For insurance coverage and policy questions please contact:

Rice Insurance Services Company, LLC

P.O. Box 6709
Louisville, KY 40206-0709
(502) 897-1876
(800) 637-7319 toll free
(502) 897-7174 fax
www.risceo.com