



Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Mold is all around us and plays an important role in the ecology of our planet. Mold can produce the finest of cheeses or melt down a real estate deal at lightning speed. Mold seems like the new age scourge with no reliable testing standards, no certain links to health symptoms, no certified testing or remediation contractors, and no insurance coverage. The worst cases are extensively covered in the media, creating a healthy new awareness as well as some irrational paranoia. To successfully handle mold issues in real estate transactions, REALTORS® must stand ready to optimize awareness and refer extreme situations to qualified professionals.

As a background to this *Update*, REALTORS® should review *Legal Update 01.07, What You Need to Know About Mold*. That *Update* overviews the media coverage of toxic black mold, the science of mold, the potential health effects of mold and other related issues as reported by such authorities as the Environmental Protection Agency (EPA), the Centers for Disease Control (CDC), and some state health departments. It must be noted that these authorities have shifted certain positions on mold as they are again referred to as resources for this *Legal Update*. The utility of mold testing has been questioned and the necessity of disinfecting with bleach solutions is seemingly downplayed by some authorities. Instead, the elimination of the water or moisture problem and safety pre-

cautions for cleaning a contaminated area are generally touted as the keys to mold management. This change in emphasis apparently stems from recognition by the scientific community that it really does not know a lot about many aspects of mold. These apparent shifts in focus are reflected in this *Update*.

This *Legal Update* attempts to lay out a practical plan for successfully managing mold issues in a real estate transaction.

The *Update* begins with a review of what is known—and more significantly, not known—about mold in our homes. The *Update* then discusses mold issues arising at different stages of a typical residential transaction: the pre-listing inspection, the seller's response to the inspection, the listing and the Real Estate Condition Report (RECR), the WRA forms, licensee disclosures, inspection contingencies, mold testing contingencies, after closing issues, and consumer mold fact sheets. The *Update* finishes with a section on mold management Legal Hotline questions and answers and a list of additional resources.

Generally, if the moisture source is quickly eliminated within 24-48 hours, mold growth may be avoided or controlled.

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What We Don't Know About Mold

As discussed in *Legal Update 01.07* and in the April 2002 report of the Mold Working Group of NAR's Risk Management Committee, we do know that three components are required before mold can grow and flourish.

First, mold requires a food source of organic material like wood, insulation, dry wall, ceiling tiles, other cellulose materials or even dirt. Second, mold grows best in moderate temperature conditions and prefers low levels of light. Extreme temperatures put mold into a dormant condition, but do not kill it. Third, mold requires a moisture source. Mold colonies often begin growing within 24 to 48 hours after a source of water has been introduced—a leak, a flood, humidity, etc. Generally, if the moisture source is quickly eliminated within that time period, mold growth may be avoided or controlled.

The problem with mold is that it is different from other environmental hazards encountered in houses such as LBP, radon or asbestos. We can readily identify these substances. There is a well-established body of scientific knowledge about how these substances are encountered and ingested by human beings, what levels are safe, and the expected health consequences of unsafe levels. We know what steps can be taken to prevent these injuries and have contractors and professionals certified to effectively contain or eliminate unsafe exposures.

Mold, on the other hand, is a naturally occurring, living organism that lives all around us with no practical means for keeping it out of a property. At present there are no EPA standards or other authoritative sources of information regarding what constitutes a safe level for mold. Different "experts" and contractors may take

samples using different testing methods, interpret data differently, and recommend different measures to address the problems they have found. A complete (and expensive) remediation may destroy or remove active mold colonies and reduce the levels of mold present indoors to match those found outside, but the potential for mold growth always exists because there usually will be a baseline residual level of mold still present. If a new moisture source appears, then there will likely be mold.

At present there are no EPA standards or other authoritative sources of information regarding what constitutes a safe level for mold.

If all species variations are counted, there are tens of thousands of different types of molds known to man. Only a few dozen of those are believed to have a toxic effect on humans, which in turn may be limited to only certain phases of their life cycle. At present there is no consensus in the scientific community on why toxic mold affects human beings or the amount of mold exposure required to trigger different adverse reactions. Some studies suggest that many or most molds may have some harmful effects on certain human occupants of a property at certain exposure levels. Some people can live or work in a property in which mold is present with no effect, while other occupants may be adversely affected almost immediately. There are many variables and no firm answers.

REALTORS® must attempt to carry on with business and sell properties despite this uncertainty. Armed with common sense, consumer information from recognized agencies, and a constant disavowal of any personal expertise or knowledge about mold,

REALTORS® can successfully proceed to closing.

Mold Consumer Fact Sheets

REALTORS® will be better equipped to work in transactions with mold issues if they have readily available informational brochures published by authoritative sources that explain mold and its effects to consumers. In addition, REALTORS® may minimize their exposure to liability for mold if they distribute authoritative information about the implications and effects of mold in real estate to the parties. NAR believes that this brochure should contain information about the conditions that allow for mold growth, methods to minimize or remove mold, and the need for buyers to make their own determination of whether further investigation of mold is needed. The brochure should indicate the problems with testing for mold and the difficulty in determining which if any tests are appropriate.

The following brochures and mold information sheets can be printed from the Internet and used in real estate transactions. REALTORS® are encouraged to review them all and decide which one(s) best meet their needs. Until a better brochure or pamphlet is created for consumers, these materials can be given to clients and customers facing potential mold issues in their real estate transactions.

EPA (2002)(6 pages) - “A Brief Guide to Mold, Moisture, and Your Home:” <http://www.epa.gov/iaq/molds/moldguide.html> (Note: a print version of this information is expected in the summer of 2002).

Minnesota fact sheet (2001)(4 pages) - “Mold in the Home:” <http://www.health.state.mn.us/divs/eh/indoorair/mold/index.html> (click on the Adobe Acrobat logo to print as a fact sheet)

Kansas State University (1995)(8 pages) - “Controlling Mold Growth in the Home:” <http://www.oznet.ksu.edu/library/HOUS2/MF2141.PDF>

American Lung Association Health House (2000)(1 page) - “Mold Control:” <http://www.healthhouse.org/tipsheets/Source1Mold.pdf>

This consumer information may be given to sellers when explaining potential mold or water problems spotted during the listing agent’s pre-listing inspection. The fact sheet information also should be provided in response to a buyer’s expression of concern about mold, or when a property in which the buyer is interested has evidence of mold issues. These fact sheets may be distributed along with any RECR or licensee disclosures pointing to actual or possible mold situations. In short, any time mold is the topic, prudent REALTORS® will stand ready with consumer information about mold.

