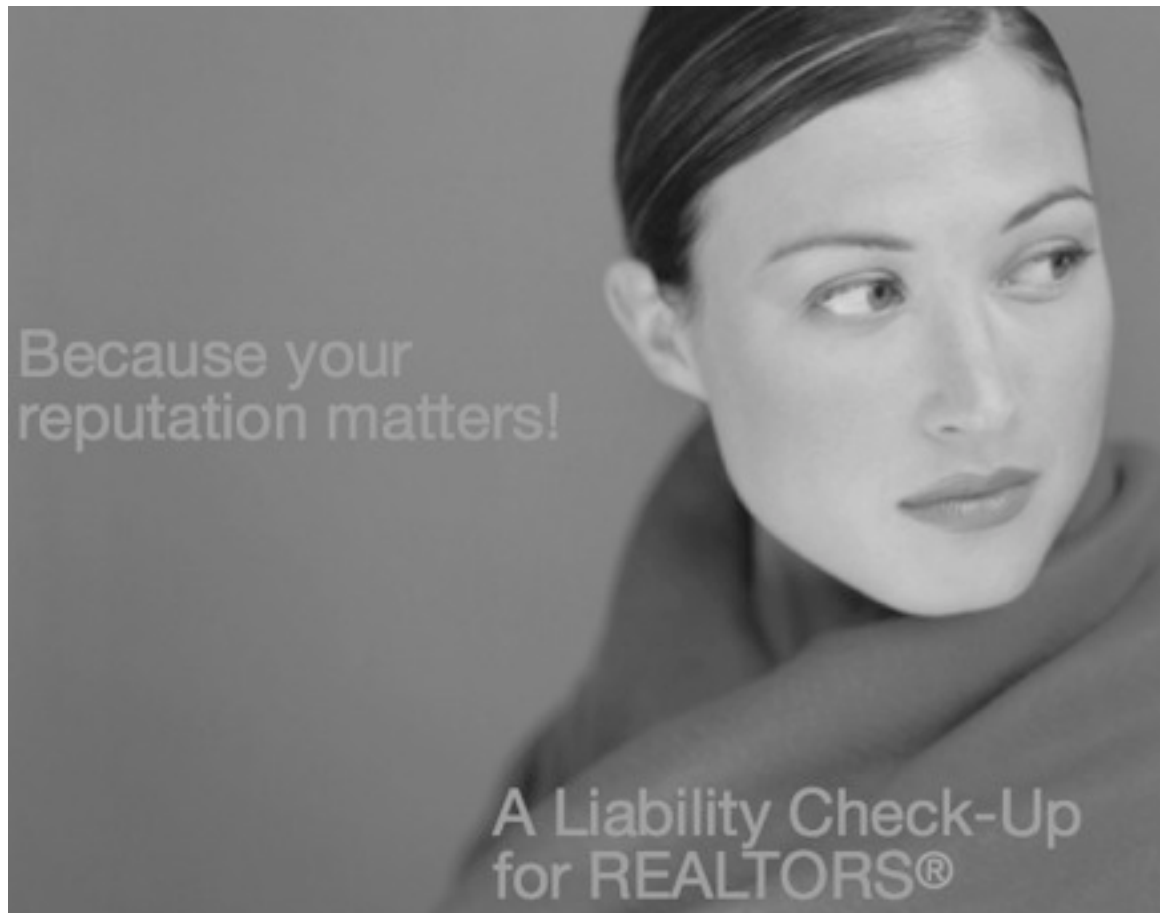


WHY RISK IT?

NAR MID-YEAR **May 18, 2013**

Katy Allenbaugh-Richards is an Area Manager for First American Home Buyers Protection Corporation. She has achieved President's Club & is a member of the Circle of Excellence.

Katy is the WCR Membership Chair for 2013, RPAC, NARPM, VAR Relocation Council Advisory Council and a CRS Central Virginia Chapter Affiliate.



Forum Wrap Notes *So you won't risk it*

By Katy Allenbaugh-Richards

Perhaps the most important piece of information I can leave you with is the compilation of notes, thoughts, case studies and general suggestions contained in these Wrap Notes.

