

Material Facts: Once Material, Always Material?

By Will Martin



I am frequently asked by REALTORS® whether they are required to disclose the existence of some past event that had an adverse effect on a property. I give my customary “it depends” answer because the answer depends—as it always does—on the particular facts.

Take the following example: you’ve just gotten a new listing on a house and you’re sitting at the seller’s dining room table assisting her in completing the Property Disclosure Statement. The seller relates that one Saturday evening a couple of years ago, water began dripping from the dining room chandelier just before the arrival of dinner guests. The dinner party was adjourned to the living room and was a screaming success, but a post-party investigation revealed a slow leak in an upstairs bathroom tub/shower just above the dining room that had caused a significant amount of unseen damage. Lots of damp wood and mold under the tub in the space above the dining room ceiling. (The hair on your neck stands up when the seller mentions “mold.”) The leak was fixed, the mold removed and a fair amount of sub flooring and sheetrock replaced. (You steal a glance at the dining room ceiling as the seller is talking and it looks perfect.) The seller tells you that she has documents from a reputable contractor that detail all the work that was done. You are thinking to yourself: Do I have to disclose any of this to a prospective buyer?

As you know, you are required by the licensing law and the REALTOR® Code of Ethics to disclose material facts about a property. So are the facts that the seller has told you about in the above example material facts? In my opinion, if an

agent can, under the particular circumstances with which he/she is confronted, reasonably conclude that: (1) the source of a problem has been identified and satisfactorily corrected/repared and (2) any damage caused by the problem has been satisfactorily repaired, then the agent would not be required to disclose any facts about the problem and the damage caused by that problem because the information is no longer material. In the example given, I would recommend that you, as the listing agent, request copies of the documentation from the contractor. If the documents support what the seller has told you, and based on your own inspection of the property there are no indications that the problem still exists, I do not believe you would be required to disclose what the seller has told you about the leak or the problems it caused to prospective buyers. On the other hand, if the seller didn’t have reasonable documentation from the contractor and you were unable to reasonably satisfy yourself in some other way that the leak and the resulting damage had been taken care of (by perhaps contacting the contractor who did the work or getting a supporting opinion from another qualified person), then you would probably be required to disclose.

Even if disclosure isn’t required, I recommend that agents have a discussion with their seller clients about the potential benefit of disclosing anyway. Buyers who discover the existence of a previous problem after closing sometimes threaten or even take action against the listing firm and/or the seller based on an alleged “cover-up” of the problem. Disclosing the problem up front and demonstrating that everything has been fixed should help avoid that possibility.

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