REALTORS® can also educate their computer-savvy clients and customers by referring them to the WRA REALTOR® Mold Resource page at http://www.wra.org/Resources/resource_pages/Mold_resources.htm.

Pre-Listing Inspection

The first place in a real estate transaction where mold issues may be encountered by REALTORS® is during the pre-listing inspection required by § RL 24.07(1). The listing agent must “conduct a reasonably competent and diligent inspection of accessible areas of the structure and immediately surrounding areas of the property to detect observable, material adverse facts ... and shall make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property as applicable.” The wise listing agent will look for visible mold growth, the appearance or evidence of water intrusion or accumulation,

The wise listing agent will look for visible mold growth, the appearance or evidence of water intrusion or accumulation, and musty or other odors suggesting the presence of mold

and musty or other odors suggesting the presence of mold. The listing agent should also ask if there have been any indoor water or moisture problems and may also ask if any chronic allergies or adverse health conditions have been experienced by the property occupants. If there is a mildew smell, ask if there were ever any spills or leaks in that room. Ask if the carpet was pulled up and dried.

NAR’s Government Affairs Department white paper, *Mold in the Home: How it Affects REALTORS®*, observes, “Although it is not prudent for licensees to opine on the cause of unusual property conditions they may have observed, the conditions that licensees would normally note in the course of a visual inspection may include some conditions that may also lead to mold problems. Examples of such conditions are obvious water stains, such as on carpets or walls, strong or musty odors, leaky roofs or windows, plumbing leaks, overflow from sinks and sewers, or even visible mold growth. A licensee should not speculate whether or not these conditions may in fact indicate a mold problem, however, since licensees are generally untrained in such matters.”

Seller Response to Inspection Results

Once the listing agent’s inspection is completed, the agent should discuss the results with the seller. Just as when other defects and cosmetic flaws are observed during the pre-listing inspection, it may be helpful to address some of these concerns

Testing for Mold

Mold testing is of limited value and should be discouraged in most cases because:

- Reliable air sampling for mold can be expensive and requires expertise and equipment that is not available to the general public.
- If sampling is carried out in a home, an outdoor air sample also must be collected at the same time as the indoor samples, to provide a baseline measurement.
- There are few available standards for judging what is an acceptable quantity of mold.

- Testing to determine the kinds and amounts of mold present is rarely helpful.
- No single test can detect all types of mold.
- Results only crudely estimate the amount of mold present (and only at the time and the specific spot where the sample was collected).
- Interpretation of results is difficult—numeric criteria for interpreting data are arbitrary.
- Findings may mislead (e.g., false negative results).
- Test results are not predictive of health risks.

before the property is listed. This may help make the property more presentable and saleable and bring in a better price for the seller.

With respect to mold issues, quick seller action is important because of the potential health and safety concerns. A more positive picture is painted if the seller takes action to correct any moisture problems—before they get worse or hatch a mold colony—and the seller cleans or remediates any known mold before it has a chance to endanger the health of the property occupants.

Prompt seller action may also serve to contain costs. For example, a seller is more likely to clean small amounts of mold him or herself while a buyer will be more likely to engage in mold testing and then call in professional mold remediators. If mold contractors are needed, the seller who acts before the listing has the opportunity to control expenses by carefully selecting professionals who act responsibly and practically and who do not overreact and overcharge consumers. Thus, it will be beneficial to the agent, the seller and the buyer if the agent aggressively urges the seller to take some action if there is a serious water problem and/or mold problem.

Armed with consumer fact sheets about mold, the agent should explain to the seller the areas of concern discovered during the agent's inspection. The agent should indicate to the seller that any situations constituting defects would require seller disclosure on the RECR—either simple disclosure of the defects, or disclosure of the defects plus a report of the steps taken to clean, repair and/or remediate the situation. If the seller does not disclose the problem areas on the RECR, the listing agent will be compelled under § RL 24.07 (2) & (3) to disclose any material adverse facts, or any information suggesting the possibility of a material adverse fact, in writing to all parties. Buyers who receive this information may test for mold and ask the seller to bring in remediation contractors. Unnecessary testing for mold will add to the overall expense and may be inaccurate unless a qualified expert takes the samples and interprets the results for the buyer.

If there is evidence of any moisture or mold problems, the seller should consider whether he or she will repair and clean them or remediate any mold before proceeding with the listing. If the problem is visible mold, the seller needs to determine whether he or she will clean up the mold or whether a mold contractor should be

consulted. If there is a water or moisture source that requires attention, the seller may need to contact the proper professional to repair the problem. This may require a plumber, basement contractor, roofer, HVAC contractor, builder, electrician, carpenter or other appropriate expert. Water leaks should be repaired and chronic condensation or moisture problems should be addressed. A dehumidifier or a fan vented to the outside may sometimes provide a fairly easy solution. If the seller cleans up the mold, but doesn't fix the water problem, then the mold problem likely will come back.

The seller may be inclined to test for mold before proceeding, but the EPA has indicated that if visible mold growth is present, then sampling is usually unnecessary. Since no EPA or other federal limits have been set for mold or mold spores, sampling cannot be used to check a building's compliance with federal mold standards. Any sampling should be conducted by reputable professionals who have specific experience in mold sampling protocols and methods, and in interpreting results.

Mold Cleaning Guidelines

According to the EPA, who should do the cleanup depends on a number of factors. If the moldy area is less

than about 10 square feet (about a three foot by three foot patch), then in most cases, the seller can handle the job. If an area larger than 100 square feet is contaminated with mold, it is generally recommended that a contractor be retained. For areas between 10 and 100 square feet, more personal discretion may be used, although more intensive personal safety precautions may be indicated if the seller proceeds on his or her own. However, these are only general rules of thumb and every situation should be judged on its own merits. If there is any doubt, the safest course may be to call in a reliable professional.

