



What Would You Do? Presentation Series: Misrepresentations



- Good morning/afternoon and welcome to the fourth presentation in the *What Would You Do?* Presentation Series.
- The presentation series explores areas of risk in real estate practice, with each presentation focusing on a different area of risk.
- Today's presentation will explore the risks of making misrepresentations.
- To do so, we will follow a real estate professional through a transaction where they may make a misrepresentation.
- We will also review two case studies involving real estate professionals that made misrepresentations and discuss how risk could have been mitigated in both scenarios.
- The *What Would You Do?* presentation series is a joint project between the BC Real Estate Association, the Real Estate Council of BC, and the Real Estate Errors and Omissions Insurance Corporation.
- This offers a 360-degree look at risk management from the perspectives of your professional association, regulator, and insurer.
- Ok, let's get started...



- This is Jaspreet. Jaspreet is a real estate professional... **(click to introduce sellers)**
- ...and Jaspreet is representing these sellers on the sale of their home.
- Jaspreet has listed the home for sale, and he measured the home at just over 1000 square feet.
- The sellers, however, insisted the home was 1375 square feet and provided a copy of the feature sheet from when they purchased the home.
- Jaspreet changed the listing to show that the home was 1375 square feet.
- After completion, the buyers were advised by the insurance company that the home was only 1000 square feet, not 1375 as represented on the listing.



- Where might Jaspreet have gone wrong here? What responsibility, if any, might the buyers' real estate professional have in this situation? (***open for discussion***)



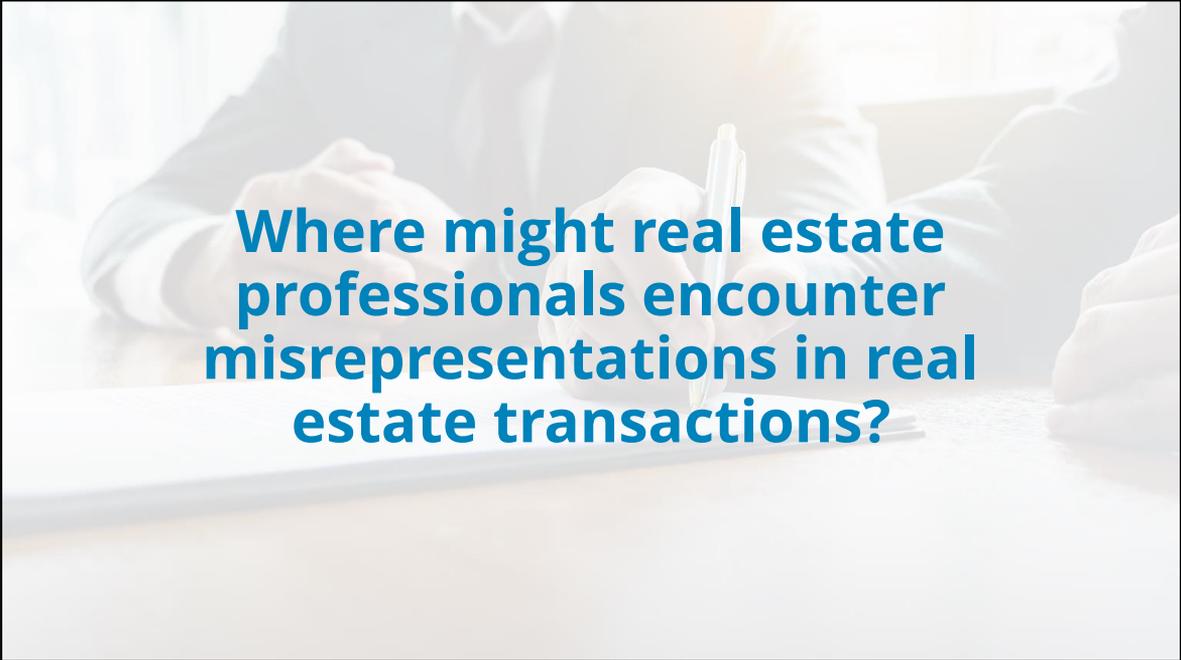
- If you found yourself in this situation, what would you do? (*open for discussion*)



What is a misrepresentation?

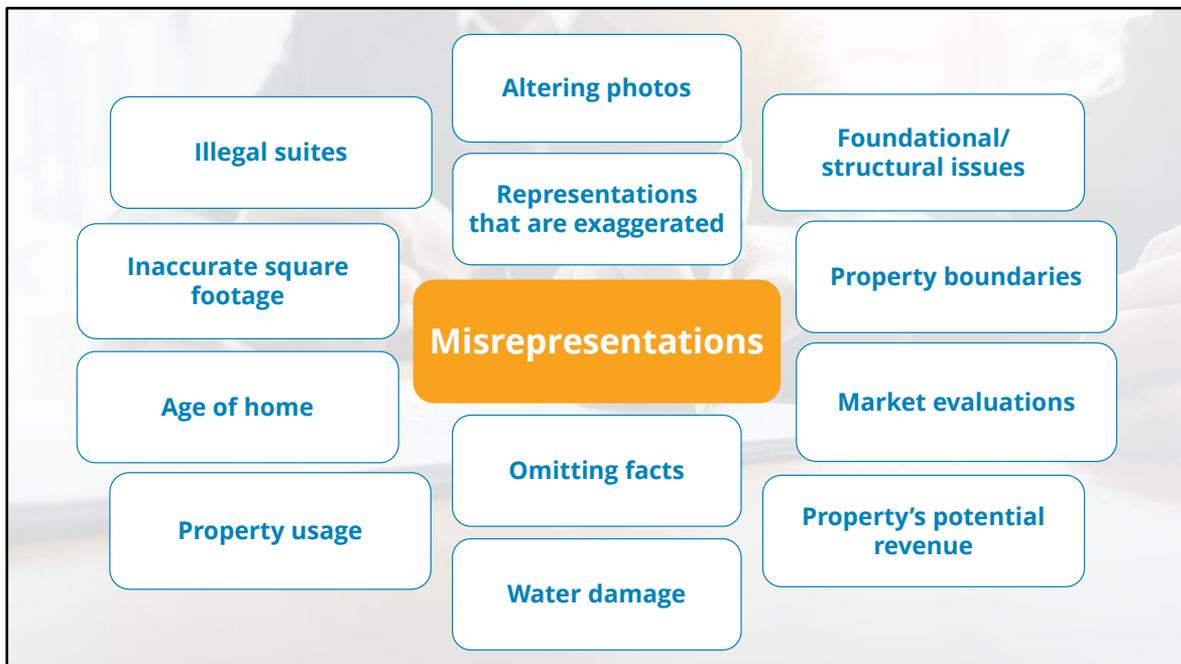
A false statement that affects someone's decision to enter into a contract.

