

Brokerage

Who should/shouldn't attend property inspection

Oh, the controversy! Google the question and you will find a plethora of opinions, many of which originate simply from a defensive attitude designed to limit the brokers liability, without consideration of duties or best practices. This article will offer an alternative perspective through the lens of required brokerage duties and best practices.

The answer to this question is not included in Colorado real estate license law, nor Real Estate Commission rules. Every broker and brokerage should give serious thought to this topic and develop their own office policies.

■ **Should the buyer be present for the property inspection?** Absolutely! The inspector is working for the buyer(s). The buyer has the right to and should be present during the inspection. Only when present can the buyer see firsthand what the inspector is seeing and ask questions to fully understand the scope and context of the inspector's comments and observations. Much greater information and knowledge can be gleaned by being present for the inspection rather than simply reading the inspection report. If the buyer cannot attend the scheduled appointment, the inspection should be rescheduled.

■ **Should the buyer's real estate broker be present for the property inspection?** Here we get to the heart of the debate. In Feb-



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ruary 2002, the National Association of Realtors published an article written by a prominent Denver real estate attorney addressing this very question.

Concerned about brokers' liability, the attorney recommended:

"Don't go through the property with the inspector." The suggested tactic was to "sit in another room and wait."

The article summarizes a legal proceeding whereby a broker was sued for missing a problem with the property during an inspection. The reason the broker lost the suit is not because he was present for the inspection or "missed a problem," but because of what the broker did and said during the inspection! In the article, the attorney asserts that a broker is not able to simply observe and listen carefully, but will insist on helping the inspector.

Brokers sometimes do point out issues with the property, discuss inspector statements, point out items the inspector "missed" and



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generally talk too much. In these instances, the attorney is correct! These actions do significantly increase the broker's liability. In addition, acting as a property inspector is a violation of

Uniform Duty

5.1.4., "Advising Buyer/Seller regarding the transaction and advising Buyer/Seller to obtain expert advice as to material matters about which Broker knows but the specifics of which are beyond the expertise of Broker."

However, it is not the presence of the broker that creates the liability, but the brokers' conduct at the inspection that puts them at risk. Liability is not created by listening and observing. One might argue that not attending the inspection could be construed as a violation of Uniform Duty Section 5.1. of the Uniform Duties, which also states that "Broker must exercise reasonable skills and care for Buyer/Seller."

The authors of this article believe the buyer's broker should always attend the inspection, but should never point out deficiencies in the property or help the inspec-

tor identify problems. The buyer's broker should listen carefully and ensure that the buyer clearly understands what the inspector is saying. If something is obviously unclear to the buyer, the broker should ask the inspector for clarification rather than attempting to explain statements made by the inspector. The broker should never pontificate as to what the inspector said nor point out items the inspector does not mention. Finally, if the broker is not present for the inspection, it may be far more difficult to negotiate terms and conditions for the buyer.

■ Should the seller be present for the property inspection?

Many buyers and buyer brokers do not want the seller to be present at the property inspection. Even though it is the buyer's inspection, it is still the seller's property! The seller has every right to be present at the inspection and not only hear what the inspector says, but also to watch over and protect his own property and raise concerns if the inspector is causing damage. If the seller is present, the buyer should refrain from discussing any confidential information until after the inspection has been completed and he has exited the property.

■ **Should the listing broker be present for the property inspection?** Again, absolutely yes! The listing broker should be present to hear exactly what the inspector

says. "Hear" being the operative word! Being present may assist the seller when negotiating objections that seem to overexaggerate what the inspector may have said. Just like the buyer's broker, the seller's broker role includes facilitating negotiations. This may be more difficult if the seller's broker was not present at the inspection and does not know what the inspector observed or stated.

There is one caveat to the seller being present at the inspection. Due to the requirement that sellers disclose all latent defects, a seller may decide he does not want the broker to attend the inspection, nor receive a copy of the inspection report, nor any disclosure as to what the inspection report says. While potentially dangerous, in this instance the listing broker should have a robust conversation with the seller and follow all legal instructions.

■ **What if the inspector won't perform the inspection if any of the brokers or parties are present?** This one is easy! The buyer should dismiss him from his inspection employment and find a new inspection company that understands its role.

The actions of licensees at the property inspection should be carefully considered and guided by your company's office policies and legal counsel. ▲