If there has been a lot of water damage, and/or mold growth covers more than 10 square feet, the seller should review the EPA guide *Mold Remediation in Schools and Commercial Buildings*, which is applicable to other building types as well. It may be obtained by calling the EPA Indoor Air Quality Information Clearinghouse at (800) 438-4318, or at http://epa.gov/iaq/molds/mold_remediation.html.

The EPA outlines the mold cleaning procedure for homeowners as follows:

1. Fix plumbing leaks and other water problems as soon as possible. Dry all items completely.
2. Scrub mold off hard surfaces. Use non-ammonia soap or detergent, or a commercial cleaner in hot water, and scrub the entire area that is affected by the mold. Use a stiff brush or cleaning pad on cement-block walls or other uneven surfaces. Rinse cleaned items with water and dry thoroughly. A wet/dry vacuum cleaner is helpful for removing water and cleaning items.
3. Absorbent or porous materials, such as ceiling tiles and carpet, may have to be thrown away if they

become moldy. Mold can grow on or fill in the empty spaces and crevices of porous materials and become difficult or impossible to remove completely.

4. During the cleaning process, you may be exposed to mold, strong detergents, and disinfectants. It is recommended that an N-95 respirator (\$12—\$25 at a hardware store), gloves and goggles be worn while cleaning moldy areas. Wear long sleeved protective clothing that is easily cleaned or discarded.

5. Ask family members or bystanders to leave areas that are being cleaned. Work for short time periods and rest in a location with fresh air. Air out the house well during and after the work.

6. Remove moldy materials that are porous and can't be effectively cleaned: paper, rags, wallboard, rotten wood, carpet, drapes, upholstered furniture, ceiling tiles, sheetrock, and wood products. Wear gloves when handling moldy materials, and bag and discard moldy items. Solid materials such as glass, plastic and metal can generally be kept after being thoroughly cleaned.

7. Do not paint or caulk moldy surfaces. Clean up the mold and dry the surfaces before painting. Paint applied over moldy surfaces is likely to peel.

8. Sellers who are unsure about how to clean an item, or who have an item that is expensive or of sentimental value, should consult a specialist. Specialists in furniture repair, restoration, painting, art restoration and conservation, carpet and rug cleaning, water damage, and fire or water restoration are commonly listed in phone books. Check references and look for specialists who are affiliated with professional organizations.

There is currently a difference of opinion among experts as to whether cleaning with detergent alone is suffi-

cient or whether additionally treating with a chemical or biocide that kills organisms such as mold (chlorine bleach, for example) is needed. The EPA reports that this step is not recommended as a routine practice during mold cleanup. Some experts advise against using bleach because of the toxic fumes that chlorine bleach produces. Some who recommend against bleach do so in terms of professional remediation workers who experience a more continuous level of exposure, not an occasional use by a homeowner. Other drawbacks of bleach are that it does not remove the marks often left by mold and it sometimes produces additional staining or discoloration.

Other authorities such as the Federal Emergency Management Agency (FEMA) and the Air and Respiratory Health Branch of the CDC's National Center for Environmental Health, still recommend the following use of a bleach solution for homeowners removing mold:

- After thoroughly cleaning and rinsing contaminated materials, a solution of 10 percent household bleach (one to one-and-a-half cups of household bleach per gallon of water) can be used as a disinfectant. Using bleach straight from the bottle is actually less effective than diluted bleach.
- Keep the disinfectant on the treated material for the prescribed time before rinsing or drying; typically 10-15 minutes is recommended for a bleach solution.
- Caution must be exercised because bleach fumes can irritate the eyes, nose, and throat, and damage clothing and shoes. Always ventilate the area and exhaust the air to the outdoors.
- Never mix chlorine bleach solution with other cleaning solutions or detergents that contain ammo-

nia because toxic fumes could be produced.

For additional information go to <http://www.epa.gov/iaq/molds/moldguide.html>.

If the seller suspects that the heating, ventilation and air conditioning (HVAC) system may be contaminated with mold (if it is part of an identified moisture problem, for instance, or if there is mold near the intake to the system), the seller should consult the EPA's guide *Should You Have the Air Ducts in Your Home Cleaned?* before taking further action. Do not run the HVAC system if it is known or suspected to be contaminated with mold—it could spread mold throughout the building. Visit <http://epa.gov/iaq/pubs/airduct.html>, or call (800) 438-4318 for a free copy.

Broker List of Reliable Mold Remediation Contractors

If the seller wants to hire a contractor to do the cleanup, the listing agent will be performing a valuable service to the seller, the buyer and everyone involved by maintaining a list of competent mold remediation contractors, industrial hygienists and other mold experts. Valuable time, money and resources can be saved by avoiding those contractors who may prey upon unsuspecting homeowners and address the problem in a far more extensive and expensive manner than necessary. There are no safe level standards for mold, there are no uniformly sanctioned procedures or protocols and there are no certified contractors or workers to rely on. This makes it easy for the unscrupulous contractors to build upon the fear of toxic black mold and over-remediate and over-charge their clients.

When looking for contractors to put on a list for clients and customers, make sure that the contractors have experience cleaning up mold. Check references and talk to other brokers.

Ask the contractor if he or she follows any particular set of recommendations or guidelines, and if so, ask for a copy. Some contractors may follow EPA's *Mold Remediation in Schools and Commercial Buildings* (<http://www.epa.gov/iaq/pubs/moldresources.html>), the guidelines of the American Conference of Governmental Industrial Hygienists (ACGIH) (<http://www.acgih.org/home.htm>), or other guidelines from professional or government organizations. Make a note on the list of contractors of the standards preferred by each contractor and the seller require that a set of guidelines be specified in the contract for any work done. It may prove helpful to review the *Guidelines For Selecting An Indoor Air Quality Consultant* brochure at <http://www.iah.org/ConsultantsConsumers/html/OOiaq.htm>, not that an indoor air consultant will normally be needed, but because it describes different types of professionals who may be involved in different projects.

