Broker Summit 2021

THINGS YOUR AGENTS MAY NOT KNOW

1. Purchase agreements should never predate the start of the term of the listing agreement. A listing agreement only entitles the listing broker to a commission if the property is sold during the term of the listing agreement. So, if the purchase agreement predates the start date of the listing agreement, the listing broker has no contractual right to a commission.

2. Agents should be instructed NEVER to arrange for a temporary "office exclusive" period – no matter how short the period is – without an office exclusive form. "Office exclusive" forms are not just an MLS requirement, but also provide the listing broker with necessary protection if the seller later claims that the price would have been higher had the listing agent put the home in the MLS. "Office exclusive" forms require the seller to acknowledge and waive the benefits of widely marketing their home through the MLS.

3. Even if the sellers have never lived in a home, they must still answer all questions on the seller's disclosure statement to the best of their ability. The fact that the sellers have never lived in the home does not necessarily mean that they do not know anything about the condition of the home. Sellers cannot avoid liability by choosing not to answer a question on the seller's disclosure form. If, for example, the sellers know that the basement leaks, they will have committed fraud if they do not disclose that information – whether they say that they do not know if the basement leaks, or they do not answer the question at all.

4. If a buyer doesn't sign a buyer's agency agreement agreeing to a designated agency relationship with only one agent in your firm, that buyer has an agency relationship with every agent in your firm. A salesperson who does not bother to get a buyer agency form signed has created a dual agency situation on all in-house listings. If the listing agent is not aware of this

particular buyer's agency relationship with the entire firm and does not get a consensual dual agency form signed, the firm forfeits its right to a commission.

5. If an unrepresented buyer wants to make an offer on a property that the agent has listed, that agent can treat that buyer as a customer. The agent does not need to create an agency relationship with the buyer and then become dual agent. Legally, it is easier/less risky to continue to act as the seller's agent than to create an agency relationship with the buyer for the purpose of creating a dual agency situation.

6. It is not typically the case that buyers who default on a purchase agreement can simply forfeit their earnest money deposit ("EMD") and not risk any further liability. While a seller's rights in the event of the buyer's default depend on the specific language in the purchase agreement, typically in the event of default, the seller has the right to the buyer's EMD and to pursue other legal remedies (e.g., damages). Buyer-clients who are having second thoughts should be told to consult with an attorney.

7. Offers can be revoked before their stated expiration date and time. A stated expiration date and time means that the offer will automatically expire at that time if it has not been previously revoked by the offeror. The purpose of such a date is not to guaranty availability for a particular time period but to keep the offer from being open indefinitely.

8. Real estate taxes are prorated differently in different parts of the state. Failure to determine how taxes are customarily prorated in a particular area can be very costly to your client. By way of example, assume a property tax bill in September is $6,000 and that the property is sold in October. If the taxes are prorated in arrears, at closing, the seller will owe the buyer $500. If the taxes are prorated in advance, at closing, the buyer will owe the seller $5,500. (If taxes are prorated on a calendar year basis, the buyer would owe the seller $1,500.)

9. An agent cannot call a FSBO seller who is on the national do-not-call registry unless the agent has a specific buyer interested in that specific home. A single willful violation of the federal Telephone Consumer Protection Act can result in a $1,500 fine.

10. Dual agents cannot avoid liability simply by not telling either buyer or seller anything. A dual agent still owes both clients a duty of disclosure. The only limitation on that duty is that the agent cannot disclose confidential information learned from the other client. Nondisclosure of a matter that is not confidential is generally not a "neutral" stance. For example, if it is public knowledge that the neighborhood school is closing, an agent who does not disclose this information is not being "neutral," but is acting in the best interest of the seller.

11. Under "procuring cause" rules, a cooperating agent is not entitled to the commission split offered through the MLS if his or her transaction does not close, regardless of the reason that the transaction does not close. A cooperating agent is not entitled to a commission if the seller breaches the purchase agreement.

12. The legal test for determining whether or not something is a fixture (and thus included in the sale) or is personal property is based on intent and is somewhat subjective. While all purchase agreement forms attempt to address this issue by including a boilerplate list of "included" property, listing agents are well advised to work with their sellers to identify any "unique" items (and/or leased items) that should be expressly excluded. A discussion of excluded items at the time the listing agreement is signed can help avoid future disputes with the eventual buyer.