- Let's first review what a misrepresentation is.
- A misrepresentation is a false statement that affects someone's decision to enter into a contract.
- Misrepresentation claims are among the most common claims made against real estate professionals.
- Let's explore situations where misrepresentations might happen in real estate and the three types of misrepresentations that commonly occur in real estate transactions.



Where might real estate professionals encounter misrepresentations in real estate transactions?

- What are some situations where you have encountered misrepresentations in real estate transactions? (***open for discussion***)



- As we've just discussed, there are several situations where misrepresentations can occur in real estate.
- These include:
 - Advertising, such as:
 - **Illegal suites** – advertising a suite as “legal,” where it is unauthorized;
 - **Inaccurate square footage** – advertising inaccurate square footage, as in this situation;
 - **Age of home** – advertising a property as new when it has only been substantially renovated;
 - **Property usage** – advertising use as a short-term rental when this is not allowed;
 - **Altering photos** – for example, removing power lines;
 - **Representations that are exaggerated;** and
 - **Omitting facts.**
 - Failure to disclose known problems/property defects, such as:
 - **Water damage,** and

- **Foundational/structural issues.**
- Other misrepresentations, such as:
 - **Property boundaries;**
 - **Market evaluations;** and
 - **a property's potential revenue.**



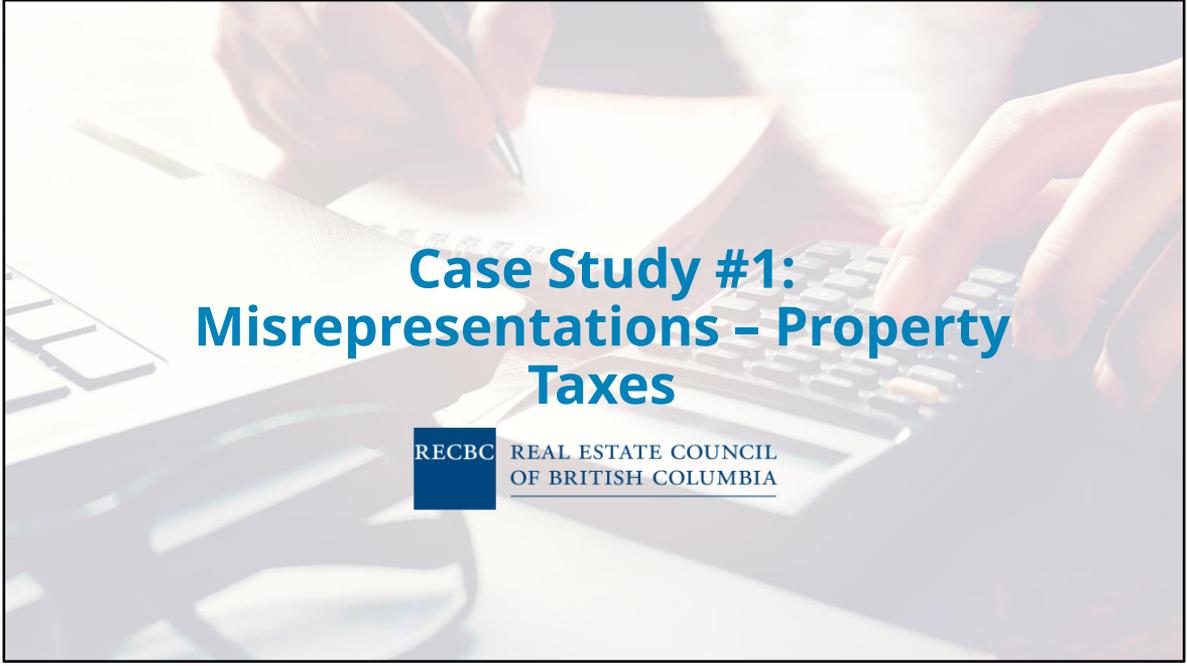
Three types of misrepresentations:

1. Fraudulent misrepresentation
2. Negligent misrepresentation
3. Innocent misrepresentation

- In reviewing the situations where misrepresentations might occur in real estate, you can see that some misrepresentations may occur due to carelessness, while others can be identified as intentional.
- Misrepresentations are often characterized into three types:
 1. Fraudulent Misrepresentation – when misleading information is purposely provided;
 2. Negligent Misrepresentation – when due diligence is not undertaken in providing information, or information is provided without taking reasonable care to determine that it is factual; and
 3. Innocent Misrepresentation – where there are reasonable grounds to believe the information to be true.
- No matter the type of misrepresentation being made, you can still face disciplinary or legal actions.
- Where you are uncertain of the facts, don't make statements; instead, let the party know the actions you will take to obtain factual information.
- Doing this due diligence and providing your clients with factual information, as well as the source of the information, can help mitigate the risk of being involved in a misrepresentation claim.