Not only should the listing agent insist that the seller only use contractors from this list, but the agent should also convince the seller that buyers who intend to bring in their own mold contractors for testing or remediation work must also use contractors from the list.

When looking for contractors
to put on a list for clients and customers, make sure that
the contractors have experience cleaning up mold.
Check references and talk to other brokers

If the seller proceeds with mold remediation, the REALTOR® should remind the seller to request and retain copies of all data, interpretive reports, remediation bids, itemization of work

performed, invoices, and follow-up reports he or she receives. These copies may be distributed to buyer prospects to demonstrate that any mold problems have been responsibly and competently addressed.

Mold in RECR Forms

Once the seller has completed repairs, cleaning or remediation that he or she has chosen to pursue, the seller should be ready to proceed with the property listing. At this time the agent should gather all reports relating to water and mold repairs, cleaning, and remediation and have the seller complete the RECR. Rather than answer in the affirmative to mold or water related questions in the RECR, the seller may check the "See Expert's Report" column and attach copies of appropriate contractor reports if repairs have been done and/or mold remediation has been performed.

As in any transaction, the seller should be encouraged to disclose any knowledge of mold problems on the property. Most sellers will not know if their properties have mold problems unless they are discovered during the listing agent's pre-listing inspection.

As per NAR's recommendations, the WRA RECR forms have been revised to include questions regarding mold. It is inadequate, however, for questions to simply ask about the presence of mold, since the universal presence of mold will require an affirmative response in essentially all cases. Instead, the questions should ask about known mold problems as well as information about water intrusion events or other conditions which might provide an environment conducive to mold growth.

Supplemented Real Estate Condition Report (WRA-SCR)

The SCR is the WRA's three-page RECR form that contains supplementary information and examples. Section A contains material briefly

describing the buyer's right to rescind the contract if the owner does not provide a RECR within 10 days of acceptance. Section B contains definitions of "am aware" and "owner." Its the biggest advantage is the numerous examples it provides following each of the 27 property condition statements in Section C of the RECR. These examples help prompt owners and help them better understand what is being asked. The supplementary information in the WRA-SCR has been updated with numerous references to mold or potential mold-producing conditions.

The property condition statements on the RECR already address many factors that would contribute to a mold habitat. For example, item C.1. asks about roof leaks and item C.3. inquires about leaks in pipes and other plumbing problems. Item C.7. asks about septic overflows or backups, and item C.12. inquires about foundation deterioration, flaws and cracks. Item C.10. was revised to not only ask about basement and foundation cracks, seepage, flooding, extreme dampness, wet walls, and defects in drain tiling and sump pumps, it also asks about unsafe concentrations of mold. Item C.15. inquires about hazardous and toxic substances and has been revised to specifically inquire about unsafe levels of mold.

In addition, a new item D.1.c. has been added to the form. That new item states, "I am aware of the presence of unsafe levels of mold, or roof, basement, window or plumbing leaks, or overflow from sinks, bathtubs or sewers, or other water or moisture intrusions or conditions that might initiate the growth of unsafe levels of mold."

Basic Real Estate Condition Report (WRA-CR)

The WRA's revised CR, on the other hand, adheres much more closely to

the statutory minimum requirements for an RECR. The scant supplementary information in this two-page form appears in italics. This information includes the same specific references to unsafe levels or concentrations of mold in items C.10 and C.15 as appear in the WRA-SCR and the addition of item D.1.c regarding mold. Otherwise, the CR simply follows the requirements of Wis. Stat. § 709.03.

Sellers should disclose any known basement mold problems on item C.10. of the RECR and any other known mold problems on item C.15. of the RECR. Specific water intrusion items may be disclosed under the appropriate item. In addition, all mold and water problems may be disclosed under item D.1.c.

WRA Addendum A

If the buyer uses the WRA's Addendum A form when writing the offer to purchase, the seller is once more put to the test and must disclose any abnormal or unsafe concentrations of mold. The WRA Addendum A states on the back side of the form:

"Asbestos, Lead, Lead-Based Paint, Mold and Radon Gas:

The parties are aware that newspapers and other public information sources indicate that asbestos, lead-based paint, lead in drinking water, mold, radium, radon gas and other toxic substances and chemicals within a structure or in soils or water supplies can cause serious health hazards. Seller represents that, to the best of Seller's knowledge, the Property does not contain asbestos, lead-based paint, or abnormal concentrations of mold, radon gas, lead, radium or other toxic or harmful substances or chemicals. Buyer is encouraged to inspect and test the property with respect to these matters and to consult with the appropriate experts, as is required, regarding these issues."

Disclose, Disclose, Disclose

Disclosure is the key to avoiding liability for mold problems. REALTORS® must be prepared to make written disclosure of any known moisture or mold problems or conditions not disclosed by the seller in the RECR or otherwise disclosed to the parties.

§ RL 24.07(2) Disclosure of Material Adverse Facts. "A licensee, when engaging in real estate practice, shall disclose to each party, in writing and in a timely fashion, all material adverse facts that the licensee knows and that the party does not know or cannot discover through a reasonably vigilant observation."

§ RL 24.07(3) Disclosure of Information Suggesting Material Adverse Facts. "A licensee, when engaging in real estate practice, who becomes aware of information suggesting the possibility of material adverse facts to the transaction, shall be practicing competently if the licensee discloses to the parties the information suggesting the possibility of material adverse facts to the transaction in writing and in a timely fashion, recommends the parties obtain expert assistance to inspect or investigate for possible material adverse facts to the transaction, and, if directed by the parties, drafts appropriate inspection or investigation contingencies. ... A licensee is not required to retain third party inspectors or investigators to perform investigations of information suggesting the possibility of a material adverse fact to the transaction."

