In My Opinion

Editor’s Note: In My Opinion is an “open forum” that may contain controversial opinions or unsubstantiated facts presented by the author. The opinions presented herein are not necessarily the editorial views or opinions of PMAR. You may be able to have your views and opinions expressed in a future In My Opinion by contacting PMAR Chief Operating Officer Michele Holen, 503-459-2154 or mholen@pmar.org.

The Importance of Full and Total Disclosure
By Gary Taylor, CRB, GRI, CDPE, Summa Real Estate Associates

What follows is fiction, but could very well have happened:

Mr. Smith had his house for sale and received and accepted an offer right away. This first buyer had a full home inspection, but decided not to continue with the purchase of the property. The home inspection contained a mention by the home inspector that the hot water heater had faulty electrical wiring to it that was both unsafe and not to code. The listing agent did not ask for a copy of the Home Inspection report from this first buyer.

The second buyer, Mr. Jones, came along shortly after the first buyer terminated his transaction and entered into a contract with Mr. Smith to purchase the home. This second buyer had a home inspection also, and while there were several issues that the 2nd inspector brought up, the faulty wiring on the hot water heater was not one of them. The transaction closed on November 22, 2015.

On the night of December 17, 2015 the home caught fire and Mr. Jones’ young son died in the hospital a few days later as the result of severe burns from the fire. The fire department determined that the cause of the fire was the faulty wiring to the hot water heater. Mr. Jones has sued the Listing agent of the seller and also the seller, Mr. Smith as a result of this. The lawsuit is for several million dollars.

The attorney for the buyer, Mr. Jones, is questioning the listing agent during the trial and asks several questions:

Attorney: “Was there a home inspection performed on the home on behalf of the first buyer just a few days prior to Mr. Jones making an offer on the property?”

Listing agent: “Yes”

Attorney: “Did that inspection report mention that the wiring to the hot water heater was defective?”

Listing Agent: “I don’t know.”

Attorney: “Didn’t you see a copy of the report?”

Listing Agent: “No, I did not see a copy of the report.”
Attorney: “Didn’t the Sale Agreement State that the seller had the right to have a copy of the report?”

Listing agent: “Yes”

Attorney: “Then you didn’t ask to see the report on behalf of the seller?”

Listing agent: “No, I did not.”

Attorney: “Why not?”

Listing Agent: “I was trying to protect the seller.”

Attorney: “Protect the seller from what?”

Listing Agent: “I was trying to protect the seller from having to disclose anything in the report to a subsequent buyer.”

Attorney: “So, even though the report was available to both you and the seller, which would have disclosed the defective wiring that caused the fire, you choose not to review the report because you would have to disclose a negative material fact in the report to a subsequent buyer?”

Attorney: “Did the seller revise the Seller’s Property Disclosure after the first buyer terminated the transaction?”

Listing Agent: “No.”

Attorney: “Does not Oregon Law require that if there has been an inspection report on the property in the past 3 years that it be disclosed on the Seller’s Property Disclosure?”

Listing Agent: “Yes”

Attorney: “Doesn’t the law require on that question among others that if the answer is ‘yes’ to that question that a copy of the report or an explanation be attached?”

Listing Agent: “Yes”

Attorney: “So to summarize, you chose not to review the inspection report that was available to you that disclosed the electrical problem and violated an Oregon statute by not revising the Seller’s Property Disclosure?”

Readers: If you were the arbitrator, judge, or on a jury hearing this case would you find the listing agent and his company at least partially liable for the death of Mr. Jones’ son? What about the liability of the seller?
I hear way too often of listing agents who are trying to “protect” their seller by advising them not to obtain a copy of an inspection report for fear of having to disclose any issues in the report. I can understand some of the reluctance, but, in light of the bigger picture of what can happen and the liabilities involved, those concerns are minor.

For example, a home inspector may comment that the roof is near the end of its useful life. A report by a licensed roofing contractor attached to the Home Inspection Report in the Seller’s Property Disclosure stating that the roof has at least 5 more years of useful life, might solve that problem. I had my own home sold once and the inspector for the first buyer said the rear deck needed to be totally replaced. A second home inspector for a 2nd buyer never even mentioned the deck. A report by a deck contractor stated that one board on the deck needed replacement.

Every attorney I have ever talked to about this issue has emphasized full and total disclosure. “I never heard of anybody being sued because they disclosed too much,” is a phrase I have heard over and over. Yet, the OREF sale agreement inspection clause and the inspection addendum still offer the seller the option to ask inspection report or not. I firmly believe that should not be the case.

I have even had a listing agent very upset because one of my agents send them the Home Inspection Report even though it was not requested by the seller or listing agent. I have also had listing agents go further and tell me they will not show an inspection report they have received to the seller. Huh? Doesn’t the sale agreement say that a document delivered to the agent is considered delivered to the client? So, the listing agent has the report and doesn’t give a copy to the seller, but the seller is deemed to have received a copy the report? I think that listing agents in this type of case are really setting themselves and the seller up for failure.

I usually try to add some humorous elements to these articles, but, for some reason I don’t find anything about this subject humorous.

Next month: We will take a humorous look at loan fraud and the hilarious consequences of not sending the lender a copy of an addendum.

Gary Taylor, CRB, GRI, is a Principal Broker with Summa Real Estate Associates. He is a Past Chairman of the Regional Multiple Listing Service. He was awarded the PMAR Realtor of the Year for 2007, the Million Dollar Club’s “Managing Broker of the Year” for 2006, the Oregon CRB of the Year in 1996, and WCR Member of the Year in 2001. He was also a Notary Public in 1974. He can be reached at gary5136@gmail.com.