



An  
Agent's  
Guide

**Understanding Real Estate Disclosure Laws**

Christopher R. Jones, Esq.  
cjones@hjlawfirm.com



HELLMUTH & JOHNSON PLLC

ATTORNEYS AT LAW

T 952-941-4005 F 952-941-2337 [www.hjlawfirm.com](http://www.hjlawfirm.com)  
10400 Viking Drive, Suite 500, Eden Prairie, MN 55344



## AN AGENT'S GUIDE TO UNDERSTANDING REAL ESTATE DISCLOSURE LAWS

### INTRODUCTION

This guide is a resource for Minnesota real estate agents regarding the disclosure requirements for selling and buying properties. Due to recent changes in Minnesota's disclosure laws, sellers of real property in the state – *as well as the agents involved* – are now required to make a broader range of disclosures regarding various conditions that may affect the use and enjoyment of a property. These new requirements affect both agents who represent sellers, and those who work with buyers.

Understanding these laws will help an agent to make required disclosure part of his or her routine, which reduces the likelihood of becoming involved in legal claims as a result of the sale of a property. This guide includes information on:

- Seller Disclosure Requirements;
- Agent Disclosure Requirements;
- “Hot Button” Areas; and
- Court Decisions Regarding Disclosure Issues.

As each transaction presents different issues, this article is not to be relied upon in place of specific legal advice. Instead, an agent (and his or her clients) faced with these types of issues should consult an attorney experienced in this area of law.

## DISCLOSURE REQUIREMENTS FOR SELLERS

The most logical place to start is a review of the disclosures required by sellers – the basic framework for all disclosures, including those of agents.

The current seller disclosure laws<sup>1</sup> – passed by the Minnesota Legislature in 2002 and effective as of January 1, 2003 – provide clear obligations on the part of sellers and their agents. Seller disclosure requirements apply to single-family homes, as well as condominiums and townhouses.<sup>2</sup> There are a number of exceptions, including but not limited to sales of nonresidential property, new construction, divorce-related transfers and transfers between certain family members.<sup>3</sup> The exceptions should be closely reviewed to determine if any are applicable to a particular situation. Otherwise, the disclosure requirements must be followed.

Disclosures must include “all material facts of which the seller is aware that could adversely and significantly affect:

- an ordinary buyer’s use and enjoyment of the property; or
- any intended use of the property of which the seller is aware.”<sup>4</sup>

These disclosures must be made by the seller “in good faith and based upon the seller’s knowledge at the time of the disclosure.”<sup>5</sup> The law states that these disclosures must be made “before signing an agreement to sell or transfer residential real property.”<sup>6</sup>

“Material facts” can include, but are not limited to:

- physical defects in the property itself;
- existing damage to the home;
- development around the property;
- failure of mechanical systems;
- knowledge of water intrusion problems or other construction defects; and/or
- past repairs related thereto.

The disclosure laws also allow a seller to provide the required information to the seller's agent in order to satisfy the disclosure requirements.<sup>7</sup> If the seller's agent is provided the required written disclosure from the seller, it is then the agent's responsibility to provide the prospective buyer with a copy of the written disclosure.<sup>8</sup> In addition, any information passed to the agent (or independently known by the agent) must in turn be communicated to the prospective buyer. Do not to rely on the seller to do so.

There is an important exception to the disclosure requirements. The law states that when a prospective buyer has either obtained or been provided with a written inspection report from a qualified inspector, the seller is not required to disclose information regarding the subject property unless the buyer provides the seller with a copy of the report and inconsistencies are identified in the report.<sup>9</sup>

Furthermore, the obligation of the seller to make disclosures continues up to the point of closing. The law states that a seller must notify a buyer as soon as reasonably possible if the seller learns that a prior disclosure was inaccurate, or if any additional material facts regarding the property become known before closing.<sup>10</sup> Failure to properly revise a previous disclosure when new facts become available (or known) can subject a seller to the same liability for failure to disclose material facts in the original disclosure.<sup>11</sup>

Where a seller is aware of and fails to disclose materials facts, the seller will be liable to the buyer for that failure to disclose.<sup>12</sup> A buyer may recover both monetary damages and seek equitable relief, which could include rescinding the sale of the property if the failure to disclose is not discovered until after the transaction has been completed.<sup>13</sup> For an agent, rescission could include the return of a sale commission or even an award of monetary damages to the buyer.