- Now that we've reviewed misrepresentations, what they are and when they might occur in real estate transactions, let's revisit Jaspreet's situation.
- Jaspreet is representing these sellers on the sale of their home.
- After the completion of the sale, a discrepancy is identified between the square footage advertised and the actual square footage of the home.
- Although the following case studies are different from Jaspreet's specific situation, they offer some important insights and fact patterns where real estate professionals have had a claim of misrepresentation and could inform how Jaspreet might have handled the situation differently.



Case Study #1: Misrepresentations – Property Taxes

RECBC REAL ESTATE COUNCIL
OF BRITISH COLUMBIA

- The first case study was provided by the Real Estate Council of BC (RECBC).
- In this case study, we will explore a scenario where real estate professionals on both sides of the transaction communicated the incorrect approximate amount of property taxes to the buyer.
- We will discuss where the real estate professionals went wrong and review the disciplinary decisions made by RECBC.
- Please note, this scenario occurred before September 30, 2016, under the old rules and disciplinary sanctions.

What happened?

- A real estate professional listed a property for sale, with gross taxes on the property for the previous year stated as **\$2184.39**
- Shortly after listing, the seller emailed the listing representative stating the taxes were actually **\$1749.59**
- The listing representative sent their board instructions to update the tax amount on the MLS®
- Following subject removal, the buyer's representative confronted the seller's representative, as the listing showed a different amount than the tax printout

- In this case study, a real estate professional listed a property for sale.
- The gross taxes on the property for the previous year were stated as \$2184.39, in accordance with the MLXChange tax report.
- Shortly after listing the property for sale, the seller sent an email to the listing representative claiming that the property taxes were incorrect, and the taxes were actually \$1749.59.
- The listing representative sent their real estate board instructions to update the tax amount on the MLS® in accordance with the seller's email.
- The buyer's representative prepared an offer on their client's behalf for the property.
- After completing their due diligence, the buyer removed their conditions.
- Following subject removal, the buyer became aware of the discrepancy in the amount of property taxes.
- The buyer's representative confronted the seller's representative about the taxes, as the listing showed a different amount than the tax printout; the seller's representative confirmed the taxes were \$1749.59.
- The sale completed and the buyers sent their complaint to RECBC.



Where did *both* real estate professionals go wrong?

- So, let's talk this through. Where do you think *both* real estate professionals went wrong in this situation? (***open for discussion***)

What were the results?

- The **seller's real estate professional** committed professional misconduct contrary to section 35(1)(a) of the *Real Estate Services Act*, in that they:
 - failed to ascertain material facts and verify them from independent sources about the property, and
 - published advertising that they ought to have known contained a false statement or misrepresentation concerning the subject property.

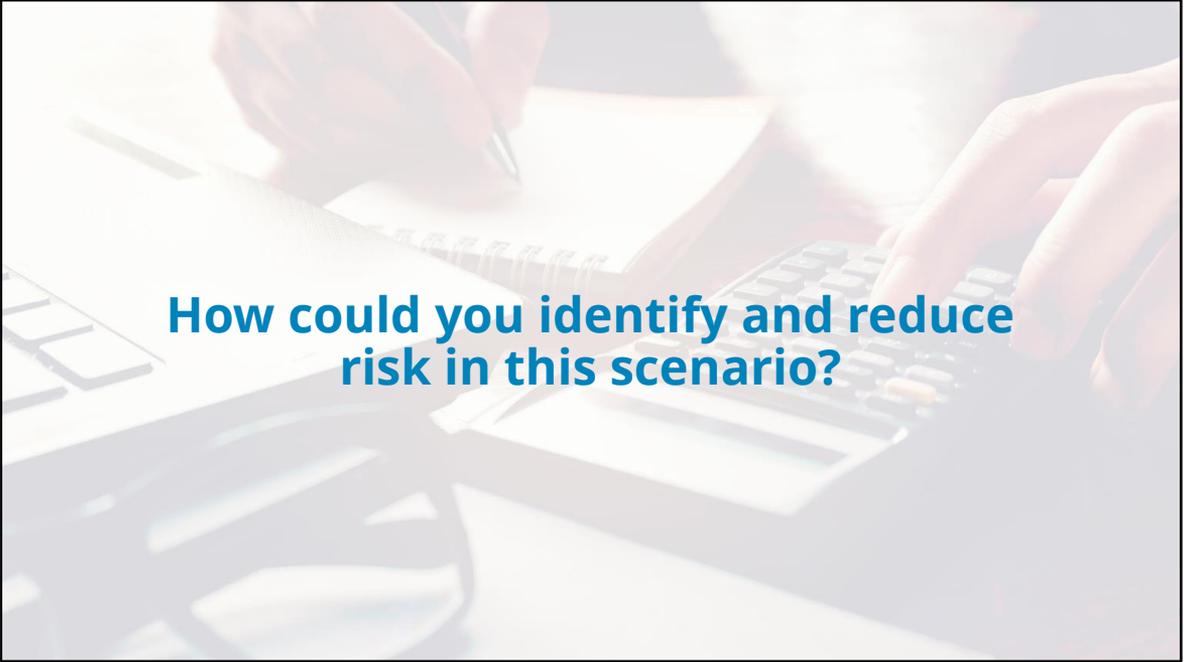
- A RECBC discipline committee found that:
- The **seller's real estate professional** committed professional misconduct contrary to section 35(1)(a) of the *Real Estate Services Act* in that they:
 - failed to ascertain material facts and verify them from independent sources about the property, namely that the annual gross property taxes were in the approximate sum of \$2,318.64, contrary to sections 3-3(a) [duty to act in the best interest of the client] and 3-4 [duty to act honestly with reasonable care and skill] of the Rules; and
 - published advertising that they ought to have known contained a false statement or misrepresentation concerning the subject property, namely that the annual gross property taxes were \$1,749.59, contrary to sections 3-3(a) [duty to act in the best interest of the client], 3-4 [duty to act with reasonable care and skill] and 4-7 [false or misleading advertising] of the Rules.



