

# Ways to avoid trouble at the closing table and beyond

Years ago, title insurance companies provided only title insurance. Earnest money was deposited and held in the listing brokers' trust account and brokers would prepare the closing documents and conduct the closing. In recent years, title companies began offering closing services and today most brokers utilize these closing services. Therein lies the concern.

Both title companies and brokers have forgotten who is working for whom, and who is liable for the transaction. Be aware that brokers remain fully responsible for the closing and for the accuracy of all closing documents, regardless of who prepares the documents.

Because of a 1957 Colorado Supreme Court case, title companies are prohibited from preparing legal documents for closings and doing so is considered the unauthorized practice of law.

Recognizing your obligations and liability, let's discuss strategies to prevent trouble at the closing table and beyond.

**Get an earnest money receipt.** If the title company, or any third party, will be the earnest money holder, you must obtain a signed Commission Approved Earnest Money



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Receipt upon delivery of the funds. The commission-approved receipt form obligates the earnest money holder to release funds in accordance with the contract. A title company prepared receipt form may not obligate the title company to comply with the contract, creating potential problems for the broker should the transaction fail. In addition, if a title company misplaces the earnest money, or worse goes out of business or absconds with funds, as has happened, the broker could be liable for the earnest money! A copy of the signed earnest money receipt must be included in the transaction file.

**Get a signed scrivener agreement.** The listing broker should secure a scrivener agreement with the title company at the time of delivery of earnest money. Through this scrivener agreement, a broker employs the title company



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to complete documents for closing, typically the deed and bill of sale, and secures the broker right and obligation to "review and approve" these documents. Without the scrivener agreement, the broker still retains responsibility for these documents, which are not always prepared as the contract demands. In addition, the title company must charge for this service and the scrivener agreement will identify the fee for which the broker is responsible.

**Accurately prepare the closing documents.** Brokers should carefully review all documents prior to the closing, including, but not limited to, the deed. General exception deeds are not allowed in Colorado. According to the Contract to Buy and Sell, the deed must list all exceptions to title as shown on page B-2 of the title commitment and Section 13 of the Contract to Buy and Sell. Remember, the title company works for you.

If the deed is improper, you must require the title company to redo the deed.

**Sign the settlement statements.** Commission Rule E-5 states "the licensee who has established a brokerage relationship shall be responsible for the proper closing of the transaction and shall provide, sign and be responsible for an accurate, complete and detailed closing statement as it applies to the party with whom the brokerage relationship has been established." Make sure you review the settlement statement prior to closing and secure a signed copy in your transaction file.

**Ensure delivery of the title insurance policy.** As is so often the case, the transaction "closes on a commitment" and the actual title insurance policy is not delivered at the closing table. If Section 8.1.1 of the Contract to Buy and Sell applies, the "seller will cause the title insurance policy to be issued and delivered to buyer as soon as practicable at or after closing." Failure to do so is a seller default of the contract and leaves the buyer's title uninsured.

Licensees involved in the transaction are required to exercise reasonable skill in care including, but not lim-

ited to, making sure the party they represent does what they have agreed to do. If the seller fails to cause the title insurance policy to be delivered to the buyer, the listing broker can be held liable for not exercising reasonable skill and care! Protect yourself and set up a method to track and confirm the delivery of the insurance policy to the buyer.

**Keep it confidential.** Confidentiality is a Uniform Duty (Section 5.2) that applies to all brokerage relationships. Throughout the transaction, your principal may disclose confidential information to you, and may or may not have specifically instructed you to keep that information confidential. If the brokerage relationship was agency, the duty of confidentiality extends beyond the closing into perpetuity. If the information was confidential during the transaction, it stays confidential after the transaction. Breaching this confidentiality before or after closing can get you into trouble.

However, this confidentiality does not extend beyond the closing if the brokerage relationship was transaction broker, nonetheless, one should be very thoughtful as to disclosing any confidential information. ■