
REAL ESTATE MATTERS

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TIMELY DISCLOSURE STRATEGIES

Perhaps the most critical aspect of any transaction, from the standpoint of risk avoidance, is the preparation and delivery of the Transfer Disclosure Statement (“TDS”). It is through the TDS that sellers and agents disclose defects and other issues relating to the property.

There are many issues concerning the TDS which warrant careful review and discussion. One of these is the question of when to have the TDS completed. The three most common options are: 1) at the time of the listing; 2) at the time the buyer and seller enter into the purchase agreement; or, 3) after the parties have entered into a binding purchase agreement.

As you know, a buyer can cancel the transaction three (3) days after personal delivery or (5) five days after mail delivery of the TDS. With this in mind, to avoid the potential loss of the sale, it is in the best interest of the sellers and agents to deliver the TDS as soon as possible. Accordingly, the preferred course of action would be to have the TDS completed by the sellers and listing agents prior to the time the offer is accepted. Given the foregoing, the question is at what point in time before the offer is accepted should the TDS be completed.

Preparing the TDS at the time of the acceptance has benefits and risks. On the one hand, the buyer is given a TDS which was just prepared with the most current information. On the other hand, during the heat and fury of the offer/counter-offer process, it is extremely difficult for either the sellers or their agent to properly focus on all of the issues in the TDS which require their attention. As a result, the completion of the TDS at that time is likely to lead to incomplete and inadequate disclosures.

To avoid this potential consequence, the best option is to have the TDS completed before an offer is actually received. Since there is no certainty as to when an offer will be received, it makes sense to have the TDS completed at the time of the listing. Having the TDS completed at the time of the listing does pose one significant risk. If the property does not sell for a period of time after the listing, then it is possible the sellers and listing agent will be left with a TDS with outdated information. There have been many claims by plaintiff buyers in which they argued the sellers and agents were negligent for failing to provide a current TDS.

With this in mind, the recommended procedure is to provide your sellers with a copy of the TDS at the time of the listing. At that time, explain to them the solemnity of the document, along with the importance of their completing it fully and honestly.

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The sellers should be counseled to take a day or two to walk through the property and carefully complete all of their portion of the TDS. In addition, they should be advised to use additional paper, rather than allowing the space in the TDS to dictate the breadth of their disclosures. Further, they should be told to disclose everything. In other words, if the question arises in their mind: "Do I need to disclose this?" then they have already recognized it is an issue which requires disclosure. Finally, the sellers should be instructed *not* to sign or date the TDS at that time.

A couple of days later, the you should return to the property and carefully inspect it for your disclosures. In conducting this inspection and making the disclosures, you should heed the advice given to the sellers regarding the breadth of disclosures and the use of additional paper. If you see any defects not disclosed by the sellers, then ask the sellers whether they would like to include those defects in their disclosure. Finally, when the TDS has been completed by you and the sellers, it should remain *not* be signed by either you or the sellers. It should be reviewed by the appropriate person at your office and then retained in your transaction file.

When an offer finally is received, you should review, with the sellers, the TDS which was completed but not signed or dated. At that time, you and the sellers should make any modifications or additions needed to the TDS. Once you and the sellers have done so, then the TDS can be signed and dated as of that date.

By following the foregoing procedures, you and the sellers will be able to provide a TDS which was prepared in a calm and thorough fashion at the time of the listing. By the same token, the TDS will be finalized, signed and dated at the time of the offer. This will assure that the buyers are receiving a TDS which is both current and complete. In addition, it will help protect the sellers and listing agent from a future claim regarding the accuracy and timeliness of the information in the TDS. Finally, it will help to eliminate any delays in providing the TDS to the buyers and the associated risks of losing the transaction.