What were the results?

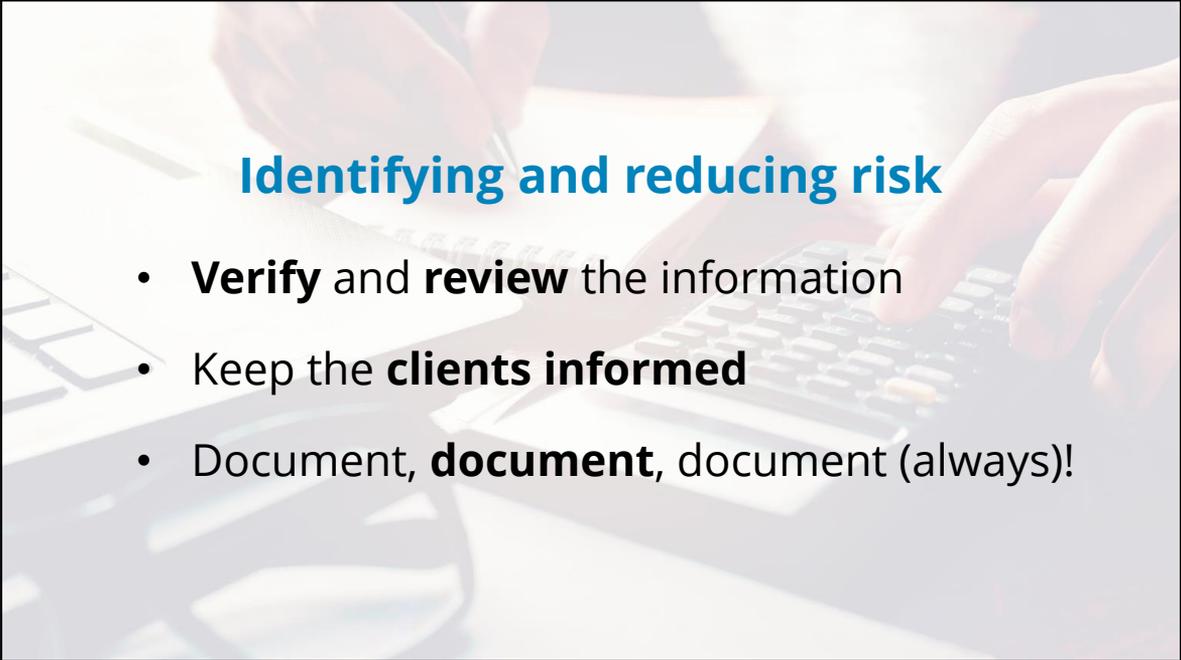
- The **buyer's real estate professional** committed professional misconduct contrary to section 35(1)(a) of the *Real Estate Services Act*, in that they:
 - failed to ascertain material facts about the property.

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- The **buyer's real estate professional** committed professional misconduct contrary to section 35(1)(a) of the *Real Estate Services Act* in that they:
 - failed to ascertain material facts about the property, namely that the annual gross property taxes were in the approximate sum of \$2,318.64 instead of the \$1,749.59 as represented by the seller's representative, contrary to section 3-3(a) [duty to act in the clients best interests], section 3-3(h) [use reasonable efforts to discover relevant facts respecting real estate] and section 3-4 [duty to act honestly with reasonable care and skill] of the Rules.

A photograph of a person's hands working at a desk. One hand is writing in a spiral notebook, while the other is typing on a laptop keyboard. A pair of glasses is visible in the foreground. The image is overlaid with a semi-transparent white box containing text.

How could you identify and reduce risk in this scenario?

