Legal Corner

Shhhh. Don't Tell Anyone. Promise?

Does a listing agent violate her duty to a seller by disclosing in the MLS or the contract that the seller's ability to perform is dependent "on the consent or approval of any third party"?

Virginia law requires (absent a written agreement to the contrary) a listing agent to "maintain confidentiality of all personal and financial information received from the client during the brokerage relationship and any other information that the client requests during the brokerage relationship be maintained confidential, unless otherwise provided by law or the seller consents in writing to the release of such information."

So, it seems to me that in order to answer the question we need to decide whether the types of things we are talking about are (a) "personal and financial information received from the client;" (b) if no then did the client otherwise request them to be kept confidential, (c) does the law require them to be disclosed; and finally, (d) did the client consent in writing to the release?

There is no question but that financial difficulty, bankruptcy, divorce, short sales, judgments, etc. are personal and financial. One might well learn these things from the public record and argue they were not "received from the client," but I simply do not believe you should allow that to trump the fact that these sorts of things are very personal and probably not common knowledge. I recognize that perhaps they are going to come out anyway, but let's save that thought for a moment.

Next, we consider whether the client "requested [the information] to be kept confidential." Obviously, this is mutually exclusive with "consent in writing to the release" but it does highlight the fact the Virginia law pretty much starts with the presumption that you are going to keep your client's confidences and only disclose them when you have written consent to do so.

So, are any of these things required to be disclosed because it is "otherwise provided by law"? No, I do not believe so. I think this provision really addresses the situation also found in the same Virginia code section, oft discussed by us, which is that a listing agent has to disclose certain material adverse facts to prospective buyers whether the seller objects or not. I do think you could make a pretty good argument that there is a legal obligation to disclose the seller is in bankruptcy (um, going to jail if it is hidden and permission not obtained is usually a pretty convincing legal argument), but I am not aware of any "provision of law" that would obligate you as a listing agent to disclose a short sale, for example.

As we have worked through this I pretty much think we can all agree that these things are confidential and should not be disclosed unless the client consents.

But I think seller clients do consent in local practice, and I think they should – both from a practical and legal standpoint.

Until recently REIN required MLS disclosure of such third-party consent items, and that box still remains. Required or not, recall though that clients sign the data input form that is submitted to REIN. I believe this is sufficient written consent provided there is a discussion about it – after all, consent is never valid unless it is freely, voluntarily and knowingly given. So, if you don't really have a discussion with your seller about what is really being disclosed and that it does not have to be disclosed there (in the MLS) then you might have a problem. I recognize that noting this type of problem in the listing somewhat stigmatizes the property and might cause prospective buyers not to make offers. Your recommendation to your client whether to disclose them in the MLS is strictly up to you and I make no suggestion in that regard. Talk to your broker for guidance and policy.

But, we all know that the REIN contract has a boilerplate provision whereby the seller affirmatively represents that there are no such contingencies and that if there are then they need to be disclosed. And here, I firmly believe such third-party consent items

should in fact be disclosed and made a contingency because if they are not then the seller will be in breach of contract if they are unable to close. And as we discussed previously, I believe that the seller signing the contract containing the disclosure is sufficient written consent to disclose provided the seller understands he or she has a theoretical choice – after all, you could strike out that language from the contract and stand silent (which of course is tantamount to screaming I HAVE A SHORT SALE SO WITHDRAW YOUR OFFER!) or you could have your client make an affirmative misrepresentation, lose your license and get you both sued.

Please feel free to email me at bdlytle@lytlelaw.com if you have any questions or have a topic to suggest for a future article.