

SELLERS SHOULDN'T TAKE THEIR DISCLOSURES LIGHTLY

By Rod Herman – All Rights Reserved

Some of the most important set of papers a seller will ever sign – perhaps more important than the purchase contract itself – are the disclosures.

Time was, buyers purchased real estate on a what-you-see-is-what-you-get basis. The seller had no obligation to tell what worked and what didn't. If the buyer didn't see it or ask about it, it was tough-luck.

Then, several decades ago, the California legislature decided it was high time to hold sellers accountable for what they were selling and enacted a set of disclosure laws that immediately gave California home buyers an opportunity to learn about all the skeletons in the closet up front.

All of a sudden, sellers had to think long and hard about what they were really selling. They had to be sure the buyer was aware of both the good and the bad. That was a major departure from the way things had gone up until that point.

If you had a leaky roof, you had to tell the buyer about it. If the dishwasher didn't work or the patio door was broken, you had to disclose it.

Not only did you have to tell buyers about defects and inoperable mechanical components, you also had to disclose any neighborhood concerns to the buyer. So if you were selling because of that barking dog next door, you had to advise the buyer about it up front.

Over the years, the disclosure laws have grown to include a number of additional disclosures. Today, sellers must fill out a number of statutory forms disclosing the presence of things like earthquake hazards, fire and flood dangers, and more.

Buyers must be given an environmental hazards booklet and be properly advised about such possible dangers in the home as lead-based paint and toxic mold.

Specific disclosures are required to advise the buyer about laws governing water heater earthquake bracing and smoke detectors. There are additional disclosures for properties which are part of a homeowners association or located in a special assessment district. Sellers may even be required to disclose if someone died at the property or the details of any legal proceedings involving the property.

The whole purpose of these laws is to make sure the buyer has a clear picture of exactly what he or she is really buying. When sellers take that responsibility too lightly problems can occur later.

One question that many sellers often have is "How do I know exactly what to disclose or not disclose?" Or, "Is it really necessary to tell the buyer about every little scratch, nick or dent?"

There's no absolute answer to either question, other than this: When it doubt, disclose it! You can never tell the buyer too much about what they're buying.

Put on your buyer's hat and ask yourself you'd want a seller to tell you if you were buying? If you look yourself squarely in the eyes, the answer should be pretty obvious.

If the house is 40 years old and the finish is worn on most of the original doorknobs, that may not be a huge problem for most buyers. But if it's something that's gnawed at you for the past 12 years and which you curse about to yourself every time you open a door, then why not disclose it? After all, if it's bothersome to you, it may also be bothersome to others.

As a seller, it's not your right to decide what the buyer should and shouldn't be told. Just fill out the disclosure forms candidly and truthfully. Let the buyer decide whether something is trivial or a big deal.

Some sellers worry that if they give the buyer a set of disclosures showing that the home is full of defects, the buyer may cool on the deal very quickly.

That's always a possibility. But here's another way to look at it. If you don't disclose something you clearly knew about and the buyers discover it after they move in, you could be looking a lawsuit – which could easily turn a great deal into the nightmare of your life.

You really don't know what that buyer's hot buttons or concerns may be. And there's really nothing to be gained by waiting until after escrow's closed to find out.

For all you know, your buyer may have just sold a home that needed \$20,000 worth of structural work due to poor drainage. If water pools in your backyard on really wet days and you decide not to tell the buyer about it during the disclosure period, you may be asking for a lawsuit once the buyer moves in and discovers that you willfully withheld information on something of major concern to him.

Now, even though you're required to disclose known defects or problems, the law doesn't require you to have the same knowledge that a contractor or engineer might have.

You're not expected to climb on your roof or go underneath your home. Nor are you expected to know the inner workings of things like your furnace or electrical system.

You're only expected to have the knowledge of an average layperson. In other words, you wouldn't be expected to know whether your water heater is operating at optimal efficiency, but you certainly should know if it's leaking.

Likewise, you might not be aware of the condition of the plumbing beneath your house. But if a plumber was out six months ago to repair a leak underneath your sink and told you that your pipes showed extensive signs of corrosion, then you certainly should give the buyer the benefit of that same information.

By the same token, if you've actually gone up on your roof or crawled underneath the house and discovered a certain problem, then yes, you certainly must disclose it. But if you haven't ventured into those areas, as long as you're not aware of any problems, then it's up to the buyer to perform his or her inspections to determine if there are any other unknown defects.

What's more, just because you're required to tell the buyer about all the defects and problem areas, the law doesn't require you to correct any of them.

You're only required to disclose them. It's up to the buyer to decide how or if they want you to address it.

Of course, if your roof has been leaking off and on for the better part of two years, you can pretty much count on the buyer insisting on a new roof. Similarly, if you know the furnace is leaking carbon monoxide into the house, be prepared to pony up for a new furnace.

But even though you told the buyer that water puddles up in the backyard during periods of heavy rainfall, the buyer may just take a "so-what...that-doesn't-worry-me" attitude or a "that's-not-a-big-deal...I-can-take-care-of-it-myself" approach to things.

As long as you've disclosed it honestly, you've done your part. We always tell our clients to simply give the buyer all the facts. They're entitled to know as much about the house as you do – both good and bad. If there's going to be a problem, get it out in the open right away and let the buyers decide if they still want to proceed.

More often than not, things that sellers agonize over turn out to be much ado about nothing to a buyer. Most buyers realize that they're not buying a new home and don't expect everything to be in mint condition.

Whenever the buyer receives a new disclosure, they're entitled to a three-day period to address any items of concern with the seller or simply back out of the contract.

For that reason, it's always wise to get your disclosures into the buyers' hands right off the bat. If there's going to be a problem, it's better for both parties, if it's addressed right away.

After all, if the buyer is going to back out, you certainly don't want to keep your home off the market (and unavailable to other buyers) for two or three weeks.

Keep in mind, too, that the house is what it is. There's nothing you can do to turn a hillside location into a flat lot. Nor is there any way you can give new life to a 30-year-old roof short of putting on a new one.

So don't fret about what the buyer might think or how they'll react. Just give them the news and let them decide how they want to handle it. It's far better to hand over the keys with hearty handshake and a clear conscience than to lay awake at night after escrow's closed and worry about getting a phone call from the buyer's attorney.

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