



Q4 2018: VOLUME 14, ISSUE 4

E&O RISK MANAGER

HELPING REAL ESTATE PROFESSIONALS REDUCE THEIR CLAIM EXPOSURES

OPEN HOUSES

A Sales Tool or a Magnet for Trouble

Bring up the topic of open houses in a roomful of real estate professionals and you'll hear strong opinions on both sides, and some who are still firmly on the fence. Around since the early 50s and 60s, open houses were much more integral to home sales, opponents argue, minus the internet, email, and cell phones. These days, most buyers are using online tools to search for their dream home, not driving around on Sunday afternoons. With smart filters and settings, potential buyers can be notified of new listings, and price changes or contracts pending for homes on their watch list. The convenience of working with a broker who can access a property on your schedule can be invaluable to many buyers.

On the flip side, proponents argue that maximum exposure is the only way to sell a property quickly and an open house is a valuable tool in their marketing kit. An open house is designed to be a low-pressure opportunity for potential buyers to explore a property at their own pace. If storage space is an issue, they can measure every closet and open each drawer without feeling the need to "move along". Open houses tend to attract a good percentage of friendly neighbors as well, which can present a unique opportunity for a potential buyer to learn about the area.

Only 3% of buyers visited open houses according to the 2018 Home Buyers and Seller Generational Trends Report published by the National Association of Realtors®.

Whichever side you fall on, safety is an on-going concern for real estate professionals whether you are sponsoring an open house or conducting a private showing of a property. Security issues apply to both the seller and the buyer, as well as individual real estate professionals. From accidents to criminal activity, inviting virtual strangers into a property can be dangerous. Most real estate professionals who carry an errors and omissions (E&O) policy should have coverage for open house claims, however, it's a good idea to review your

policy. Insurance offers protection in case of the unexpected, but prevention is an important part of the equation too.

The U.S. Department of Labor considers real estate sales a hazardous occupation.

Common Sense Tips for Safe Open Houses

Open houses can draw a wide array of people, some of whom may have ulterior motives. We're not talking about the neighbor next door who wants to see your new kitchen, but thieves who may be scouting out the property. A crowded open house may be great for exposure, but it also means you can't keep track of everyone on the property. Here are some quick tips to help decrease the likelihood of theft and any resulting claims.

- Instruct the seller to store all valuables (i.e., checkbook, jewelry, prescription drugs, and firearms)
- Request the seller to repair any hazards like torn carpet, loose floor boards, or leaky pipes
- Make sure outdoor areas are free of debris, ice, snow, or other impediments
- Use a sign-in sheet and request an ID from all visitors
- Alert the neighbors to watch for any suspicious activity

When the open house ends, make sure to:

- Inspect the property before leaving
- Ensure all windows and doors are securely locked
- Account for all property keys and return them to the lockbox or another designated area

In general, conducting open houses on your own is not recommended. Not only can a co-worker or friend keep you company, they can help you monitor visitors and may help to deter criminal activity. It's the buddy system! In the case of a co-worker, it's helpful to have an extra hand to answer questions and communicate with potential buyers so you don't miss any opportunities.

Watching your own valuables during an open house is just smart business. Carry electronic devices in your hand or leave them in your trunk. In addition, wearing expensive jewelry may seem like putting your best foot forward, however, it may invite unwanted attention and risk.

If you don't routinely conduct open houses, safety should still be a concern. Review these common misconceptions that may be placing you, and others, at risk.

Misconception 1: It's a 'good' neighborhood.

Criminals are not discerning. In fact, they can target upscale neighborhoods or even "popular, high-end" brokers.

Misconception 2: I have my cell phone.

Cell phone service in certain areas may be spotty at best. In rural areas, or even certain rooms in a house, signals can weaken or die. Check for a landline and always inform a co-worker or buddy where you are. Arrange a time to check-in. Carrying an old-fashioned map as a back-up when your GPS goes down on that country road is a good idea, too.

Misconception 3: It's broad daylight.

Actually, most crimes against real estate professionals occur during the day. You may be less vigilant in daylight hours, so criminals may have the advantage. It's helpful to be aware of your exits and carry a safety tool that you know how to use.

CLAIM 1:

BEWARE OF SCOPE CREEP

Avoid going outside your area of expertise

The complexity of most real estate transactions is a key reason why documentation, clear communication, and attention to detail is so critical to a successful deal. The desire to please and be helpful to clients can sometimes get in the way of clear roles and responsibilities. Your expertise is real estate, not inspections, zoning, construction, or real estate law. The best way to limit risk is to operate within your role as a realtor and resist the temptation to assist in areas outside your scope of knowledge.