Real estate licensees who truthfully disclose any known moisture problems, mold problems or conditions associated with mold follow the § RL 24.07 rules and provide the parties with consumer mold information will fulfill their legal duties and help protect themselves from potential liability.

ty. These REALTORS® will be better able to defend against claims asserting that they failed to disclose the presence, or possible presence, of mold growth that is asserted to have produced adverse health effects on residents. Licensees must, of

REALTORS® must be prepared to make written disclosure of any known moisture or mold problems or conditions not disclosed by the seller in the RECR or otherwise disclosed to the parties.

course, never give opinions about the presence, extent or toxicity of any suspected mold and should avoid any conversation or conduct suggesting that real estate brokers are experts in the field of mold or its effects.

Disclosure of past incidents of mold growth or water intrusion is also critical. If a past mold and/or water problem has apparently been rectified by the owner, the prudent REALTOR® will still always disclose whatever information he or she has about the past incident. This may be accompanied by documentation showing the measures taken by the owner and mold contractors to eliminate the problem. However, REALTORS® are not scientists and cannot be sure when harmful mold is gone and if it will come back. Likewise, some water problems, such as seepage in the basement, tend to reoccur despite vigilant efforts to control the situation.

Inspection Contingency

If the offer to purchase does not provide a testing contingency, the buyer has no authority to test for mold under the inspection contingency found in the residential offer to purchase. If visible evidence of mold is found during the home inspection,

the inspector is prohibited from testing the apparent mold if there is no separate testing contingency. If, after discovering the apparent mold, the buyer and seller agree to amend the offer to purchase to allow for testing, then testing can be conducted. Results from testing outside the scope of a home inspection cannot be properly listed on the home inspection notice of defects because the testing was not authorized under the home inspection contingency.

Pursuant to the home inspection contingency, the buyer may give a notice of defects if apparent mold, water problems or other conditions associated with mold are found during an inspection and these conditions independently meet the definition of a defect stated at lines 311-315 of the offer to purchase without consideration of the mold test results. For example, the buyer might list a hole in the roof and a greenish black substance covering the roof insulation as a defect, but legally could not test the substance nor use the results of unauthorized testing on a notice of defects.

The existence of mold in a home is not per se a defect. Mold is all around and presumably is in every house. Whether mold is a defect will depend upon location, quantity, relation to water or moisture sources, and other related circumstances.

Although the buyer may not give the results of any unauthorized mold testing in a home inspection contingency notice of defects, the buyer may use the test results as a legal defense to the completion of the contract. When the parties are mistaken as to a basic factual assumption on which the contract was made and the mistake has a material effect on their performances, the contract is voidable by the party adversely affected. Under this theory, both parties must have been mistaken. A mistake by only one of the parties makes a con-

tract voidable only if the party who causes the mistake has reason to know the other party is proceeding based on that mistake. The mistake must be based upon a past or present fact.

As reported in the Report of the Mold Working Group of the Risk Management Committee (NAR, April 2002), most sources recommend an inspection of the property rather than testing. The inspector, of course, should look for visible mold growth in a property, but should also look for any appearance or evidence of water intrusion or accumulation, and musty or other odors suggesting the presence of mold colonies. If the observed mold-associated conditions constitute a defect, the buyer will have the opportunity to address the situation without resorting to the expense and uncertainty of mold testing.

Mold Testing Contingencies

NAR reports that the lack of a “safe” level for mold makes addressing the presence of mold in real estate problematic. Testing for airborne mold spores may not reveal whether unsafe levels of mold are present and if the present level poses a potential risk to human beings. Virtually all such tests will provide positive results for some kinds of spores. Such tests may not be an accurate measure of the active mold growth in the property, and the amount of mold growth can change quickly. The absence of any “safe” standard for mold makes it difficult for even a qualified and trained environmental professional to interpret mold test results and predict possible health implications for occupants of the property, except in the most extreme cases. Consequently, the authoritative sources do not recommend testing, at least as an initial step.

Nonetheless, some consumers may

have a higher level of concern, or there may be instances where a musty odor or some other indicator of the presence or potential for mold exists without any visible sign of mold. Testing may be what the customer wants or needs.

If a buyer wants to have mold testing performed, a testing contingency will be needed. Testing for mold does not fall within the standard home inspection contingency in the residential offer to purchase. Like with radon or any other testing desired by the buyer, a specific provision authorizing the testing must be included in the offer. Buyers who want to test for mold must have proper authorization from the sellers.

The following is a sample mold testing contingency that may be used by REALTORS® as a model for developing appropriate contingencies in their offers. The contingency may be adapted to meet the desires of the buyer and the procedures of the qualified contractors and labs in the market area.

The sample mold testing contingency requires that the parties retain qualified contractors, defined as independent, qualified persons who have the education, training and experience to conduct mold sampling, hazard evaluation and remediation. The contingency also allows the parties, at their option, to name qualified contractors and certified labs that are agreeable to the parties. Per the mold testing language, the qualified contractors, who may be specifically listed in the contingency, exert a large amount of influence over the situation. They determine the appropriate testing methodologies and the standards that will be applied to interpret the lab test results because there are no authoritative scientific standards to be applied. However, the party who engages the qualified contractor can control the scope of services and the methodologies and standards applied

by stating them in the written contract or engagement letter. Obviously, the REALTORS® in the transaction can be helpful by providing lists of competent and reliable mold remediation professionals and by pointing out reported problems with less than reputable contractors.

The contingency also dictates that any cure attempted by the seller be performed according to the recommendations of a qualified contractor. Note that this need not be the same qualified contractor who was involved with the initial testing. The buyer will often hire the qualified contractor who samples the apparent mold and interprets the lab test results, while the seller may hire a different qualified contractor for the cleaning/remediation stage. The contingency also requires that a qualified contractor report to the buyer on the repair, cleanup and/or remediation steps taken and confirm that all unsafe levels of mold have been removed. It does not specify that the qualified contractor actually perform this work, because the qualified contractor may recommend basic repairs and cleanup measures that do not necessarily require a remediation professional to perform. The removal of the water source may also be addressed under the inspection contingency if that problem appears as a defect on the home inspection report.

