



THE LAW OFFICE OF  
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**To:** Clients and Friends  
**From:** Christopher J. Sullivan  
**Subject:** Avoiding Liability for Texas Real Estate Agents and Brokers

Today's real estate practice is fraught with more liability than ever before. While the vast majority of property transactions go uncontested, it is becoming increasingly common for real estate agents and their brokers to become parties to a lawsuit concerning the sale of real property. Sometimes, agents lose their commissions over lawsuits or threats of lawsuits, and in the worst circumstances they can be personally sued for negligence or actions that they took on behalf of their clients. In a competitive business, it is easy for agents to be swayed into gray areas. However, in almost all cases, the exposure to potential liability is not worth the risk. Here are three situations in which liability abounds.

#### *Failure to Disclose*

Sellers in Texas, of course, have a duty to disclose property defects. If the seller knows of a property defect and fails to disclose it to the buyer, the buyer can bring a lawsuit against them post-sale. Agents need to be constantly aware that the duty to disclose also presents liability to themselves and their brokerage because agents also have the duty to disclose property conditions that they knew or reasonably should have known about. This means that agents cannot simply look the other way when they are aware that a seller is marking "no" or "unknown" on a seller disclosure when the agent knows that the answer is yes. The extent of the duty to disclose is often debated. If, for example, there is a hole in the wall of the basement, does the duty extend to disclosure of the size? What about disclosure of the cause? Agents should try to get sellers to err on the side of over-disclosure as opposed to under-disclosure, both for their own protection and that of the agent. A disgruntled buyer who learns of a significant issue with the property post-closing is apt to bring a lawsuit against not just the seller, but the seller's agent as well.

#### *Breach of Duty*

Every agent knows that they have a duty to act in the best interests their client, whether the client is a seller or a buyer. Breach of duty is one of the most common lawsuits brought against an agent, perhaps because it can be asserted against so many different situations. Agents are held to a high standard of disclosure and honesty to their clients, and some duties even extend to the client's counterpart (the buyer or seller on the other side of the table). The best way that an agent can protect themselves against a claim of breach of duty is to document, document, document. Since most breach of



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duty claims become instances of he-said, she-said, the agent's best defense is to be honest at all times and to document every step of the transaction, including what advice is given to the client. Whenever possible, give important information via email so that you have a written record that you provided it.

### *Unauthorized Practice of Law*

Many agents loath the idea of involving an attorney in their transactions, even when legal advice or custom provisions are necessary to get the deal done. There is a perception that when attorneys get involved they will impose extra conditions on the deal, create paranoia among clients, and just generally create more obstacles. Depending upon the attorney involved, this is sometimes true. However, the majority of times, an experienced real estate attorney will do just the opposite. By counseling a client as to their options under the law, and giving sound advice to overcome such issues as unreleased liens on the property or disagreements over contractual terms, the right real estate attorney can be an incredible tool that an agent uses to facilitate a smoother transaction and get parties to the closing table faster than ever before.

When agents are reluctant to involve an attorney, they often end up dispensing legal advice to clients themselves, as well as inserting custom provisions into contracts. Both of these common actions are, unfortunately, unauthorized practice of law (UPL). In recent years, UPL has taken a spotlight and many brokers are cracking down on agents when it happens. This is because a UPL claim represents a significant liability to a realty firm, and can get both the agent and his or her broker into serious trouble with the state bar (the organization governing attorneys) or even sued by parties to the transaction. Avoid UPL and get a trusted and experienced real estate attorney, such as The Law Office of Christopher J. Sullivan, PLLC, involved on your behalf.

Sincerely,

*Christopher J. Sullivan*

Christopher J. Sullivan  
*Managing Member*