Learn how easily agents can cross the line, sometimes unknowingly or even mistakenly, in this real-world case study.

Situation: A real estate agent listed a 10-acre tract of rural land next to a highway as a potential site for a small hotel. The seller had owned the property for decades, and believed it to be zoned for commercial use. After the agent located a buyer, the buyer and seller agreed on a price and entered into a Purchase and Sale Agreement.

Problem: Approximately seven acres of the property were restricted wetlands regulated under the Natural Resources and Environmental Protection Act, resulting in the inability to fully develop the parcel of land.

Misconception 4: Nothing happened.

Too many of us know in our gut that something is off, or it feels wrong, but we ignore it. If you see something, say something. What you encounter may only be a precursor to something more criminal.

44% of female REALTORS® and 1 in 4 male REALTORS® have experienced a situation in the past year that made them fear for their personal safety or safety of their personal information.

- 2017 Member Safety Survey, National Association of REALTORS®

Make sure you're not falling victim to assumptions. Operating smart means paying attention to how you do business and placing safety ahead of all else. **P**

Sources:

Rivera, Donna. "Rethinking the Open House as a Sales Tool." *Investopedia*, 8 November 2018.

"What Are the Pros and Cons of a Real Estate Open House?" *Mashvisor Real Estate Blog*, 9 January 2018

"10 Tricks for Hosting an Open House That Make Buyers Say 'OMG, Wow!'" *HouseLogic*, 12 April 2018.

Payne, Donald. "Big Risks with Open Houses | Should You Have One?" *ActiveRain*, 10 December 2018.

Hawkins, Tracey. "7 Dangerous Practices You Think Are Safe." *Realtor Magazine*, 17 May 2018.

Dwyer, Susanne. "7 Safety Tips for Real Estate Agents." *RISMedia*, 9 May 2018.

Mistake: Even though the agent knew the buyer had development experience, he casually implied that he would investigate the "build-ability" of the property before the parties executed the Purchase and Sale Agreement. The buyer, having previously worked with an agent who did perform these tasks for a similar project, proceeded to hire an architect and secured financing, fully expecting the agent to advise him if there were any problems with the proposed development. The agent did not investigate the zoning and assumed that the buyer would take care of the necessary approvals. When the buyer questioned the agent about the approval status as the close of escrow approached, only then did the buyer learn of the wetland restrictions.

Result: The buyer sued the agent alleging that he failed to disclose or otherwise discover the wetland restrictions. The damages claimed included loss of revenue, attorney fees, and other related costs. The agent argued that it was the buyer who should have performed due diligence on the property's potential for development. The claim was settled after the seller testified that the agent did in fact tell the buyer that he would investigate the "build-ability" of the property.

Prevention: The agent should have advised the buyer prior to the execution of the contract that it was the buyer's duty to perform due diligence and gain the necessary approvals. Instead, he offered to act outside his scope of expertise as an

agent. The agent may have thought the offer was only casually mentioned, and therefore not binding, but the buyer took it at face value.

Staying within the confines of your expertise as a realtor can help manage expectations and mitigate confusion. Offering recommendations to clients can be a good way to be helpful without putting yourself at risk. Always document your communication and recommendations to both buyers and sellers. This detailed recordkeeping can help prevent miscommunication during a deal and will also be a solid source of evidence in the event of a liability claim. **P**

CLAIM 2:

JUST THE FACTS, PLEASE

Failure to Confirm Can Result in Fraudulent Claims

In the rush of completing paperwork and procuring signatures to close a transaction, it may be easy to brush aside the need for one more phone call or email to double-check some small detail. Unfortunately, a trivial detail to you may not be equally insignificant to a buyer or seller. Or perhaps in your mind, you consulted a "trusted source" who can be counted on for the latest information. But if you're not confirming all details with the appropriate authorities, you may be leaving yourself and your firm open to a potential claim.

Here's an actual scenario that could easily happen to anyone. Next time, make sure it's not you.

Situation: A buyer purchased a large single-family home on a one-acre lot. The home site was near a main highway but a large tract of woods located at the rear of the property served as a buffer between the home and the highway. During the home search, the buyer made it clear to the agent that privacy and easy access to the main highway were key considerations in their final decision. The agent believed the property met all the buyer's needs.

Problem: Prior to the sale, the agent informed the buyer that the adjacent woods were a designated greenbelt, protected from development. Based on that information, the buyer agreed to purchase the property. One month after the sale, a large retail chain announced plans to develop the woods and build a large "box store" 100 feet behind the property.