The “defect” in this contingency is an unsafe level of mold, based upon whether the volume and/or types of mold detected present a health risk to property occupants. There will be some level of mold, such as mold in

Like with radon or any other testing desired by the buyer, a specific provision authorizing the testing must be included in the offer.

the shower grout, mold in the refrigerator and other minor amounts of mold, that is not intended to be addressed by this contingency.

Sample Mold Testing Contingency

“This Offer is contingent upon (Buyer obtaining) (Seller providing) a current written report interpreting the written results of lab tests conducted to determine whether the samples submitted, taken from inside the Property, contain an unsafe level of mold within ___ days of acceptance, at (Buyers’) (Seller’s) expense. All sampling shall be performed by a Qualified Contractor, all samples shall be tested in a Certified Laboratory, and all lab results shall be analyzed by a Qualified Contractor who shall prepare a current written report which shall, to the extent not covered by any written report from the Certified Laboratory, interpret the lab results and explain the extent of any indicated mold and whether unsafe levels of mold have been detected. An unsafe level of mold is defined as mold which may present a health risk to Property occupants based upon the volume and/or types of mold detected.

“This contingency shall be deemed satisfied unless Buyer, within ___ days of the earlier of: 1) Buyer’s receipt of the Qualified Contractor’s written report and the lab results or 2) the deadline for the delivery of such report and lab results, delivers to Seller and Seller’s agent, a copy of the lab results, a copy of the Qualified Contractor’s written report explaining the lab results, and a written notice identifying the unsafe levels of mold to which the Buyer objects (or notice that no lab results or interpretative report were received if to have been provided by Seller). Seller (shall) (shall not) have the right to cure. [Seller shall have a right to cure if no choice is indicated] If Seller has the right to cure, Seller may satisfy

this contingency by (1) delivering a written notice of Seller's election to cure within 10 days of receipt of Buyer's notice; (2) and by removing/repairing the water/moisture source sustaining the mold and by removing the unsafe mold levels, all in a good and workmanlike and safe manner as recommended in a written opinion from a Qualified Contractor, and by giving Buyer a written report from a Qualified Contractor detailing the work done prior to closing and confirming that the unsafe levels of mold have been removed. The actual work may be performed by a Qualified Contractor and/or by the Seller or other contractors such as plumbers, electricians and carpenters implementing the recommendations of a Qualified Contractor. This Offer shall be null and void if Buyer makes timely delivery of the above notice, test results and report and (1) Seller does not have the right to cure; or (2) Seller has a right to cure but: a) Seller delivers notice that Seller will not cure; or b) Seller does not timely deliver the notice of election to cure. This Offer also shall be null and void if Buyer makes timely delivery of written notice that no lab results or interpretative reports were received, if to have been provided by Seller.

"A Qualified Contractor is an independent person qualified to conduct mold sampling, mold remediation or mold hazard evaluation, as applicable, by virtue of the person's education, training and experience. If the parties have named individuals or companies on the following lines, the definition of a Qualified Contractor is limited to the persons listed below (Note: Consider the amount and nature of the education, training and experience of the Qualified Contractors - including qualifications as an industrial hygienist, mycobiologist, indoor air quality consultant, or other mold-related specialization):_____."

"A Certified Laboratory is the State Hygiene lab or another lab qualified to test mold samples. If the parties have named labs on the following lines, the definition of a Certified Laboratory is limited to the listed labs: _____."

REALTORS® should remember that this is simply a sample contingency that may be modified to meet the needs of the parties. For instance, if a REALTOR® is working with a buyer with a known mold allergy, the "unsafe level of mold" standard may have to be modified so that contractors will test for levels of mold that could trigger the allergy.

After Closing

After the water or moisture source has been repaired and the unsafe levels of mold have been removed, the parties should proceed to closing. A useful item for the cooperative agent to leave with the buyer, and for all agents to leave with all buyers, is a tip sheet on moisture and mold prevention and control. Awareness is the first step towards prevention and each time a buyer pays immediate attention to moisture and leaks and spills, mold may lose its chance for a new indoor habitat.

REALTORS® may copy the Moisture and Mold Prevention Tips on page 13 of this *Update* and use it as a buyer handout.

Mold Management Legal Hotline Q and A

The following questions concerning mold issues were recently asked of the Legal Hotline:

Disclosure

An agent has a condo that was listed about one year ago. There was an offer at that time and during inspection mold was found on the ceiling in one room. After the offer fell apart, the POA for the owner had the mold remediated. The RECR was completed with everything checked as "n/a"

and was signed by the POA stating that the POA for the seller has never lived in the property and cannot make any representation. An amended RECR was also provided showing that the condominium assessment had changed. All this information was made available to all potential buyers. The agent received a couple of offers and multiple counteroffers. Now the agent who is looking to accept the multiple counteroffer is making an issue of the fact that the seller did not disclose about the mold remediation. Please advise.

Despite the fact that the mold was apparently remediated, there are no baseline safe levels for mold and we do not know if the moisture source was eliminated. Because there are no safe levels, no one arguably can know for sure if the mold is gone for good or if it will come back. Accordingly, the prior mold situation should be disclosed despite the remediation. If the seller does not disclose the situation, then the agent is obligated to disclose information suggesting the possibility of a material adverse fact.

If the agent knows or is aware of information suggesting the possibility of a material adverse fact, § RL 24.07(3) states that the agent will be practicing competently by providing timely written disclosure of the information suggesting the material adverse fact to all parties to the transaction, by recommending that the parties obtain expert assistance to inspect or investigate for the possible material adverse fact, and, if directed by the parties, by drafting the appropriate inspection or investigation contingencies. Any documentation of the remediation work done may accompany the disclosure.

Can the trustee of a revocable trust, who once lived in the property, sell the property "as is"? The listing agent has seen mold in basement. Is there a duty to disclose?

Generally, an “as is” clause alerts the buyer that he or she is responsible for determining the condition of the property being purchased. The use of an “as is” clause does not, however, necessarily mean that the seller has no need to make some disclosures about the property.

