

## **Notes from C.R.E.B. Sponsored Seminar**

### **Avoiding Litigation Through Property Condition Disclosure Seminar with Robert Brand**

*October 2018*

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If using the AVID, consider not writing any disclosures (from the agent's visual inspection) on the TDS in sections 3 or 4 – instead check off the “See attached Agent Visual Inspection Disclosure Form” box.

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When the agent does not find anything of concern in a particular room, consider writing “nothing noted” (rather than “OK” or “nothing wrong”) in the appropriate AVID section.

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The first week after a buyer complains post-close about a property condition issue is a critical time for risk management efforts. Respond immediately, provide the client with very specific time frames for follow-up efforts, and consider arranging a rapid and appropriate compromise solution to bring the matter to an early conclusion.

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Regarding the issue of an increasing presence of the homeless community into a residential neighborhood, the following steps are suggested: (1) If representing the seller, point out the question in the TDS form's Section 2, item C11 (“Neighborhood noise problems or other nuisances”). If the sellers consider the homeless issue to be a nuisance, then they should disclose it. (2) Consider making a verbal and written suggestion to the client such as “Contact XYZ Police Department regarding law enforcement issues in this community.” (3) Verbally suggest to the client (and also document) something like “I encourage you to drive around the community at different times to see if you are comfortable with the area.”

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Great caution should be used regarding content on social media websites, as well as in blogging, tweeting, etc. Keep in mind that any comments you post on social media regarding a property, a client, another agent, area crime statistics, opinion on pricing, etc., may fall under the concept of “no expectation of privacy.” A good “test” before posting on social media is to ask “How would this comment look on display in a court room?”

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When representing investors who are flipping multiple properties, consider advising them (in writing) to obtain a listing-side professional home inspection to supplement their limited knowledge of the property’s condition. Also, follow your company’s policy regarding the issue of checking for building permits.

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The Seller Property Questionnaire (C.A.R. form SPQ) form is mentioned in the RPA item 10.A(4) – “...Seller shall...complete and provide Buyer with a Seller Property Questionnaire...” Note that the sellers should complete this form, not the agent. Also note that the seller’s answers are “...based on actual knowledge and recollection...” at the time the form is completed, and issues that the seller does “...not consider material or significant may be perceived differently by a buyer.” The agent’s disclosures should be in the TDS (section 3 or 4), and preferably also on the AVID – not on the SPQ. Agents and sellers have different standards of care.

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Consider disclosing property issues that may seem overly obvious – such as a shopping center next to the property, or a nearby freeway. Instead of mentioning what might bother the client about a nearby train, shopping center, freeway, etc., consider only disclosing that it is nearby (without creating a list of possible nuisances).

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Document text messages to clients with a printed email or other method of correspondence that will remain in the file and/or in cyberspace storage. It may be best to not use texting for messages that are of a sensitive or complex nature.

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Some observations from the revised/updated Residential Purchase Agreement (12/15):

10. A-4 The Seller Property Questionnaire (SPQ) is now mandatory.

10.D Megan's Law Database Disclosure - "Neither seller nor brokers are required to check this website."

11. Properties are sold in their "present physical condition" -which is synonymous with the term "as is."

16. Unless otherwise specified, sellers may personally perform repairs or have the repairs accomplished "through others." If buyers expect that the repair person will have a specific qualification (example – a Licensed Plumbing Contractor), that qualification should be clearly stated in the request for repair.

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Two fundamental principles of disclosure:

"The only buyers who sue are surprised buyers." During a visual inspection, agents should ask "Will the buyers be negatively surprised about this property condition?" If the answer is yes, then they should generally disclose it.

"Point it out, do not figure it out." Agents should bring a property condition of concern to the client's attention, but should not diagnose the issue. So, "stain noted at ceiling due to roof leak" becomes simply "stain noted at ceiling."

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Depending on the location of the property, and unless regional disclosure advisories are provided regarding potentially dangerous local wildlife, consider disclosing:

"Buyer is advised that there is indigenous/invasive wildlife in the area. Check with the local municipality for further information if concerned."

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Consider replacing numbers with the optional word "some." Example: rather than "12 cracks noted at exterior siding" disclose "Some cracks noted at exterior siding."

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When a room is extremely cluttered, consider disclosing: "Extensive personal belongings prohibited a visual inspection of this area."

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When noticing a strong odor in the home, consider disclosing "Obvious odor noted." Do not diagnose the issue.

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Check with company management regarding policies concerning the disclosure of neighbor hearsay, and also the disclosure of nearby "half-way houses." Opinions and procedures vary in these two areas.

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Remember that all disclosure requirements remain the same for all parties for so-called "As Is" transactions. (See the Residential Purchase Agreement's section 9 – "Condition of Property.")

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When completing a disclosure form (TDS or AVID, etc.), agents should refrain from using adjectives. So, "3 large setting cracks noted above fireplace" becomes "Cracks noted above fireplace."

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Note that conversations between agents and prospective buyers may be recorded and videotaped in "Smart" homes.

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For "trashed out" homes, consider including this disclosure: "Deferred maintenance noted throughout the property. Extensive personal belongings prohibited a visual inspection of several areas." For "unlivable" homes, consider including this disclosure: "Extensive disrepair noted throughout the property."

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Do not use superlative words (such as totally, completely, thoroughly, etc.) in either disclosure or real estate advertising. In advertising, substitute them with “generic” words (such as beautiful, wonderful, amazing, etc.).

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Keep in mind that the word “visual” in the TDS (“visual inspection”) may be interpreted as “any sensory perception.”

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Sample wording for building permit concerns:

"Buyer is encouraged check with the local municipality regarding building permit issues."

**Clear all disclosure practices with company policy  
and with a qualified attorney.**

**2018**