Often I have the opportunity to engage in conversations that are held in offices just like yours. The successes of those conversations are

the take-aways and support that professionals in our industry are the best at giving. Some of the points we have discussed today came from some of those very conversations.

There are so many tools available to us & so many resources among our peers to consult with and guide us. I do want to extend a suggestion to you to get involved in a

few of these peer networks. WCR has been a wonderful experience for me and a group I am confident I can turn to for the advice and guidance we have talked about today. You will be richly rewarded by getting involved.

I wish each of you the best and encourage you to stay in touch. Let me know your successes!

Katy Allenbaugh-Richards

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Your Duties as a Real Estate Professional

*“five steps to **better** client relationships”*

1. When in doubt, disclose.

If you're a real estate agent, disclosure should be your mantra. If you know something that is or could be important, you should make sure that your seller discloses that fact. Otherwise you too could be looking at a lawsuit.

2. Know what hat you're wearing.

Anyone in a client-serving business wants to be helpful to their clients. Unfortunately, however, in today's litigious society it is not wise to give advice beyond your area of expertise. Real estate professionals aren't usually trained as lawyers, or engineers or inspectors. So don't go beyond your expertise to answer someone's questions. That means you shouldn't tell your client that he should sign an arbitration clause because it's "cheaper and quicker" or that you think creaking in the floorboards is probably nothing. Rather, suggest and document that he discuss his concerns with the appropriate specialist.

3. Recognize your role in the process.

While you shouldn't give advice outside your area of expertise, as a real estate professional you're often in a better position than your clients to spot red flags. Courts have often held agents to a higher standard than the average person. So while you should not give advice about a problem, it's very important that you point out potential trouble spots and steer your clients to the right specialist to help them evaluate their options.

4. Find a translator when necessary.

Most cities, and increasing numbers of rural areas, have populations that may or may not yet be proficient in the English language. Perhaps you have a large Vietnamese community where you do business, or are working with an Ethiopian family that's fluent in Amharic but struggling with English. If your client isn't proficient in English, then you must locate a family member or friend who can translate for him. Equally important: document the conversation. For example, write down and confirm that the mother who's buying a property had her daughter explain the terms to her satisfaction, in her native language.

5. Understand your fiduciary duties.

Your fiduciary responsibility is what you, as a real estate agent, owe to your client. It actually includes several duties:

The duty to be absolute and undivided in your loyalty—There should be no hint of any conflict of interest. This requires diligence, faithful service, integrity, utmost care, honesty, good faith and full disclosure.

The duty to keep client monies in separate accounts—Any dollars that you are holding for one client must be kept separate from other funds. Never commingle monies and always provide an accounting of all funds.

The duty to explain and provide counsel—As a real estate agent, it is your obligation to make sure that your client understands his or her obligations under the contract. This means, for example, that a listing agent must explain the nature and scope of disclosure requirements. And a buyer's agent needs to explain the client's right to bring in specialists to investigate aspects of the property. At the end of the day, it doesn't matter whether a buyer opts to get an inspection—just that you informed him of his right to do so and confirmed that he either did investigate or chose not to do so.



Ways to Reduce Your Legal Risk

Let your E&O Insurance work for you

By Katy Allenbaugh-Richards

Practitioner's at large firms often obtain E&O policies through their brokerage's preferred provider. However, in some cases it's necessary to shop for your own insurance. Since premiums are determined by your individual situation and risk profile, there's no one-size-fits-all policy.

How As with other insurance policies, your desired deductible and level of coverage play big roles in setting your premium. But there are other deciding factors:

Insurers look at the value of properties you sell, your transaction volume, gross revenue, and risk management practices, among other things.

If you engage in higher-risk business activities, such as providing property management services, doing commercial and raw land transactions, and selling agent-owned property, you can expect to pay a higher rate. On the other hand, if you go out of your way to prevent being sued, you can often find a discount. Experts in E&O insurance share these risk reduction strategies, which could save you money on your policy:

Meet the four requirements. Many insurers offer discounts or additional benefits if you meet four requirements for every transaction: **Use home warranties, recommend qualified home inspectors, standard contracts, and seller disclosure forms.** Insurance companies are obviously sending a message. Why not make these practices standard.

