

## Hanover Miscellaneous Professional Advantage

# My client wants to skip [*fill in blank*]. Now what?

A growing number of real estate professionals are noting a dangerous trend. Clients are skipping key parts of the transaction which are intended to protect their interests. When a client is unwilling to listen to seasoned advice, any agent or broker should understand what this means to *their* interests, and whether this professional liability risk can somehow be mitigated.

## Waiver versus Notice

A client may decide that, rather than pay for or perform acts that provide up-front or back-end protection, they simply want the transaction to move as fast as possible. This request was unheard of one year ago; now the market has made it commonplace. When a client says, “Can I waive that?”, what is often misunderstood is that a “waiver” is a formal relinquishing of legal rights. By extension, because it deals with legal rights, a waiver may require a specific form in order to be respected. What most agents are familiar with is likely a “notice”. A notice is just what it says – a notification of the potential future outcomes associated with an action taken currently. While a notice combined with strong loss limitation language may have an effect similar to a waiver, an improperly formatted waiver may provide a false sense of security.

Clients who believe they are waiving rights often are not. There is no legal obligation that says a buyer **MUST** get a home inspection, yet the home inspection is a classic “who buys a house without an inspection” task. Rare is the agent that advises purchasing a property without some insight into the structural integrity of the building and its systems. And yet purchasing property sight unseen and without inspection is happening with increasing regularity. If there is no right to be waived, then a waiver is inappropriate.

## What to do?

When confronted by a client’s request to skip an important step, there are two actions to consider. Because time is of the essence, you should be prepared for these two items well ahead of time. First, know what is an actual “right” and what is not. While a home inspection may not be a right, warranties, representations or other common tasks may be a different answer. Identify with business counsel what requires a formal waiver to prepare you for the best way to respond. Second, have the right paperwork to appropriately and quickly respond to the client’s request. Waivers may need to conform to state law or consumer protection requirements. Your business counsel can help you draft a template that will help protect you. A notice with loss limitation language is simply documentation that the client has knowingly decided to ignore your (good) advice. In professional malpractice, this documentation is critical to defend against allegations that your failure to protect the client’s interests resulted in a dollar loss, physical damage or personal injury.

## A Sample Notice

The *Sample* Notice below is intended to provide a basic example of documentation between an agent and client when the client wishes to act against the recommendation of the agent. Although drafted with the current environment in mind, any situation where the client is attempting to cut corners or not follow advice should consider use of a notice to protect against allegations of professional negligence. A final word – should you decide to use a notice it is recommended you not wait until closing to try to get the client to sign as this may invalidate the notice altogether. The notice should be used as soon as it is apparent the client will not follow your advice.

**CLIENT** has entered into an agreement with **AGENT** to provide professional assistance in the purchase or sale of real estate property. In connection with the services to be provided, **AGENT** recommended the following acts be done by **CLIENT** prior to closing in connection with the purchase/sale involving the property located at **PROPERTY ADDRESS**:

*List acts recommended and dates of conversations/communications*

**AGENT** by this Notice reiterates that these acts should be completed prior to closing, and **CLIENT** by signing this Notice acknowledges and confirms that:

**CLIENT** agrees **AGENT**'s assistance with the purchase/sale is suitable for **CLIENT**'s purposes and **AGENT**'s advice is designed to minimize potential loss to **CLIENT**;

**AGENT** has provided **CLIENT** ample opportunity to discuss the acts recommended with **AGENT** or other professional of **CLIENT**'s choosing;

**AGENT** has discussed risks to **CLIENT** if they complete the purchase/sale without performing the acts recommended above (including risk of economic loss, risk of future value loss, risk of damage to property, risk of physical injury to occupants, or risk of loss of function or habitability);

**CLIENT** has opted to act contrary to **AGENT**'s advice and now expressly advises **AGENT** to proceed with the closing of the purchase/sale; and

**CLIENT**'s choice to proceed contrary to **AGENT**'s advice is done so willingly notwithstanding the risks identified and explained to **CLIENT** by **AGENT**.

The signer below also acknowledges that by signing this Notice, they accept full responsibility for conveying of or the failure to convey any and all conversations related to the necessity of acts listed above (and risks associated therewith) to any interested person who may share a reasonably foreseeable legal interest in the subject property (such as a spouse, relative, beneficiary, partner/LLC member, or any similar individual).

By signing this Notice, **CLIENT** agrees that it shall not hold **AGENT** or **BROKERAGE** responsible for any loss, and **AGENT** or **BROKERAGE** shall not be liable for any loss, resulting from conditions which reasonably could have been identified in the normal course had **CLIENT** completed the acts listed above. Further, by signing this Notice, **CLIENT** agrees that it shall indemnify **AGENT** or **BROKERAGE** for any third-party claim of loss resulting from conditions which reasonably could have been identified in the normal course had **CLIENT** completed the acts listed above.

(Signature lines for CLIENT, AGENT, and identification of BROKERAGE, MLS# and Agent License Number)

**Prior to use, agents should consult with appropriate Brokerage and legal counsel for applicability and practice area considerations.**

## Contact information

For questions about the content of this article, please contact J. Michael Reese,  
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