

Questions and Answers on the MD: MOLD DISCLOSURE

Q Why do agents and brokers need to use a Mold Disclosure form?

A By now everyone has heard the phrase “Asbestos is old, mold is gold!” What that means quite simply is that litigation concerning mold and mold-related issues is skyrocketing and producing some sizable judgments/settlements for plaintiffs. One cannot be in the real estate business in California and not be aware that mold is a huge issue, one that requires REALTORS® to be extremely vigilant in assuring that their clients are aware of both the dangers of mold itself and the dangers of being sued over mold. Further, REALTORS® need to understand that they themselves can be held accountable for failure to advise their clients regarding mold and mold-related issues, and that there are almost no insurance policies that cover mold. To assist its members in serving their clients and protecting themselves as REALTORS®, SDAR’s Risk Management Committee introduced a new Mold Disclosure for use in all real estate transactions in San Diego County. While it is true that mold is covered in the Environmental Hazards and Local Area Disclosures for San Diego County (LAD) booklets, think of the new Mold Disclosure as, “You can’t have too much of a good thing.” Logically, the more times someone is advised of something, the more likely it is something significant. More important, the more times someone is advised of something, the less likely they will later be able to successfully argue that they were not aware of it. This is one time that redundancy is a must. It is expected that all REALTORS® use the new form, in addition to the LAD and Environmental Hazards booklet in every real estate transaction, all the time.

Q What does the Mold Disclosure Form say and do?

A The Mold Disclosure, a one-page, easily understood form, explains the problems with mold and the necessity of obtaining a mold inspection. The Mold Disclosure further advises the buyers that failure to obtain a mold inspection is expressly against the advice of brokers, and gives the buyers some resources to learn more about mold. Finally, the Mold Disclosure contains language that in essence relieves the broker of responsibility regarding the actual or potential existence of mold at the property, provided the form is given to and signed by the buyers.

Q When and how should the Mold Disclosure be given to buyers?

A The Mold Disclosure should be given to the potential buyers or lessees at the onset of the transaction. In the final analysis it doesn’t matter whether a listing agent or a selling agent gives the buyer the form; however, logically (and in terms of fiduciary duty) the buyers’ agent should provide the form to the buyer.

The buyers’ agent should sit down with the buyers and explain the form, explain that mold is a concern for some people and can cause health problems in susceptible persons, and advise the buyers that the only way to provide reasonable assurances that the property does not have mold or other health hazard conditions is to retain the services of an environmental expert to conduct an evaluation. If there is any indication of moisture problems, visible evidence of mold, odors or ponding water at the property, this is especially true. Once the REALTOR® has presented and reviewed the form with the buyers, the buyers’ signatures should be obtained on the form and a copy provided to the buyers, given to the listing agent, and retained in the buyers’ agent’s files.

The next step is for the buyers’ REALTOR® to hand-write in “Mold Inspection” on page 4, item 11 of the Buyer’s Election of Inspections (BEI). The BEI is due to be revised in the near future to contain a check-off box for Mold Inspection; hence the need for this interim method. That way, the REALTOR® has given the clients the Mold Disclosure form and then the clients are given the opportunity to elect (or not elect) to have a mold inspection done. It would be extremely difficult for a buyer to later sue over mold issues and claim that he or she was not provided any information on mold in the face of so many disclosures and so many opportunities to sign his or her name to a document relating to mold!

Q How important is it for me to use this Mold Disclosure?

A In the current litigious climate, REALTORS® cannot do enough to protect themselves (and their clients) from lawsuits. SDAR members are fortunate to have this new Mold Disclosure form at their disposal to help manage their risk. This form, when used in conjunction with the Environmental Hazards booklet, the Local Area Disclosures for San Diego County booklet, and the Buyer’s Election of Inspections form, is an important tool in ensuring that REALTORS® are relieved of liability for mold-related claims. 