First, the seller has the duty to exercise ordinary care in refraining from any act which would cause foreseeable harm to another or create an unreasonable risk to others. Second, the seller may be liable for misrepresentation if he or she actively conceals a defect or prevents a buyer from investigating the property and discovering the defect. Third, the seller may be liable if he or she makes false affirmative statements about the property, as was shown in the Grube v. Daun case summarized on page 8 of *Legal Update 93.04*. Finally, the seller may be liable in an “as is” situation if he or she fails to disclose material conditions which the buyer is in a poor position to discover, as discussed in the Green Springs Farms case (see page 9 of *Legal Update 93.04*). The seller arguably is not required to disclose the mold if it is not hidden and can be seen by a person touring the property

From the licensee’s standpoint, Wis. Admin. Code § RL 24.07 requires that licensees perform reasonably competent and diligent property inspections and disclose material facts and potential adverse facts to the parties in writing. This is not waived in “as is” sales. In fact, where the buyer is purchasing “as is,” it is very important for the buyer to know the condition of the property. Generally, the buyer has expert inspectors inspect the property as a condition of the offer to purchase, although this does not excuse the licensee from his or her duty to assure that all known material defects are disclosed in writing to the buyer. Although mold per se is not a defect, the presence of

mold may be considered as information suggesting the possibility of a material adverse fact and disclosed per § RL 24.07(3).

No Standards

A buyer had a mold inspection. How does the buyer’s agent protect the buyer regarding an acceptable level for mold removal?

The buyer and the buyer’s agent should work with qualified mold contractors. The determination of a safe level of mold will likely involve a bit of discretion or judgment because there are no federal or state guidelines. The buyer’s agent is not expected to be mold expert, and will be acting competently if the buyer is referred to appropriate experts and proper contingencies for mold clean up and/or remediation are included in the offer to purchase.

If there is a mold contingency in the offer, what type of qualified individual should be used?

There are no standards yet from the EPA or the state, and there are no certified mold remediation contractors. The parties and the agents will have to find contractors through the telephone directory and through word of mouth, ask for references, and check their credentials and trade organization memberships. Industrial hygienists may be an appropriate choice.

Mold Testing

The seller received an offer to purchase and the buyer wants to have a mold inspection and testing contingency. Does the seller have a right to deny the inspection?

Yes. The seller is not obligated to agree to any mold testing provisions. A home inspector could, however, see mold growing in the property and include this in the home inspection report.

Is mold considered a defect?

Mold is not a defect per se. It is a defect only if it is present at unsafe levels due to the volume or type of mold. It also likely indicates a moisture or water problem that may also be a defect.

A broker had a property listed. The co-broke wrote an offer to purchase subject to inspection (but not subject to testing), and the seller does not have right to cure. The inspector performed a mold test on a sample taken from the basement during the inspection and sent it out for testing. The offer was extended twice because the results of the test were not back. The buyer wanted a third extension, but the seller refused. The buyer delivered a notice of defects and walked away from transaction. The results of the mold test are still not known. Is the seller entitled to a copy of the test results, even though seller did not give permission for the test? What are the seller’s disclosure obligations?

The seller did not authorize this testing so the seller could assert that the mold test results are irrelevant with respect to the inspection contingency. The offer was silent with respect to test results—it should have included a mold-testing contingency prior to testing being performed. A complaint may be filed against the home inspector at the Department of Regulation and Licensing for this unauthorized testing.

If the seller never receives the test results, the seller arguably should disclose to future buyers that a mold test was done, but that the results are unknown. If a broker knows or is aware of information suggesting the possibility of a material adverse fact, § RL 24.07(3) states that the broker will be practicing competently by providing timely written disclosure of the information suggesting the material adverse fact to all parties to the transaction, by recommending that

the parties obtain expert assistance to inspect or investigate for the possible material adverse fact, and, if directed by the parties, by drafting the appropriate inspection or investigation contingencies.

Re: Mold in an older commercial listing.

(1) If it is not written in the offer that there will be testing done for mold, and the buyer, during inspection, realizes that there is mold and has testing done, is this an issue where the buyer can be released from the contract?

(2) After the offer is terminated, the seller was left with three different professional opinions as to how mold should be handled and how much it would cost. Must the seller or the listing agent disclose that they had opinions that recommend more drastic measures than the work actually done?

(1) The buyer has no authority to test for mold if there is no mold-testing contingency in the offer to purchase. The home inspector is prohibited from testing any apparent mold that is found during the home inspection. Results from any testing done outside the scope of the inspection cannot be used in the inspection contingency notice of defects. On the other hand, the buyer and seller may agree to amend the offer to purchase to allow for a testing if mold is discovered.

Unless there is an extreme situation, the buyer may not use the inspection contingency to give a notice of defects about the mold without first testing it. The buyer, however, may have other legal defenses to the completion of the contract. When both parties are mistaken as to a basic factual assumption on which the contract was made and the mistake has a material effect on their performances, the contract is voidable by the party adversely affected. This is the common-law theory of a mutual mistake.

(2) The listing agent may refer the sellers to the mold professionals to evaluate how to proceed. The listing agent has no expertise in this area and should not advise the seller in this regard. Lack of standards for mold testing and remediation make it a difficult decision.

For future disclosures, any information about the extent of the mold problem would arguably need to be disclosed, but the bid prices would not have to be revealed.

Remediation Contractors

Two air tests and one swab test performed by an Illinois home inspector in the basement of a Beloit home revealed toxic mold. One air test was taken outside of the building, to serve as the control sample and show what levels of different molds occur naturally in the area. The inside air sample showed elevated quantities of Penicillium and Aspergillus mold, indicating that these molds are colonizing in the basement and going airborne. A swab test done by the home inspector on visible black mold had high amounts of Stachybotrys, Penicillium and Aspergillus. These are all mycotoxins—poisonous substances or toxins produced by a few types of mold. The charge for the sampling and analysis by an out-of-state lab was \$270.

An environmental contracting firm gave a bid for mold remediation. This was to include containment of the work area; removal of paneling, wall board, insulation and carpeting; air scrubbing by a machine that removes particles and destroys airborne spores from the air; application of disinfectant and HEPA vacuuming; and costs of personal protective equipment and clothing used by workers. The remediation bid was for \$10,324.