Buyers faced with underlying problems with a property have limited time to act. The disclosure laws require that a buyer commence an action under these laws against a seller for failure to disclose within two years from the date of closing.<sup>14</sup> However, the law also says that even if more than two years has passed there is nothing to prevent a buyer from bringing suit against a seller and the selling agent for common law fraud, misrepresentation or other grounds relating to the failure to be truthful regarding the condition of the property.<sup>15</sup> Thus, even after

two years, both the seller and seller's agent could indeed be held liable for failing to make the proper disclosures.

A seller and a prospective buyer may jointly agree to waive the written disclosure requirements.<sup>16</sup> In order to do so, the buyer and seller must have a written agreement clearly indicating that the disclosure requirements are being waived.<sup>17</sup> Waiver of the disclosure requirements has significant implications for buyers, sellers and their respective agents – it should be executed with due caution and the advise of legal counsel.

For instance, a property may be sold in an “as-is” condition, the effect of which is often the same as waiving the disclosure requirements. However, unless properly drafted, an “as-is” addendum may leave both the seller and agent open to potentially significant liability. Special attention must be given to such transactions, including the requirement for specific disclosures, which is discussed below.

## **DISCLOSURE REQUIREMENTS FOR REAL ESTATE AGENTS**

Minnesota law also requires that an agent disclose to any prospective buyer all “material facts” of which the agent is aware that could adversely and significantly affect a purchaser's use or enjoyment of the property.<sup>18</sup> While specific rules govern agent disclosures, the requirements are very similar to those required by a seller.<sup>19</sup> Basically, whatever a seller is obligated to disclose, an agent is obligated to disclose to the extent the agent is aware of the fact or information. The disclosure standards discussed should be reviewed and understood by agents. If you know of a condition affecting a property, the standard for disclosure can generally be boiled down to three words: *disclose, disclose, disclose.*

The potential liability of an agent for a failure to properly disclose problems or issues with a home should outweigh the desire to sell quickly or at a high price – especially in the current market environment. Ignoring these disclosure requirements may lead to serious consequences for an agent, including lawsuits and great financial loss in addition to suspension or revocation of an agent's license.<sup>20</sup> As far as agents are concerned, below are some areas that merit specific attention.

**Buyer Inspections.** One important wrinkle in the disclosure laws relates to inspection reports. The agent is not required to disclose information relating to the physical condition of the property if there has been a written inspection report issued by a qualified third party and provided to the buyer.<sup>21</sup> In reality, however, this provision is not applicable as often as it may seem because disclosures are required to be made before the signing of the purchase agreement, and home inspections are generally conducted after the purchase agreement has been signed. Thus, some disclosures are made before an inspection even occurs.

However, when the buyer provides a copy of their inspection report to the agent and/or seller, the agent and seller must in turn disclose any information that contradicts what is stated in that report.<sup>22</sup> Note that the person issuing the report must be a “qualified third party” – essentially any person with expertise necessary to meet industry standards for property inspections and who is acceptable to the person receiving the disclosure.<sup>23</sup>

While many disclosures are made before the inspection stage, the inspection report itself is of great importance to the process. Knowledge of information adverse to the inspection report creates an obligation on the *seller and the seller’s agent* to contradict the report. A buyer's agent should make a habit of providing the buyer’s inspection report to sellers in order to take advantage of that obligation. This is one of the most overlooked parts of the disclosure laws, and one to which agents have historically not paid enough attention.

However, this does create a unique predicament for the seller’s agent and seller. Because of the disclosure requirement, a seller or seller’s agent may have to disclose a past buyer’s inspection report to future buyers if the earlier sale falls through. This explains why many agents do not want copies of inspection reports. However, agent or seller knowledge that an inspection occurred is not in itself a required disclosure, as long as both parties have not obtained new information “affecting the use and enjoyment of the property.”<sup>24</sup>

**Property Disclosure Forms.** The Property Disclosure Form is typically the main written disclosure made to prospective buyers. Sellers generally provide this disclosure early in the sale process – often prior to listing and often during showings. Thus, the Form has a very significant role in overall disclosure requirements.

However, it is certainly possible that there are other items that must be disclosed which are not specifically requested in the Disclosure Form. The form should only be considered a guide, it is not the final determination on what should or should not be disclosed. Attention should be paid to what is legally required to be disclosed, not just the information requested through the use of the form. This issue has been given special mention below.

## **“HOT BUTTON” AREAS**

There are certain “hot button” areas that are ripe for potential liability that should be given special attention by both agents and their clients.