Create written customer service policies. Such policies show you're organized and thorough, and will help you build strong customer rapport. Remember, clients are less likely to complain when they're treated well. "Management can't tolerate sloppy record-keeping or associates not delivering papers on time or returning calls. It's important to have pro-active management and a policy of doing the right thing.

Take classes. Some E&O insurance providers offer discounts for continuing education and professional designations. It shows commitment to the industry. Education should focus on risk reduction topics such as ethics, writing listing agreements, and disclosure laws.

Keep paper trails. Maintain transaction logs to record what you discussed with clients and save electronic copies of every document related to a transaction. Follow up client conversations with e-mails summarizing the phone or in-person discussion. If a complaint comes up that leads to a lawsuit, the question then becomes: How defensible are you? You want a well-documented file to defend yourself.

Ask a lawyer for advice. Bring in a lawyer who's experienced in litigating real estate matters to examine your risk areas and advise you on risk management policies. Lawyers also can conduct seminars at brokerages

Use board-approved forms — not your own. When it comes to disclosures and purchase agreements, it's critical to use the approved forms. "Insurers prefer forms that have been scrutinized by the industry, don't change the language in standard contracts.

Have your broker review and sign off on every transaction. An extra set of eyes can prevent problems and catch mistakes.

Make sure everyone on your team is licensed and insured. Your "team" includes appraisers, lawyers, inspectors, and anyone else involved in the purchase or sale of a home. Each of these team members should be properly licensed and protected by their own E&O insurance. It gives us an outer shield of protection and insulates us from claims that we negligently referred clients to someone.

Stay within the scope of your expertise. Don't advise clients on issues outside your area of expertise, such as taxes and legal topics.

Red Flags

Definition: Potential defects or problems which a reasonably careful agent should have recognized and communicated to the client

Basement water leakage or foundation problems

- cracks or displacement in foundation walls
- uneven floors, windows hard to shut, bowing support beams, loosened brick or mortar
- gap between top of foundation wall and the superstructure of the house
- enlarged or filled-in hydro gap (suggesting waterproofing)
- multiple sump pumps in curious locations
- paneling concealing view of foundation walls
- cracks on outside of foundation which may not appear on the inside
- poor water drainage (filled gutters, sloping driveways, drainage ditches, etc.)
- water marks of any kind (rotted paneling; mineral deposits around floor drains, etc.)
- evidence of “efflorescence” – fine, white powdery substance left on walls and floors when water leaches through walls
- standing water or mud in basement
- damp or musty smells
- broken or boarded windows in basement
- no carpeting or finished areas in basement
- poor lighting

Water Under the Slab (in addition to the above)

- cracking in the slab which radiates out from certain point
- deflection of vertical support members (uneven floor in first floor)
- water leakage into basement which rises and falls like a water table rather than immediate flooding when there is rain
- presence of underground springs in neighborhood or at property

Water in Other Parts of the House

- water spots
- a can of Kilz or other stain hiding paint in the garage or basement
- water damaged sheet rock or wood
- warped flooring
- detached plumbing access panels

- soaked carpets or rugs
- repaired or replaced roof
- buckled shingles, valleys, conduits or swales
- seeing points of light through shingle roof
- excessive shimming of shingle roof

Termites

- “hollow” wood
- trails
- observing swarming
- holes at intervals suggesting treatment
- information that when the house was treated it did not receive an envelope treatment
- independent water source in house
- peeling wallpaper

Other Pests

- woodpecker pecking
- sighting of black widow or brown recluse spider
- rat infestation, mouse droppings, mouse traps or rat poison in garage or basement
- observation of carpenter ants
- proximity to dump, construction site or woods

Other Structural – Exterior

- upraised or deflected patios or decks
- leaning chimney
- busted brick and mortar
- easily moved fence posts
- extensive cracking of flat work
- puddling after moderate rain
- drainage systems in yard