How can a REALTOR® or his or her client know if the environmental firm is qualified and if the bid is reasonable?

REALTORS® and parties can certainly ask environmental contractors for credentials and resumes, but there are no lists of certified or approved mold contractors. Large environmental companies and the State Lab hold training classes for proper sampling techniques, and testing can be done at most state certified labs. Contractors, however, are hard to find because this is a relatively new field. In this case, the bid does not seem to be patently unreasonable, but it would be hard to know for sure without other bids to compare it to or some other expert to confirm that their methodologies are sound.

The seller must decide whether to remediate. This home will likely not sell unless the work is done — unless a buyer is found that wants to do the work himself and rehabilitate it.

Mold Repair

Re: A condition that came up on a property after an offer was accepted and before the closing. The home is vacant. There was a home inspection on May 13, and on May 23 listing broker went to the home to check the mail and the house. When she entered, the house was very hot. She went into the basement and discovered that the hot water tank had been turned to high and had a broken pipe. There was standing water present and mold was growing all over the basement. The seller has said he will fix everything, regardless of whether it is in excess of 5 percent of the purchase price. How should the parties proceed?

The Property Damage Between Acceptance and Closing provisions of the offer to purchase will govern this situation. The seller will have to give a written disclosure with estimated costs of the repairs. The buyer may then decide whether to proceed with the transaction. The parties may wish to confer with mold and cleaning experts as well as legal counsel to assist in determining how to best proceed with the transaction.

Moisture and Mold Prevention TIPS

Every home has some level of mold spores in the air. Every home also has the cellulose food source materials, such as wood, paper, drywall, fabric, carpeting, leaves or dust, that mold needs to grow. What every home does not have to have is a moisture source that fosters the growth of mold. Moisture problems can usually be controlled if not eliminated. Without a moisture source, mold will not have a chance to grow.

Water in your home can come from many sources. Water can enter your home by leaking through the roof or by seeping through basement floors. Showers and even cooking can add moisture to the air in your home. The amount of moisture that the air in your home can hold depends on the temperature of the air. As the temperature goes down, the air is able to hold less moisture. In cold weather moisture condenses on cold surfaces, like drops of water on the inside of a window. This moisture can encourage mold to grow.

Prevent Leaks and Spills

- Clean and repair roof gutters and downspouts regularly to help direct water away from the basement.
- Make sure the ground slopes away from the building foundation, so that water flows away from the house and does not enter or collect around the foundation.
- Repair water leaks in pipes or around tubs and sinks.
- Put a plastic cover over dirt in

crawlspaces to prevent moisture from coming in from the ground. Be sure crawlspaces are well ventilated.

- Keep air-conditioning drip pans clean and the drain lines unobstructed and flowing properly.

Reduce humidity

- Keep indoor humidity low. If possible, keep indoor humidity below 60 percent (ideally between 30 and 50 percent) relative humidity. Relative humidity can be measured with a moisture or humidity meter, a small, inexpensive (\$10-\$50) instrument available at many hardware stores.
- Vent appliances that produce moisture, such as clothes dryers, stoves, and kerosene heaters to the outside wherever possible. (Combustion appliances such as stoves and kerosene heaters produce water vapor and will increase the humidity unless vented to the outside.)
- Use air conditioners and/or de-humidifiers when needed.
- Run the bathroom fan or open the window when showering. Use exhaust fans or open windows in bathrooms and kitchens whenever cooking, running the dishwasher or dishwashing etc.
- If you see condensation or moisture collecting on windows, walls or pipes act quickly to dry the wet surface and reduce the moisture/water source. Condensation can be a sign of high humidity.



Prevent Condensation

- Open doors and/or windows and move furniture from wall corners to promote air and heat circulation. Circulation carries heat to cold surfaces thus discouraging condensation. Increase air circulation by using fans.
- Be sure that your house has a source of fresh air and can expel excessive moisture.
- Cover cold surfaces, such as cold water pipes, with insulation.
- Use insulation or storm windows (on the inside works better than on the outside).
- Increase air temperature.
- Pay special attention to carpet on concrete floors. Carpet can absorb moisture and serve as a place for biological pollutants to grow. Instead use area rugs that can be taken up and washed often.

Act Quickly if There is a Water Intrusion!

Despite a homeowner's best efforts, a water or moisture problem may develop. When water leaks or spills occur indoors, it is important to act quickly. If wet or damp materials or areas are dried within 24-48 hours, in most cases mold will not grow.

Additional Mold Resources

American Industrial Hygiene Association: <http://www.aiha.org/governmentaffairs-pr/html/mold-home.htm>

Environmental Protection Agency: <http://www.epa.gov/iaq/molds/molguide.html>

California Department of Health Services Indoor Air Quality Info Sheet (2001) - Mold in My Home: What Do I Do?: <http://www.cal-iaq.org/mold0107.htm>

Centers for Disease Control: <http://www.cdc.gov/nceh/airpollution/mold/>

Family Handyman, March 2000: http://www.familyhandyman.com/200003/how_a_house_works/main.html

NAR Government Affairs Department white paper "Mold in the Home: How it Affects REALTORS®" (February 2002): www.realtor.org/gapublic.nsf/pages/moldpapers

NAR Risk Management Committee's Report of Mold Working Group (April 2002): <http://www.realtor.org/letterlw.nsf/pages/0502mold>

New York City Department of Health, Environmental & Occupational Disease Epidemiology - Facts About Mold (February 2001): <http://nycdoitt.ci.nyc.ny.us/html/doh/html/epi/epimold.html>

Wisconsin Department of Health and Family Services - Flood Aftermath Procedures (September 2001): http://www.dhfs.state.wi.us/dph_emsip/InjuryPrevention/disaster/flooding.htm

Conclusion

Armed with the WRA REALTOR® Resource page and consumer brochures, REALTORS® can educate buyers and sellers and help them responsibly respond to the mold situations they encounter in real estate transactions. Managing mold in a reasonable manner may help the parties to contain costs, avoid unnecessary hysteria, find logical solutions, and reach a successful closing.

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