**As-Is Addendums.** Many times, properties are sold “as-is” with no warranties made regarding the condition of the property. Unfortunately (and incorrectly), there are occasions in this type of sale where a Seller’s Disclosure Form is included. While the point of selling a property “as-is” is to avoid having to make any disclosures, the very act of making disclosures voids the “as-is” aspect. Therefore, if a home is truly being sold “as-is”, it requires a specific written waiver of all disclosures - no disclosures should be made, either verbally or in writing.

**Completing the Seller Disclosure Form.** If an agent assists the seller in filling out the disclosure form, the question of whether the agent participated in the decision of what should or should not be disclosed arises, and the agent has just inserted him or herself in the middle of a potential disclosure lawsuit.

An agent’s active participation in assisting a seller with completing the Seller's Disclosure Form may create liability. To avoid this dilemma, an agent should simply explain the form and request that the seller answer all questions truthfully.

Often, an agent will review the Seller's Disclosure Form after it is completed – at a minimum to ensure that all questions have been answered. However, if the agent is aware of any condition that has not been disclosed, the agent should take steps to ensure that the information is made available to prospective buyers. This includes any information that the seller has disclosed to the agent, and any “material facts” of which the agent has independent knowledge – regardless of whether a condition is made known to the agent through touring the home, or even through a

neighbor's remark regarding a pre-existing condition. In this circumstance, the agent should advise the seller to amend the disclosure form.

If the seller refuses to divulge the information, as painful as it may be, the agent should walk away from the listing. It is also prudent for an agent to independently document (in writing) any perceived issues or clarifications regarding the form that they deem necessary to protect their interests.

**Inspection Reports.** As discussed earlier, one of the most overlooked areas for agents is the use of inspection reports. Because a seller must disclose any condition of the property that is incorrectly stated in any inspection report the seller receives, a habit should be made as a buyer's agent to give the report to the sellers. This will create an additional obligation on the seller and seller's agent to "correct" any problems with the report.

Conversely, when working for a seller, if the buyer provides a copy of the report to the seller and/or the seller's agent, the agent should make sure the seller reviews the report, and discloses any condition in the report that is contradictory to seller's knowledge.

**"Puffery".** Inexperienced agents too often use this tactic in "making the sale". "Talking up" a property to create interest, or conversely to downplay something negative, can be disastrous. Under pressure to make a sale, an agent may (often subconsciously) try to lessen the impact of a bad condition. State the facts and only the facts – the less "spin" the better. However, over (or under) exaggerating a certain aspect of the home or property may unnecessarily place an agent in the crosshairs of an angry buyer – if the statement proves to be untrue.

## **AVOIDING THE MISTAKES OF OTHERS: COURT DECISIONS REGARDING DISCLOSURES**

In addition to the above-referenced statutory requirements, there have been a number of court cases involving claims against agents that are informative on the issue of how an agent should (or should not) act in a transaction. Although the new disclosure laws have not yet been

fully interpreted in the courts, these cases illustrate some of the areas that warrant special attention.

**THE “KEEP YOUR MOUTH SHUT” CASE: Sawyer v. Tildahl, 148 N.W.2d 131 (Minn. 1967).** In this case, the listing agent was sued by the buyers, who had earlier contacted the agent to view the property. These prospective buyers were fully aware that other homes in the area had experienced problems with basement water seepage, and discussed this with the listing agent, who stated, “You will never have a water problem with this basement.” The agent further stated that the prospective buyers “couldn’t possibly have a water problem in this home, because you are south of Highway 10 and your land is very close to Rice Creek and this land all drains to Rice Creek.” Ultimately, after the buyers took possession, they observed 1-1 ½ inches of water in the basement. In addition, evidence showed that the sellers had made previous attempts to correct the seepage problem by various methods, including siphoning.

The Court discussed the standard regarding the potential liability of agents: an agent who fraudulently makes representations or knowingly assists in the commission of fraud or duress by others is subject to liability, even though the fraud occurred in a transaction on behalf of a seller. If the agent induces a third person to purchase by means of fraudulent misrepresentations, he or she is liable to that person for loss suffered as a consequence.

The Court also held that a water problem in a basement is a “material consideration” to a prospective buyer, which is not surprising. The Court importantly noted that even if the agent did not know that there had been seepage in the basement, he could have easily discovered that fact. That type of information should have been available to him as an experienced agent who “knew his merchandise”. Any statements, or for that matter *omissions*, regarding the physical condition of the property can subject an agent to potential liability.

The agent was held liable to the buyers for the statements regarding the water seepage in the basement to the extent of the reduced value of the property due to the water problems despite the buyer’s inspection. The implication of this point is that even where a buyer separately conducts his or her own inspection or investigation, statements made by the agent can lead to potential liability. An agent may still be held liable to a buyer even if that buyer did an

investigation or inspection that should have discovered any problems. A buyer's inspection does not remove all potential liability for fraudulent or negligent misrepresentations to the buyers.

