Brokerage

'Best practices' recommendations for closings

Eric J. Gold
President and owner, Sheldon-Gold Realty Inc. Commercial Real Estate Services. He also is senior instructor for Armbrust Real Estate Institute and a Colorado court qualified real estate expert witness.

In 2012, the Colorado Real Estate Commission eliminated language in the commission-approved contract to buy and sell that required closing instructions to be completed at the time of the contract. The rationale behind this change was the recognition that closing instructions are an employment agreement between the title company and the buyer and seller to "close the contract." The real estate broker is not a stakeholder in this agreement. Under Colorado Division of Insurance Rules, the title company is required to secure closing instructions (get hired) prior to providing closing services.

The main reason commission-approved closing instructions were previously required was related to the preprinted language securing the title company's agreement to release earnest money pursuant to the contract to buy and sell, rather than at the whim of the title company. There was no assumption that a title company's version of closing instructions incorporated the real estate commission contract to buy and sell earnest money release language, so the contract required the commission-approved form.

Nevertheless, many brokers failed to complete closing instructions at the time of contract, leaving it up to the title company, usually at the closing table. As a result, if a dispute over earnest money occurred, it was up to the title company to determine if, when and under what conditions the earnest money would be released. Common title company practices required signed mutual instructions before the funds would be released. This strategy was incorporated to eliminate title company liability as the earnest money holder. Obtaining written mutual instructions was never a problem if there was no earnest money dispute. However, in the event of a dispute, written mutual instructions could not be obtained and earnest money was often forfeited by both parties, left to languish in a title company trust account.

Once the requirement for closing instructions was removed from the contract to buy and sell, many brokers, rightly so, left the closing instructions up to the title company. Yet the earnest money release issue remained and the Real Estate Commission had to modify the earnest money receipt form, which became compulsory when delivering earnest money to a title company so as to be able to secure the release of funds according to the contract.

So, what is all the fuss and concern for us brokers?

As hard as it was to get brokers to do the closing instructions at the time of contract when it was a requirement of the contract, the continued practice of some brokers securing closing instructions at the time of the contract often leads to two separate closing instruction contracts. As title companies will often insist the parties sign additional closing instructions at the closing table, it is not a best practice to have two such agreements. As a result, brokers need not concern themselves with closing instructions but leave it up to the title company to comply with Division of Insurance Rules. Nonetheless, it remains critical that brokers use the commission-approved earnest money receipt form when handing over the earnest money to a title company, or any third-party earnest money holder.

One remaining critical issue then is the scrivener agreement. Brokers must be aware of the purpose of the scrivener agreement and the brokers responsibility for the proper preparation of the deed and bill of sale, the most common documents prepared "on behalf of the broker." So, we suggest brokers "clip" the scrivener agreement from the commission-approved closing instructions form and make sure they get the title company to sign the scrivener agreement when they deliver earnest money. Signing a scrivener agreement at the closing table is too late. Without a scrivener agreement, the broker has not secured the right to "review and approve" these legal documents.

This leads us to another discussion about the broker's responsibilities related to accurate preparation of the deed and bill of sale. A great number of title company-prepared deeds are not completed according to the contract and the broker must secure the right to review and approve the deed according to Section 13 of the contract. Brokers also should understand how to "fight back" when title companies insist on doing the deed "their way," which, as stated, is often different than the requirements of the contract to buy and sell. Remember, the title company is hired to "close the contract" and does not have the right to determine how the deed is prepared. That right remains with the parties to the transaction and it is the broker's obligation to ensure a properly prepared deed.

In summary, our "best practices" recommendations are to 1) ensure the title company signs the commission-approved earnest money receipt form and a scrivener agreement at the time of delivery of earnest money, and 2) understand how to review the title company-prepared deed for compliance with the Section 13 of the contract to buy and sell.▲