Sanitary System – Septic

- odors generated by bacteria
- puddling water in yard
- illegal drainage (more common than you think)
- unusual system (jet aeration, gravity berm)
- cast iron pipe going through middle of foundation wall (instead of at base of wall or into slab – court indicated this should tell a careful broker that the house was on septic not sewer)
- back-up problems
- sale by older couple with no children to couple with children (suggests potential for greater demand on sanitary system)
- remote location of nearest sewer access point
- bad perc test results

Red Flags

Definition: Potential defects or problems which a reasonably careful agent should have recognized and communicated to the client (CONT)

- failure to obtain necessary government inspection or approval
- approval of septic by municipal rather than county authority
- recent repairs or replacement

Sanitary System – Sewer

- subdivision sewer system (anything short of county or city-wide system or where tax base is relatively small and could get into financial trouble)
- any lake development
- sewer back-up or other sign of line infiltration or insufficient capacity
- cross-infiltration of sewers and storm water
- information that crews are doing dye tests or doing fiber-optic examinations
- bad traps (distinctive odor, also visible)
- reports of sewer gas (usually odorless)
- reports of “sick house” testing
- lines erupting through surface of yard
- sewer line deflection
- common connections for duplexes, fourplexes, town homes
- any situation where maintenance of one unit requires access to another unit
- on a build job- relocation of sewer lines or access (as compared to same model built by builder in same subdivision)

Case Study Review

Case #1-18: REALTOR® Not Responsible for Legal Advice

(Originally Case #2-4. Revised and transferred to Article 7 as Case #7-22 May, 1988. Transferred to Article 1 November, 1994.)

Client A listed a commercial property with REALTOR® B who sold it. Following the sale, Client A learned that his total tax position would have been more favorable if he had disposed of the property in a trade. He complained to the Board of REALTORS® against REALTOR® B stating that in connection with his listing of the property he had discussed his total tax position with REALTOR® B, and that REALTOR® B, in spite of his obligation under Article 1 of the Code of Ethics to “be informed regarding laws” had failed to advise him that a trade would be more to his advantage than a sale.

At the hearing, REALTOR® B defended his actions by stating that it was true that Client A had briefly outlined his total tax situation at the time he listed the property for sale. REALTOR® B advised that he had told Client A that sale of the listed property might result in unfavorable tax consequences and suggested that Client A consult an attorney. The client had not taken this advice.

After several weeks of advertising and showing the property, in the absence of a change of instructions from the client, the property was sold in accordance with the terms of the listing contract.

The Hearing Panel concluded that advising the client to consult an attorney had demonstrated REALTOR® B’s attempt to protect the best interest of his client; that in giving this advice REALTOR® B had fully discharged his

obligation under Article 1; that a REALTOR® is not responsible for rendering legal advice beyond the advice that legal advice be sought when the client’s interest requires it; and that REALTOR® B was not in violation of Article 1.

NOTES:

Case Study Review

Case #1-19: Knowledge of Proposed Legislation

(Originally Case #2-5. Revised and transferred to Article 7 as Case #7-23 May, 1988. Transferred to Article 1 November, 1994.)

REALTOR® A received a letter from the ABC College in another city stating that one of its old graduates in REALTOR® A's city had willed a vacant property in that community to the college. The letter explained that the college had no use for the property, and wanted REALTOR® A to sell it at its fair market value. The proceeds would go to the endowment fund of the college. REALTOR® A suggested a price for the property, an exclusive listing contract was executed, and in less than a month the lot was sold and settlement made with the college. Two weeks later, a trustee of the college, who handled its investments, filed a complaint against REALTOR® A charging negligence in knowledge of proposed local legislation which had resulted in sale of the property at approximately one-eighth of its fair market value. The Grievance Committee referred it for hearing before a panel of the Professional Standards Committee.