**“CROSSING THE LINE”:** Berryman v. Riegert, 175 N.W.2d 438 (Minn. 1970). In this case, buyers met with an agent who worked for the company listing the subject property for sale, a “dual agency” situation. Prior to meeting the prospective buyers, the agent toured the home. During the initial meeting, the prospective buyers specifically informed the agent that they did not want to buy a property with a “water problem”. While viewing the property with the buyers, the agent stated that the lot was “high and dry” and referred to recent rains, saying, “if there is no water here now, there never should be any.” However, within days after moving into the property, the buyers had 1-3 inches of water in their basement.

The Court ultimately found there was sufficient evidence to rule that the buyers were induced to purchase the home by the fraudulent statements of the agent. The Court noted that a water problem in a basement was a material consideration and was of great importance to the buyers. While the agent did not know of any actual water seepage in basement or of any water problem in the neighborhood, that information was **“susceptible of knowledge”** by the agent, *i.e.* he could have known about it.

The Court stated, “it would seem that such information should be available to an experienced real estate broker, who should know his merchandise”. The agent's statements about the lack of water in the property implied that he had knowledge of the condition of the property sufficient to allow the buyer to rely on his statements as accurate.

The Court also concluded that the agent's statements were more than mere “puffery” or “dealer's talk” and noted that the parties were not on equal footing. The agent had superior knowledge (or at least the opportunity for knowledge) concerning problems with the property. The sellers were inexperienced in real estate, and had a right to rely on the statements made by the agent, assuming that his statements were based on actual knowledge of the condition of the property.

So, when an agent's representations “substantially and materially” induce a buyer to purchase the property, the agent may be held liable regardless of any investigation by the buyer.

Dual agency situations like that can be very difficult for disclosures, and agents should take extra care.

**“PASSING THE BUCK”:** Baker v. Surman, 361 N.W.2d 108 (Minn. Ct. App. 1985). During a showing, the buyers asked their agent about a “water puddle” in the basement and staining in the ceiling of a closet. The buyers’ agent asked the sellers’ agent about the issue, who in turn inquired of the sellers. The sellers’ agent then relayed the sellers’ answers to the buyers’ agent, who in turn relayed to the buyers that the puddle was from an open window in the basement, and the sellers had never experienced any problems with the roof.

Following the purchase, the buyers found that the home was in poor condition – observing bowed walls in the basement not previously visible. Subsequently, the home also suffered from water leakage and stains on the ceiling from a leaking roof. The buyers brought suit against the sellers and both agents for misrepresentation.

In ruling on the liability of the agents, the Court held that an agent can be independently liable for fraud if he or she knew or should have known of the misrepresentations of the seller. As far as the buyers’ agent was concerned, the Court held that that agent visited the property only once, did not know of any leaking, and had no reason to doubt what the sellers’ agent relayed to him. Thus, in this circumstance, there was no liability on the part of the buyers’ agent for simply relaying the information told to him.

However, the Court ruled that the buyers could have a claim against the sellers’ agent as the agent was experienced, visited the home repeatedly, and was in this case, actually aware that the basement walls were bowed. This was true even though the Court noted that there was no direct evidence that the sellers’ agent in fact knew that the sellers misrepresented the condition of their home. There was a fact issue as to whether the agent should have known of the seller’s misrepresentations and buyers were entitled to find out what the agent knew about the home and may not have disclosed thus making the agent’s life much more difficult.

This case points out the importance of making sure that any information communicated to prospective buyers is in fact true, especially when relaying a seller’s comments. If, as a listing agent, you choose to visit the home while assisting sellers in listing, you need to be aware of and

ensure that the relevant physical condition of the home is adequately disclosed – including what the seller tells you. Failure to do so, as this case suggests, exposes an agent to potentially significant liability when an agent knows a misrepresentation is made and does nothing to counter it.

Before making any communication to a prospective buyer, an agent should be confident that any information they communicate is accurate and truthful. Likewise, the agent should make sure that there is no exclusion of material information to a potential buyer. When a seller provides you with information, especially if you have any indication that it may be inaccurate, you must attempt to verify the facts.