- What could have been done to help identify and reduce risk in this scenario? (*open for discussion*)

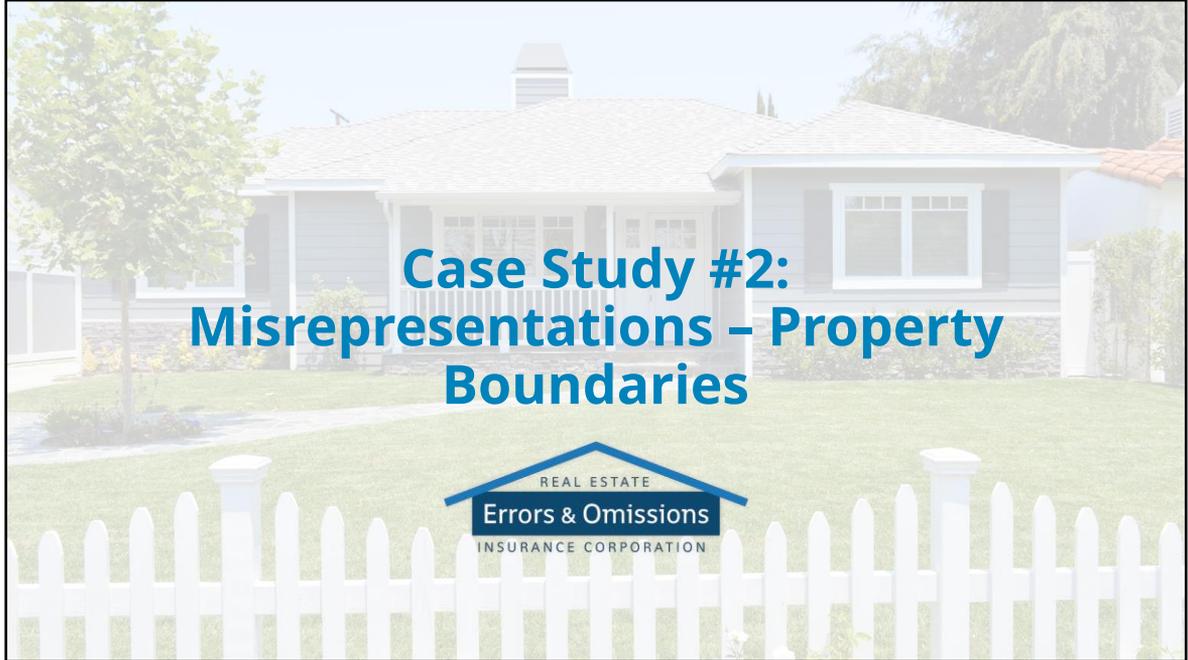


Identifying and reducing risk

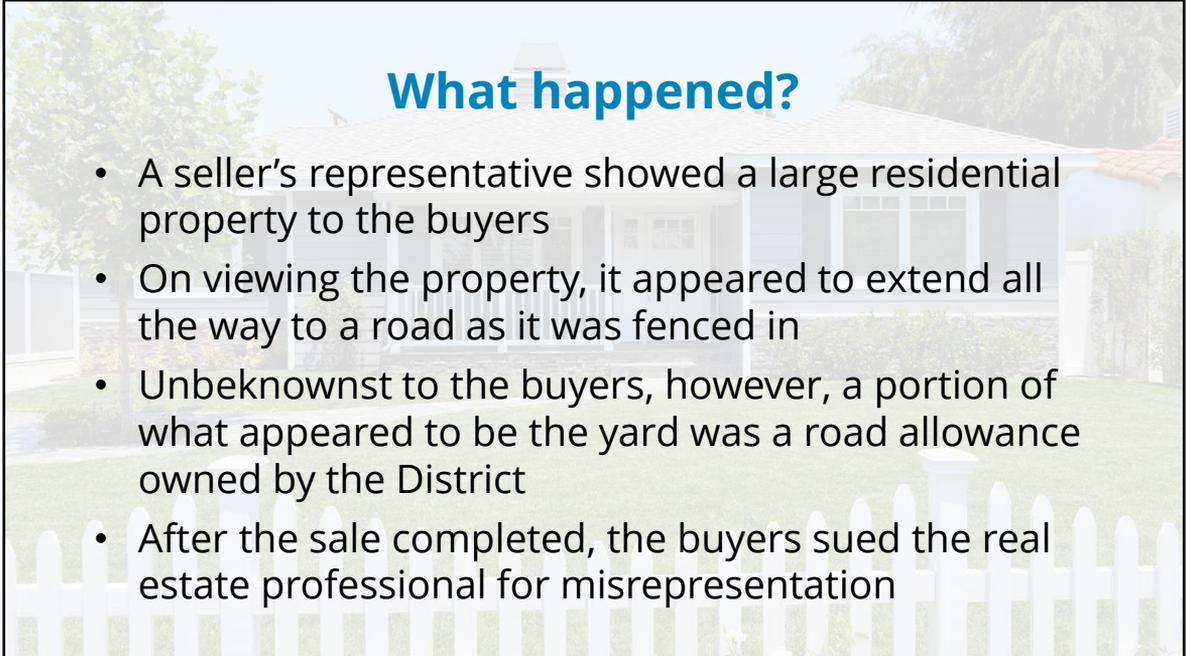
- **Verify** and **review** the information
- Keep the **clients informed**
- Document, **document**, document (always)!

- Both the listing and selling representatives have a general duty to be familiar with the property they are intending to market.
- Real estate professionals should also ensure the information they provide is accurate, as it may be relied upon by the recipient.
- If a recipient suffers a loss because the information is inaccurate or misleading, the person providing the information may be held liable for misrepresentation.
- To reduce the risks of having a complaint brought against them in this situation, the seller's real estate professional could have:
 - **Verified the information:**
 - In this case, the seller's real estate professional should have reviewed the property tax notice or alternate reliable sources and documented how they verified the information.
 - They should have also informed the buyer's real estate professional of the source of the information being relied on and provided them with a copy of the property tax notice and the contact information they used to obtain this information so the buyer could

- perform any additional due diligence.
- **Reviewed the information:**
 - In this case, the seller's real estate professional should have reviewed any marketing materials including MLS® spec sheets, websites, print ads, etc.
- **Kept the clients informed:**
 - When the seller notified the real estate professional that the information was incorrect, the seller's real estate professional should have reviewed and verified the information against the property tax notice or other reliable sources to ensure it was correct.
 - If the seller believed the information was incorrect, the seller's real estate professional should have reviewed the source of the information and how the information was obtained with the client.
- The buyer's real estate professional could have helped to protect their clients by:
 - Understanding what was material information to the buyer;
 - Verifying the information, and not solely relying on the marketing materials and information provided in the listing; and
 - Obtaining the property tax notice and reviewing it with their client.
- Both real estate professionals could have helped to mitigate risk by **documenting** the diligence and actions they took to verify the information.