Mistake: The agent described the woods as a protected greenbelt based on second-hand information and failed to confirm with the appropriate entities. The representation made by the agent was not accurate and was based only on assumption.

Result: The buyer sued the agent for negligent misrepresentation and fraud, demanding rescission of the contract as well as other unspecified damages. Due to the allegation of fraud and negligence, the insurance carrier for the agent provided a defense, but reserved the right to deny coverage for any damages that arose from fraud. Ultimately, the case settled with the parties agreeing to pay for the construction of a large privacy wall and additional compensation to the buyer.

Prevention: The agent should have confirmed the information with the appropriate authorities before making the statement. Complete accuracy of all representations is critical to avoiding claims. Misrepresentation of material facts is the most common cause of claims against REALTORS®. Verify that any information shared with prospective buyers is factual and reliable. Remember, a homebuyer's decisions are based on a multitude of considerations, including some that might seem insignificant to others.

As an agent, your duty is to provide buyers with accurate information based on facts that will help them make the right home-buying choice. Successfully fulfilling this responsibility will also ensure you are minimizing risk and protecting yourself against possible liability claims. **P**

CLAIM 3:

BE CAUTIOUS CONCERNING DUTIES BEYOND YOUR SCOPE AS A REAL ESTATE PROFESSIONAL

You want to close deals as quickly as possible and sometimes you may do a little extra work to make that happen. However, offering services outside your scope of expertise can expose you to a higher level of risk. It may seem expedient at the time, but in the long-run you are placing your career and your business on the line.

Here's an actual scenario demonstrating how easily communication and expectations can run off the rails.

Situation: An agent listed a single-family home for rent, confirming the landlord wanted a tenant with a verified employment history and a minimum credit score. The landlord provided the agent with a standard rental application and requested to review all completed applications.

The agent showed the property to several prospective tenants, secured applications, and ran credit score reports. In addition, the agent submitted the names of the prospective tenants (with their consent) to a tenant screening service and all reports indicated "no prior evictions." The landlord reviewed all applications, including the reports from the tenant screening service, and selected a tenant. The tenant signed the lease, and paid the first month's rent and security deposit.

Problem: The tenant defaulted and failed to pay any further rent. The landlord learned the tenant was evicted one month prior to completing the rental application. The eviction was not noted on the tenant screening service report due to a time lag with electronic public records. The tenant was judgment proof, or financially insolvent, having no income or property that could be seized in a settlement.

Mistake: By providing information from the tenant screening service, the agent was subject to potential liability for negligence for not ensuring the accuracy of information and misrepresenting the tenant's qualifications. The landlord relied upon the report and interpreted it as the agent's own representation concerning the qualifications of the prospective tenant.

Result: The landlord sued the agent for negligence and for violations of the Consumer Fraud Act claiming the agent misrepresented the qualifications of the tenant. The landlord requested damages for lost rent and treble damages, or triple the amount of actual damages awarded, plus counsel fees.

The claim was settled after discovery confirmed the listing agreement did not provide any specific agreement for the agent to screen tenants and the landlord was involved in the screening process. The agent argued he merely provided information to the landlord and made no statements concerning the tenant's qualifications or the accuracy of the content of the screening report.

Prevention: The agent could have advised the landlord to perform his own screening and provided the landlord with the names of (ideally three) tenant screening services. Alternatively, the agent could have presented a written disclaimer for the landlord to sign stating the report from the tenant screening service was information provided by the service; that by providing the report, the agent was not making any guarantee or recommendations; that the information from the service was not a substitute for independent investigation; that the landlord acknowledged the risk of renting; and, that a tenant's circumstances can change at any time.

Moving a deal along can be accomplished in ways that don't make you vulnerable to potential liability claims. Keeping your scope of expertise in mind as you engage in new deals is a good filter for decision-making. A standard disclaimer that can be tailored to different situations can also be helpful to have in your files. Don't overlook the fact that prevention goes a long way in keeping your premiums low and your business intact. **P**



Insurance coverage in any particular case will depend upon the type of policy in effect, the terms, conditions and exclusions in any such policy, and the facts of each unique situation. The recommendations in this article may differ from state and local practices. AXA XL is a division of AXA Group providing products and services through our four business groups: AXA XL Insurance, AXA XL Reinsurance, AXA XL Art & Lifestyle and AXA XL Risk Consulting. Coverage is underwritten by the following AXA XL companies: Greenwich Insurance Company and Indian Harbor Insurance Company. Not all insurers do business in all jurisdictions nor is coverage available in all jurisdictions. AXA, the AXA and XL logos are trademarks of AXA SA or its affiliates.