The Professional Standards Committee scheduled a hearing and notified Realtor A and the college trustee to be present. The hearing developed these facts:

(1) The client's property was in an area which had been approved for rezoning from residential to commercial use in a general revision of the local zoning map and ordinance that was in preparation. (2) Although specific sections of the revisions, including the section involving the lot in question, had been tentatively approved, final approval had not been given to the complete revision at the

time of the sale, but this action had been taken a few days following the sale. For several months prior to the sale there had been a public notice of the proposal to rezone affixed to a sign near one corner of the property. (3) In his one inspection of the property, REALTOR® A had not noticed the sign. (4) Other sales in the rezoned area substantiated the client's belief that the shift to commercial zoning supported a value at approximately eight times the price received for the lot.

REALTOR® A's defense was that the ordinance putting the rezoning into effect had not been enacted at the date of his sale of the client's property, and that he had no knowledge at the time of the rezoning proposal.

The Hearing Panel's conclusion was that REALTOR® A had violated Article 1 and was definitely deficient in his professional obligations in this instance; that before suggesting a price to his client he should have checked the property carefully enough to have seen the notice concerning a proposal for rezoning; and that as a REALTOR® active in the area he should have been aware of the extensive changes that were being proposed in his city's zoning ordinance. Such knowledge was within his obligation under Article 1 to protect the best interests of his client.

Case Study Review

Case #1-25: Disclosure of Latent Defects

(Adopted November, 2000.)

REALTOR® A had listed Seller S's vintage home. Buyer B made a purchase offer that was contingent on a home inspection. The home inspection disclosed that the gas furnace was in need of replacement because unacceptable levels of carbon monoxide were being emitted.

Based on the home inspector's report, Buyer B chose not to proceed with the purchase.

REALTOR® A told Seller S that the condition of the furnace and the risk that it posed to the home's inhabitants would need to be disclosed to other potential purchasers. Seller S disagreed and instructed REALTOR® A not to say anything about the furnace to other potential purchasers. REALTOR® A replied that was an instruction he could not follow so REALTOR® A and Seller S terminated the listing agreement.

Three months later, REALTOR® A noticed that Seller S's home was back on the market, this time listed with REALTOR® Z. His curiosity piqued, REALTOR® A phoned REALTOR® Z and asked whether there was a new furnace in the home. "Why no," said REALTOR® Z. "Why do you ask?" REALTOR® A told REALTOR® Z about the home inspector's earlier findings and suggested that REALTOR® Z check with the seller to see if repairs had been made.

When REALTOR® Z raised the question with Seller S, Seller S was irate. "That's none of his business," said Seller S who became even angrier when REALTOR® Z advised him that potential purchasers would have to be told about

the condition of the furnace since it posed a serious potential health risk.

Seller S filed an ethics complaint against REALTOR® A alleging that the physical condition of his property was confidential; that REALTOR® A had an ongoing duty to respect confidential information gained in the course of their relationship; and that REALTOR® A had breached Seller S's confidence by sharing information about the furnace with REALTOR® Z.

The Hearing Panel disagreed with Seller S's contentions. It noted that while REALTORS® do, in fact, have an obligation to preserve confidential information gained in the course of any relationship with the client, Standard of Practice 1-9 specifically provides that latent material defects are not considered "confidential information" under the Code of Ethics. Consequently, REALTOR® A's disclosure did not violate Article 1 of the Code of Ethics.

Case Study Review

Case #10-5: Use of “Choose Your Neighbor” Form Letters as Part of a Marketing Campaign

(Adopted November, 1987.)

The ABC Board of REALTORS® received a complaint from a local fair housing group alleging that REALTOR® A was using discriminatory marketing techniques, in violation of Article 10 of the Code of Ethics, as the listing broker for a property in a new subdivision.

In support of their complaint, the fair housing group provided copies of “Choose Your Neighbor” form letters sent by REALTOR® A to current neighborhood residents. The letters announced that the property was on the market and invited neighborhood residents to contact REALTOR® A if they knew of anyone who they thought might be interested in purchasing the home.