- The second case study was provided by the Real Estate Errors & Omissions Insurance Corporation (E&O).
- In this case study, we will explore a scenario where a real estate professional is not clear on property boundaries when showing a property.



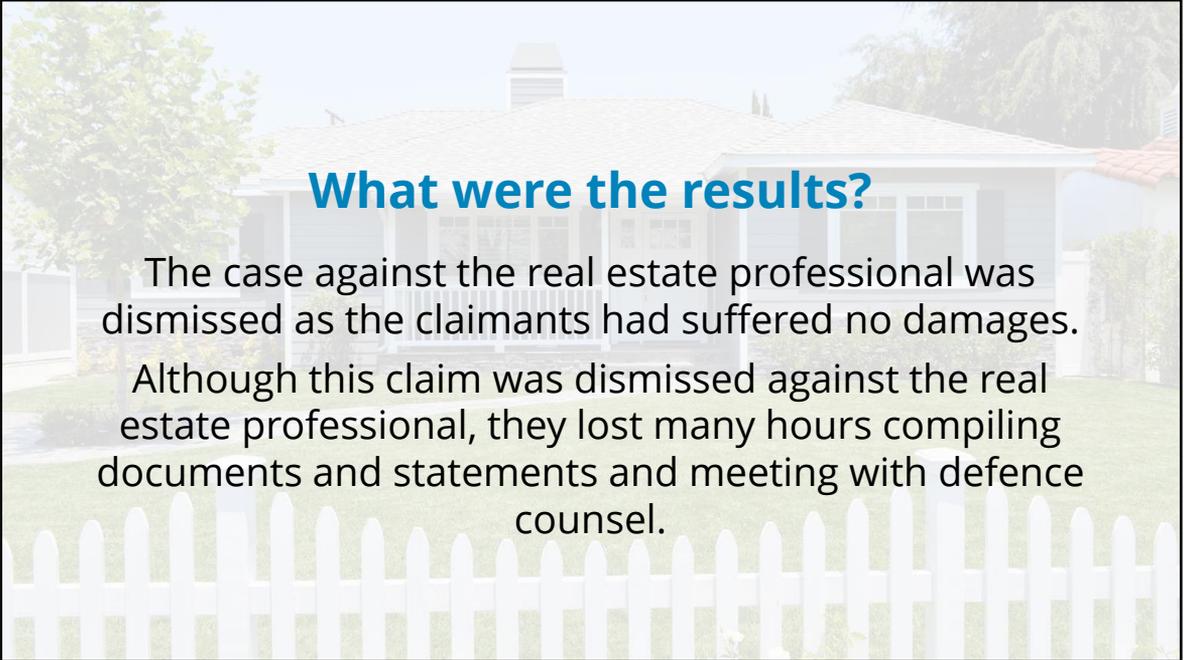
What happened?

- A seller's representative showed a large residential property to the buyers
- On viewing the property, it appeared to extend all the way to a road as it was fenced in
- Unbeknownst to the buyers, however, a portion of what appeared to be the yard was a road allowance owned by the District
- After the sale completed, the buyers sued the real estate professional for misrepresentation

- A seller's representative showed a large residential property to the buyers.
- On viewing the property, it appeared to extend all the way to a road as it was fenced in.
- Unbeknownst to the buyers, however, a portion of what appeared to be the yard was a road allowance owned by the District.
- After the sale completed, the buyers sued the real estate professional for misrepresentation.



- So, let's talk this through. Where did this real estate professional go wrong? (*open for discussion*)



What were the results?

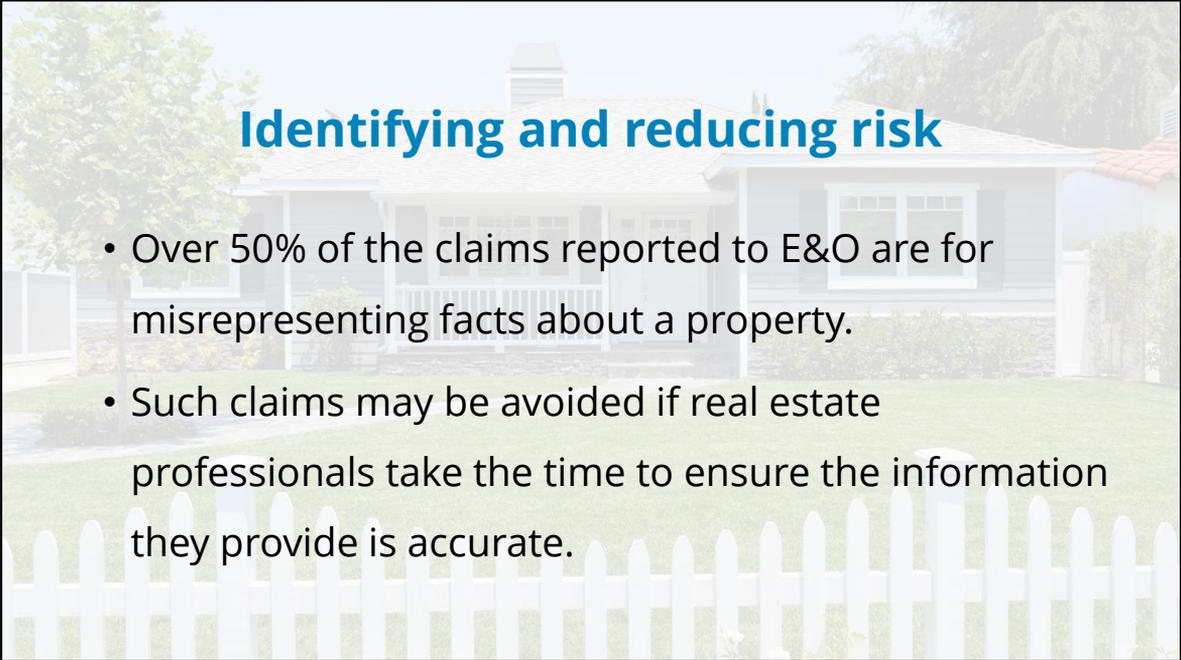
The case against the real estate professional was dismissed as the claimants had suffered no damages.

