

## Confidential or Not?



Suppose you have a listing where there is a material adverse fact pertaining to the physical condition of the property. A bad furnace, for example. You rightly discuss this with your seller and advise the seller you are required under Va. Code § 54.1-2131(B) to disclose it to prospective buyers. Your seller, furious, demands that you not do so. Again, you explain that you are obligated to do so. An argument ensues; the seller fires you, and you decide to let the seller out of the listing rather than deal with them.

Much to your chagrin you soon see the property listed by another agent at another firm (at that lower price you suggested no less!). Curious, you pick up the phone and call the other agent and ask whether the agent is aware that the furnace is broken and is disclosing it to prospective purchasers. The new agent informs the seller that she too will now need to disclose (ah, sweet revenge). Upon learning of your treason the seller furiously and gleefully files a Code of Ethics complaint and a complaint with the VREB.

What is the result? The “inquisitive” first agent has not violated the Code of Ethics. He probably has not violated VREB regulations either, but that is not as clear.

This particular fact pattern is the subject of a National Association of Realtors® case interpretation adopted in 2000 (Case Number 1-25: Disclosure of Latent Defects). The nature of the complaint is that the seller says that the broken furnace is confidential information, and since a Realtor® has a duty to maintain confidential information the agent breached that duty by disclosing it to someone who did not know it. According to NAR, Realtors® do in fact have an obligation to preserve confidential information gained in the course of any relationship with clients, but Standard of Practice 1-9 specifically provides that latent material defects are not considered “confidential information” under the Code of Ethics.

While I found no reported VREB disciplinary actions dealing with this situation, the Virginia Code follows a track similar to the Code of Ethics. Under Va. Code § 54.1-2131(A)(3) “an agent is obligated to maintain the confidentiality of personal and financial information received from the client” but it also provides that that confidentiality is to be maintained “unless otherwise provided by law....” As we noted, subsection (B) obligates an agent to disclose that information; and, that section further provides that “no cause of action shall arise against any licensee for revealing information as required by this article or applicable law.” So, it seems to me that the same result should obtain. However, I should point out that it is conceivable that VREB would take a different view because an agent is only obligated to disclose the information to prospective buyers, not to other third parties and agents (and your “inquisitive” phone call probably isn’t all that well-intentioned). So, as always, please discuss any such situation with your broker and your lawyer before acting for a specific opinion based on specific set of facts. Please feel free to call me at 757.595-5655 or email me at [bdlytle@lytlelaw.com](mailto:bdlytle@lytlelaw.com) where I will confidently and confidentially help.