At the hearing, REALTOR® A defended his use of “Choose Your Neighbor” form letters by demonstrating that they were just one element of his marketing campaign, and were not an attempt to restrict access to the property on the basis of race, color, religion, sex, handicap, familial status, or country of national origin as prohibited by Article 10. REALTOR® A produced copies of advertisements run in several newspapers, “OPEN HOUSE” flyers distributed at supermarkets throughout the town, and a copy of the property data sheet submitted to the Board’s MLS. REALTOR® A remarked, “In my experience, the current residents of a neighborhood often have friends or relatives who have said that they would love to live in the neighborhood. It just makes sense to me to include contacting these folks in any marketing campaign!”

The Hearing Panel found REALTOR® A not in violation of Article 10. In their “Findings of Fact and Conclusions,” the panel noted that the use of “Choose Your Neighbor” letters is not a per se violation of Article 10, but cautioned that such letters could be used in a manner inconsistent with the intent of Article 10. If used in conjunction with other marketing techniques and not as a means of limiting or restricting access to property on the basis of race, color, sex, handicap, familial status, or country of national origin, “Choose Your Neighbor” letters were another method of announcing a property’s availability and attracting potential purchasers.

Case Study Review

Case #10-4: Use of “Choose Your Neighbor” Marketing Letters (Adopted November, 1987.)

REALTOR® A listed a property in a new subdivision. At the instruction of his client, Seller X, REALTOR® A did not file information on the listing with his Board’s MLS, did not place a “For Sale” sign on the property and did not advertise the property in the local newspaper. Seller X had told REALTOR® A that he wanted the sale handled quietly, with the new purchasers being people who would “fit into the neighborhood — people with the same socioeconomic background” as the other residents of the subdivision.

Based on his conversation with Seller X, REALTOR® A’s only marketing effort was mailing a letter to the other residents of the subdivision, inviting them “. . . to play a part in the decision of who your next neighbor will be. If you know of someone who you would like to live in the neighborhood, please let them know of the availability of this home, or call me and I will be happy to contact them and arrange a private showing.”

REALTOR® A’s marketing strategy came to the attention of REALTOR® B, whose mother lived in the subdivision. REALTOR® B filed a complaint charging REALTOR® A with a violation of Article 10 of the Code of Ethics.

At the hearing, REALTOR® B told the Hearing Panel of receiving a copy of the marketing letter from his mother, who had recently moved to the subdivision. REALTOR® B advised the panel that he had checked the Board’s MLS for information on the property, had driven past the house to look for a “For Sale” sign and had scanned the Sunday real estate section of the local newspaper for information on the property. Finding no mention of the property in either the MLS or the newspaper and noting the absence of a sign on the property, REALTOR® B concluded that REALTOR® A’s marketing strategy was to limit access to the property to individuals preselected by the current residents. “In my mind,” said

REALTOR® B, “this could only mean one thing. REALTOR® A was deliberately discriminating against home seekers from other areas, or those with different backgrounds, who would never have the opportunity to learn about the house’s availability. Obviously, REALTOR® A was directing all of his marketing energies into finding purchasers who would not disrupt the ethnic and economic character of the neighborhood.”

REALTOR® A defended his actions by advising the panel that he was acting on Seller X’s instructions. Seller X appeared as a witness for REALTOR® A and confirmed this fact, adding that he and the other residents of his block had an informal agreement that they would try to find “suitable” purchasers for their homes if they ever decided to sell. Seller X felt that by broadening the marketing campaign to include all residents of the subdivision he had increased the chances of finding such potential purchasers.

The Hearing Panel found REALTOR® A in violation of Article 10 of the Code of Ethics. In their decision, the panel advised REALTOR® A that no instruction from a client could absolve a REALTOR® from the obligation to market properties without regard to race, color, religion, sex, handicap, familial status, or country of national origin, as expressed in Article 10. There was no doubt, in the panel’s opinion, that the exclusive use of “Choose Your Neighbor” letters to market the property was designed to circumvent the requirements of Article 10.

Katy Allenbaugh-Richards

When Service & Experience Matter

Thank you for your valuable time today.
Please feel free to email me or call me. I look forward to exchanging ideas and collaborating.



THANK YOU!

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NAR MID-YEAR 2013
Washington DC

NOTES: