

THE PAPERLESS REAL ESTATE TRANSACTION: Understanding the Risks



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Throughout the country, real estate agents are celebrating the wonders of sending contracts and disclosures to their clients electronically. The paperless transaction has become an admirable and reachable goal with the unintended side effect of increasing risks in real estate transactions. In my opinion, this is an area that is ripe for litigation. Let me explain ...

All manner of real estate contracts are now accessible online. By subscribing to such a service, licensees may easily fill out the forms electronically and then send these documents to their clients – buyers and/or sellers – to sign online. Some of these systems even have tutor programs to help agents in completing the forms.

During a deposition, plaintiff attorneys often ask licensees how much time was spent with their clients discussing the contracts at hand prior to the execution of the documents to determine the client's degree of comprehension before signing on the dotted line. I venture to say that it takes a minimum of one hour for a fast talking agent to carefully review the contracts with the client prior to signing. On the other hand, when plaintiff/clients are asked the same question, many will say that no time was spent in discussion since they were instructed to sign and initial as indicated and return the fully executed contracts to the agent. It is all too common for a busy real estate agent to do business in this manner.

Typically, disclosures regarding a particular property are scanned by the listing agent and sent to the buyer's agent prior to or after an offer has been accepted by the seller – custom varies with respect to when these documents are sent to buyers. In turn, the buyer's agent forwards the disclosures to his or her clients.

In theory, this sounds wonderful since the disclosures are out there ready for review by client and agent. In reality, many agents do not carefully scrutinize these documents and discuss them with their clients.

Who has the time to read them? Pages upon pages – sometimes hundreds of pages, are sent to the agents for their perusal. Listing agents have done their job with respect to buyers who are not their clients once they have delivered mandatory disclosures as well as any additional disclosures that are deemed material to the transaction to the buyer's agent.

Now it is up to the buyer's agent or dual agent to advise his or her clients regarding the details and importance of these disclosures. It is very tempting for agents to send contracts and documents to their clients with the suggestion that the clients contact them if they have any concerns prior to signing and returning the documents electronically.

In fact, defense attorneys often argue that if the client does not understand the

disclosures and/or documents the client has an obligation to contact his or her agent with any questions. In my opinion, this does not relieve the agent of his or her fiduciary duty to the client. It is not realistic to think that buyers and sellers know the pertinent questions to ask. Real estate licensees get paid to help buyers and sellers sort out all the information that is delivered to them regarding the property.


This does not mean that licensees are expected to advise their clients outside of their expertise as real estate professionals. It does mean that they should point out any material facts and red flags within their expertise as licensees and advise clients accordingly.

As fiduciaries, real estate licensees have a duty to be looking out for the best interests of their clients. With respect to the terms and conditions within the contracts that their clients sign as well as the acceptance of disclosures, principals have a right to expect their agents to discuss and explain the details and possible ramifications of what they will be signing. The goal of the fiduciary is to help the client make informed decisions.

What should licensees do to manage their risks in the age of the paperless transaction? First and foremost, agents should maintain copies of all correspondence sent to clients,

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customers and third parties pertaining to the transaction. Here are some additional suggestions:

1. Agents should always include a cover sheet that details what documents are being sent as well as advising clients to carefully scrutinize everything received.
2. With respect to clients, licensees should always follow up with a telephone call after sending documents and/or contracts to clients to review with them.
3. Agents should then send written confirmation to clients reiterating the amount of time spent on the telephone as well as detailing the documents/contracts discussed and request they call if there are any more questions or concerns.
4. Agents should document in writing when clients refuse to spend the time to review pertinent documents/contracts and send a copy to the client.
5. Brokers should formally set up a system that demonstrates that their agents are fulfilling their fiduciary duties. 

Lois Kadosh is a real estate educator, broker and expert witness in California. In addition to working as a consultant and expert witness for attorneys, she is available for presentations and workshops for real estate licensees and consumers. For additional information: www.ReaJEstateEthics.com.

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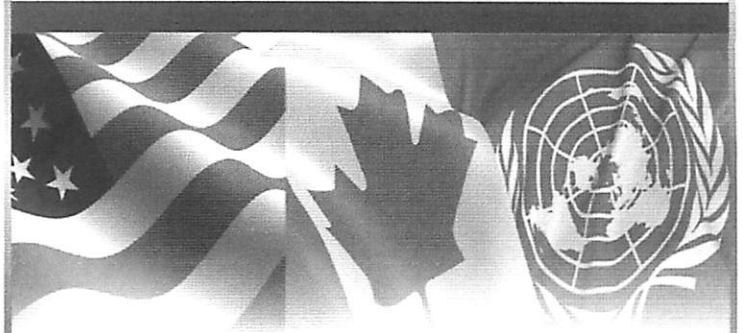
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