CHAPTER 20

DISCLOSURES AND DUE DILIGENCE IN RESIDENTIAL REAL ESTATE TRANSACTIONS

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PART ONE – DISCLOSURES

Part One of this chapter summarizes the disclosures required for residential real estate transactions in Minnesota. It is organized by the individual or entity that must make the disclosure. First it reviews the disclosures to be made by sellers, then it reviews the disclosures required by brokers and agents (collectively referred to as "licensees"). Part Two discusses the various due diligence concerns that may arise in connection with residential real estate transactions.[1]

SELLERS

The duty of the seller to make various disclosures in connection with residential real estate transactions is well known. Attorneys representing sellers in transactions should be aware of both the statutory requirements under Minnesota Statutes §§ 513.52 – 513.60, as well as the various common law claims that can arise from errors or omissions that may be made by their clients in disclosures.

I. CONDITION OF PROPERTY – MATERIAL FACTS

The most common disclosures in real estate transactions are those regarding material facts that could adversely and significantly affect an ordinary buyer's use and enjoyment of the property or any intended use of the property of which the seller is aware.

A. **STATUTORY PROVISIONS:** Minn. Stat. §§ 513.52 – 513.60.

[1] The scope of this chapter is limited to matters concerning buyers, sellers and real estate licensees arising in the sale of individual residential properties. Therefore it does not, for example, address the duties of developers, corporations or builders arising in multi-unit sales, transfers of non-residential property, or property development. See e.g. Family Farm Act, Minn. Stat. § 500.24 (requiring certain disclosures by corporations that seek to acquire an interest in agricultural land); Minnesota Subdivided Land Sales Practices Act, Minn. Stat. § 83.20 et seq. (requiring public offering statement to be prepared by subdivider in sales of more than a single or isolated transaction); Minn. Stat. § 326B.875 (establishing the duty of builders to disclose prior occupation of residential property); Minn. Stat. § 515B.4-101-106 (establishing disclosure obligations of declarants for Common Interest Communities). It also does not address disclosures in connection with residential leases.

1. **APPLICABLE TRANSACTIONS:** Minn. Stat. § 513.53 states that the protections afforded by the statutory duty to disclose material facts apply to prospective purchasers of residential real property.
   (1) It applies to property that is occupied or intended to be occupied as a single family residence. This *includes* a unit in a common interest community.
   (2) The disclosures must be made in connection with the transfer of any interest in residential real estate, including a transfer by sale, exchange, deed, contract for deed, lease with an option to purchase, or other types of options.

***PRACTICE POINTER**: To the extent a licensee actively assists a seller in completing a property disclosure form, he or she may be subject to liability under this statute. The liability of licensees for such claims is discussed below.*

2. **EXCLUDED TRANSACTIONS:** Minn. Stat. § 513.54 states that the disclosure requirements do not apply to the following types of transfers or transactions:
   (1) Non-residential real property;
   (2) Gifts;
   (3) Transfers pursuant to a court order;
   (4) Transfers to a government or governmental agency;
   (5) Foreclosures and deeds in lieu of foreclosure;
   (6) Transfers to heirs or devisees of a decedent;
   (7) Transfers between co-tenants;
   (8) Transfers among immediate family members (spouse, parent, grandparent, grandchild, or child of seller);
   (9) Transfers between divorced spouses;
   (10) New construction;
   (11) Transfers to Tenants in Possession; and
   (12) Certain CIC transactions.

3. **TIMING:** Minn. Stat. § 513.55 requires the seller to make the disclosures before signing the agreement to convey. Note also that under Minn. Stat. § 513.58, the disclosure must be accurate to the date of the disclosure, and that if the seller subsequently learns of any inaccuracies it must notify the buyer in writing as soon as reasonably possible, but in any event before closing, with an amendment to the disclosure.

4. **WHAT MUST BE DISCLOSED:** Minn. Stat. § 513.55 provides that the seller must make a good faith disclosure based upon his or her knowledge at the time of disclosure of, "all material facts of which the seller is aware that could adversely and significantly affect:
   - An ordinary buyer's use and enjoyment of the property; or
   - Any intended use of the property of which the seller is aware."

PRACTICE POINTER: *"Material Facts" might include physical defects in the property, development near the property, existing damage to the property, failed mechanical systems, water intrusion problems, construction defects, or other repairs related to such problems.*

But under Minn. Stat. § 513.57, subd. 1, the seller is not liable for any error, inaccuracy, or omission of any information:

(1) That was not within the "personal knowledge" of the seller;
(2) That was based entirely on information provided by a "qualified third party" such as a home inspector, government agency, or other third party expert;
(3) That could be obtained "only through inspection or observation of inaccessible portions of the real estate;" or
(4) That could be discovered only by a person with expertise in a science or trade beyond the knowledge of the seller.