**“NO HARM, NO FOUL?”: Raach v. Haverly, 269 N.W.2d 877 (Minn. 1978) & Hommerding v. Peterson, 376 N.W.2d 456 (Minn. Ct. App. 1985).** These cases involved contract for deed purchases, and are worthy of mention because of their unique factual situations. In both cases, buyers/vendees commenced action against the listing agent after the cancellation of a contract for deed. The most important lesson from these cases is that, despite the cancellation of the contract for deed and nonpurchase of the property, the Court allowed claims against the agents to go forward.

The Court held that where an agent made false statements, the cancellation of the contract for deed had no bearing on the liability of the agent. Even if a contract for deed is cancelled and the property returned to the seller, an agent can still be held liable for false statements made during the course of the transaction, *e.g.* for money already paid under the contract for deed and “lost” by the buyer. The point is that there is no “safe harbor” concerning liability, and care must be taken in all statements made regarding the condition of a property at any time. An agent could be liable to a buyer for false statements even where it may appear the transaction has not even been completed fully. Thus, no harm does not always equal no foul.

## **WHY SHOULD AN AGENT BE KNOWLEDGEABLE ABOUT DISCLOSURE ISSUES?**

As agents play such a significant role in the marketing and sale of properties, a solid knowledge of disclosure requirements is crucial. Being aware of disclosure issues at every stage of a transaction may help an agent avoid possible liability.

The current state of the market may create added pressure on agents to perform by selling a home quickly, and at the highest price possible. Regardless of that pressure, agents and their clients must comply with all of the disclosure requirements or run the risk of being dragged into a lawsuit and being held financially liable for their actions, or lack thereof.

Disclosures have even more significance in the current real estate landscape in light of the increase in water intrusion, mold and construction defect claims involving newer homes. These types of claims, combined with the turn towards a “buyers’ market,” may lead to an atmosphere where sellers are feeling hard-pressed into selling “at all costs”, and may be tempted to cut corners in their disclosures in order to increase the selling power of their homes.

Again, how disclosures may be applied varies on a case-by-case basis. The nuances of disclosure laws can be difficult to fully understand and they often seem conflicting and contradictory – especially depending on which side of the transaction you stand. When there are concerns over what should or should not be disclosed, an agent should contact an experienced real estate attorney to analyze the facts and determine the best approach regarding disclosure. The potential risk of improper disclosure far outweighs the cost and effort needed to ensure compliance with these disclosure requirements.

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<sup>1</sup> Minn. Stat. §§ 513.52 to 513.60

<sup>2</sup> Minn. Stat. § 513.52, subd. 4

<sup>3</sup> Minn. Stat. § 513.54

<sup>4</sup> Minn. Stat. § 513.55, subd. 1(a)

<sup>5</sup> Minn. Stat. § 513.55, subd. 1(b)

<sup>6</sup> Minn. Stat. § 513.55, subd. 1

<sup>7</sup> Minn. Stat. § 513.55, subd. 2

<sup>8</sup> *Id.*

<sup>9</sup> Minn. Stat. § 513.56, subd. 3

<sup>10</sup> Minn. Stat. § 513.58

<sup>11</sup> Minn. Stat. § 513.57, subd. 2

<sup>12</sup> Minn. Stat. § 513.57, subd. 2

<sup>13</sup> However, a violation of the disclosure laws in and of itself does not invalidate the sale of the property. If requested by the injured buyer, a court would have the power to “undo” the transaction based upon failure to disclose or other misrepresentations should the circumstances warrant.

Minn. Stat. § 513.59

<sup>14</sup> Minn. Stat. § 513.57, subd. 2

<sup>15</sup> Minn. Stat. § 513.57, subd. 3

<sup>16</sup> Minn. Stat. § 513.60

<sup>17</sup> *Id.*

<sup>18</sup> Minn. Stat. § 82.22, subd. 8

<sup>19</sup> *Id.*

<sup>20</sup> Minn. Stat. § 82.48, subd. 2

<sup>21</sup> Minn. Stat. § 82.22, subd. 8

<sup>22</sup> *Id.* and Minn. Stat. § 513.56, subd. 3

<sup>23</sup> *Id.*

<sup>24</sup> Minn. Stat. §§ 82.22, subd. 8 and 513.55, subd. 1(a)

**CHRISTOPHER R. JONES, ESQ.** is an attorney with Hellmuth & Johnson, PLLC and concentrates his practice in the areas of real estate law and commercial and construction litigation. He represents both buyers and sellers in arbitrations and lawsuits relating to real property. He also represents homeowners in construction defect disputes involving single and multi-family housing. Mr. Jones provides a free consultation to individuals with real estate issues. For questions and comments, contact Christopher Jones at (952) 941-4005 or [cjones@hjlawfirm.com](mailto:cjones@hjlawfirm.com)

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