Although this claim was dismissed against the real estate professional, they lost many hours compiling documents and statements and meeting with defence counsel.

- In this case, the Judge found that showing the property with its landscaping and fence was a representation by conduct that the property listed for sale included the garden at least to the line of the fence.
- The case against the real estate professional was dismissed, however, as the claimants had suffered no damages.
- Although this claim was dismissed against the real estate professional, they lost many hours compiling documents and statements and meeting with defence counsel.
- Also, the stress of being involved in a professional liability claim should not be underestimated.



- How could you identify and reduce risk in *this* scenario? (***open for discussion***)



Identifying and reducing risk

- Over 50% of the claims reported to E&O are for misrepresenting facts about a property.
- Such claims may be avoided if real estate professionals take the time to ensure the information they provide is accurate.

- Over 50% of the claims reported to E&O are for misrepresenting facts about a property.
- Although E&O is successful in defending many of these claims because the claimants are unable to establish “reasonable reliance” on the representation or that they suffered any damages, real estate professionals are still put through the wringer.
- For example, even when a claim is dismissed at trial, the experience of going to trial can be very difficult and stressful for a real estate professional.
- Standards of practice have been rising consistently and every real estate professional is expected to conform to higher standards as they become the norm.
- Such claims may be avoided if real estate professionals take the time to ensure the information they provide is accurate.



- Now that we've reviewed two case studies involving real estate professionals who faced claims of misrepresentation, have these influenced how you feel Jaspreet should have handled the situation, and how he should proceed? (***open for discussion***)

What should Jaspreet (the seller's real estate professional) do?

1. Mitigate risk before an issue arises
2. If the seller believes there is a discrepancy, consult with his managing broker and decide on an appropriate course of action with the sellers
3. If Jaspreet receives notice of a claim, consult with his managing broker and notify E&O if legal action is contemplated
4. If Jaspreet receives notice of a complaint against him, inform his managing broker and respond to all requests for information from RECBC promptly

- To determine how Jaspreet should have handled the situation and how he should proceed, we first need to acknowledge that there may be different aspects to this scenario that will have an impact on Jaspreet's actions and those of the real estate professional representing the buyers.

Working with Sellers:

- To mitigate risk before an issue arises, Jaspreet could have:
 - Created a process for measuring homes, following consistent practice, and aligning with any board regulations following set standards;
 - Drawn a plan of the home documenting the measurements, address, and date the home was measured;
 - Reviewed the measurements to ensure they were properly recorded and double checked any calculations; and
 - Reviewed the marketing materials carefully against the measurements taken.
- When the sellers believed there was a discrepancy, Jaspreet could have:
 - Consulted with his managing broker on the best course of action;

- Discussed the discrepancy with the clients and decided on an appropriate course of action to mitigate the issue, such as engaging a measuring company or having a team member or colleague assist in remeasuring;
 - Explained the risks of continuing to advertise the property with the wrong square footage and discussed temporarily removing the property from the market to address this concern;
 - Revised any marketing materials to ensure they accurately reflected the size of the home; and
 - Provided the buyers' real estate professional with the steps taken to verify the information.
- If Jaspreet receives notice of a claim, he should consult with his managing broker and, if legal action is contemplated, notify E&O right away.
 - If Jaspreet receives notice of a complaint against him, he should inform his managing broker and respond to all requests for information from RECBC promptly.

What should the buyer's real estate professional do?

1. Mitigate risk before an issue arises
2. If new information becomes available after conditions are removed, inform clients and advise clients to seek legal advice as appropriate
3. If they receive notice of a claim, consult with their managing broker and notify E&O if legal action is contemplated
4. If they receive notice of a complaint against them, inform their managing broker and respond to all requests for information from RECBC promptly

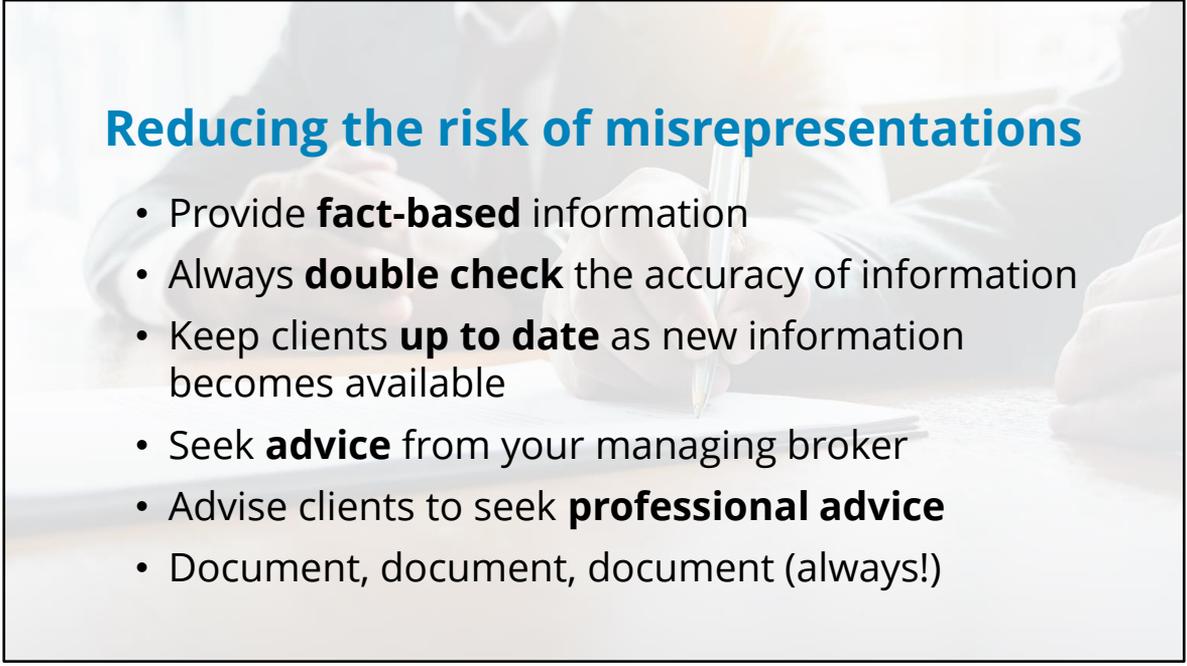
Working with Buyers:

- Since a buyer's real estate professional also has a duty of reasonable care and skill, they must also verify the information being provided that's important to a buyer in the transaction.
- To mitigate risk before an issue arises, a buyer's real estate professional could have:
 - Reviewed the MLS® spec sheet with the client, ensuring they understand what's important to the client;
 - Discussed square footage – whether the buyers are satisfied with the square footage as viewed (outside of the contract) or providing options for the real estate professional/buyer to remeasure the home or possibly including professional measuring as a condition of purchase – and consider documenting the discussion; and
 - Sought guidance from their managing broker and discussed the options available with the buyer if the square footage was different than listed.
- If, in this situation, new information became available after conditions were removed, the real estate professional could have:
 - Informed their client of all material information promptly,

and

- Advised their client to seek legal advice as appropriate.
- If the buyer's real estate professional receives notice of a claim, they should consult with their managing broker and, if legal action is contemplated, notify E&O right away.
- If they receive notice of a complaint against them, they should inform their managing broker and respond to all requests for information from RECBC promptly.

- Real estate professionals should always try to verify information from reliable sources and document the discussions and actions they take.
- They should also always work with their managing broker and seek legal advice as early as appropriate.
- Taking preventive action early on can help real estate professionals reduce risk.



Reducing the risk of misrepresentations

- Provide **fact-based** information
- Always **double check** the accuracy of information
- Keep clients **up to date** as new information becomes available
- Seek **advice** from your managing broker
- Advise clients to seek **professional advice**
- Document, document, document (always!)

- So, let's review ways to reduce the risk and mitigate the risk of misrepresentations:
 - Avoid making statements or representations if you are unsure or don't know.
 - Don't rely on information from old listings without verifying the information yourself.
 - Provide fact-based information rather than opinions or relying on other parties. Avoid exaggerating features or omitting information.
 - Be consistent in your practice and always double-check the accuracy of information.
 - Disclose to parties what steps you've taken to verify the information.
 - Keep clients up to date as new information becomes available. Review the information with the client, verify the source of the information being provided, and provide contact information if the client wants to make additional inquiries.
 - In working with buyers, real estate professionals can help protect their clients by making their client's offer subject to the buyer confirming the accuracy of the information with

which the buyer is concerned, or by including a specific term or warranty in the Contract of Purchase and Sale.

- Seek advice from your managing broker, before making any statements or advertising anything that may be construed as misrepresentation.
 - Advise clients to seek professional advice, as appropriate.
 - And, as always, document, document, document!
- Real estate professionals who verify and provide information to clients and consumers can help reduce the risk of consumer complaints and help ensure the integrity of the real estate profession.

Support and Resources

- BCREA Legally Speaking #438: <https://www.bcrea.bc.ca/legally-speaking/being-sued-is-no-fun-438/>
- RECBC Professional Standards Advisors: advisor@recbc.ca
- E&O Risk Reports: <https://www.reeoic.com/news/risk-report/three-common-claims-to-watch-out-for> and <https://www.reeoic.com/news/risk-report/puffery-or-misrepresentation>



- While this presentation considers different perspectives on how a real estate professional may address situations to avoid misrepresentations, it's important to utilize the resources available to help ensure your compliance to practice.
- These resources include:
 - BCREA's *Legally Speaking* articles & PDP opportunities,
 - RECBC's Knowledge Base and Professional Standards Advisors, and
 - E&O's Risk Reports.
- Thank you!