PRACTICE POINTER*: Review the following facts in connection with any failure to disclose claim: (1) Was it a material fact? (2) Was seller aware of the fact at the time? (3) Could the fact adversely and significantly affect an ordinary buyer's use and enjoyment of the property? (4) Could the fact adversely and significantly affect the buyer's intended use of the property, and was the seller aware of that intended use? (5) Did the fact come entirely from information provided by a third-party inspection? (6) Could the information only be obtained through inspection of inaccessible portions of the property; or (7) Could the information only be discovered by an expert?*

5. **WHAT DOES NOT NEED TO BE DISCLOSED:** Minn. Stat. § 513.56 provides that there is no duty to disclose the fact that residential property:

(1) Is or was occupied with someone infected with HIV or diagnosed with AIDS;
(2) Was the site of a suicide, accidental death, natural death, or perceived paranormal activity;
(3) Is located in a neighborhood containing any adult family home, community based residential facility, or nursing home;
(4) Is in any way impacted by sex offender notification or related information, as long as the seller timely provided written notice that such information could be obtained from local law enforcement or the MN Department of Corrections; or
(5) Information regarding airport zoning regulations if the seller, in a timely manner, provides a written notice that a copy of the airport

zoning regulations as adopted can be reviewed or obtained at the office of the county recorder where the zoned area is located.

Under Minn. Stat. § 513.56, subd. 4, any common law duties based upon the disclosures indicated by numbers (1) through (4) above are also modified.[2]

6. **IMPACT OF PROFESSIONAL INSPECTIONS:** Minn. Stat. § 513.56, subd. 3 provides that if the buyer has obtained or been provided with a written report from a professional inspector or governmental agency which discloses the information, then the seller does NOT need to furnish written disclosure of the information.

   - In an unreported 1998 case, Zehrer v. Helland, No. C2-98-214, 1998 WL 346651, at *1 (Minn. Ct. App. 1998), the Minnesota Court of Appeals held that a buyer who has obtained a professional inspection is deemed to have relied upon the results of that inspection, rather than on any of the seller's representations.
   - Thus, where a buyer obtains a professional inspection, the seller may be protected from certain future claims by buyers.

7. **CONTRADICTIONS MUST BE DISCLOSED**: Importantly, however, if the seller is given or obtains a copy of the report and knows of any material facts that contradict the information contained in the written inspection report, those facts must be disclosed.

***PRACTICE POINTER**: Buyers who obtain written inspections should provide copies to the seller - - that way if the seller knows a material fact that contradicts information in the report he or she will be under a duty to disclose those facts.*

***PRACTICE POINTER**: Many municipalities (e.g. the Cities of Bloomington and St. Louis Park) require a code compliance inspection at the time of sale. The results of those inspections can also be used in lieu of a written disclosure of information by the seller. Those ordinances require homes to be brought up to code prior to sale. Other municipalities (e.g. Minneapolis) merely require an authorized inspector to inspect the home to determine its general condition. A copy of the report would be filed with the municipality and could be accessed by a buyer as part of their due diligence. Finally, some local units of government may impose requirements for inspection of individual sewage treatment systems. See the Due Diligence section, infra, for more information.*

[2] The statue does not address whether any common law duty related to airport zoning disclosures under number (5) above is modified.

***PRACTICE POINTER**: Sellers may consider obtaining their own inspections both to determine the actual condition of the property and to proactively make any repairs that may be discovered and thereby speed up the transaction. In addition, an inspection can actually protect a seller from a future claim by the buyer, regardless of whether the seller or buyer obtained the inspection. For it could be more difficult for a buyer to prevail in a post-closing claim if a thorough inspection had been obtained by the seller and turned over to the buyer - - if the defect appears in the report then the buyer had notice of it, and if it doesn't appear then the seller can argue that it wasn't even detectable to a trained expert.*

8. **LIABILITY FOR NON-DISCLOSURE:** Minn. Stat. §§ 513.57 & 513.59 provide that in the event of non-disclosure the sale is not invalidated, but that the buyer may seek damages and other equitable relief. The equitable remedy of rescission is available.

9. **STATUTE OF LIMITATIONS:** Minn. Stat. § 513.57, subd. 2 requires an action to be commenced "within two years after the date on which the prospective buyer closed the purchase or transfer of the real property."

***PRACTICE POINTER:** Check to see whether there is an arbitration provision that requires all claims relating to the property be arbitrated. Also, check to see if there is a time limitation in any arbitration provision. Oftentimes the arbitration provision will contain a reduction in the applicable statute of limitations.*

10. **WRITTEN WAIVER BY PARTIES:** Under Minn. Stat. § 513.60, the parties may sign a writing waiving the statutory disclosure requirements under Minn. Stat. §§ 513.52-513.60. Such a waiver, however, does not waive, limit, or abridge any obligation for seller disclosure created by any other law.

***PRACTICE POINTER:** Parties will frequently enter into an "as-is" addendum to the purchase agreement, the effect of which is to waive the written disclosure requirements. In such a case, however, attorneys should ensure that their clients avoid making any disclosures whatsoever -- in a Seller's Disclosure Form or otherwise -- as the very act of making the disclosures could void this attempt to deem the transaction "as-is."*

B. **RELATIONSHIP OF STATUTE TO COMMON LAW CLAIMS:** Minn. Stat. § 513.57, subd. 3 provides that an action based upon fraud, negligent misrepresentation, or other actions allowed by law, is not precluded by virtue of the statutory failure to disclose claims found in Minn. Stat. §§ 513.52 – 513.60. Thus, the right to sue under various common law claims remains available to the

buyer, including the right to sue for claims such as breach of contract, fraud, quantum meruit, and the following:

1. **NEGLIGENT MISREPRESENTATION:** *See* Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976) (failure to exercise reasonable care in obtaining or communicating information).
2. **FRAUDULENT MISREPRESENTATION:** *See* Davis v. Re-Trac Manufacturing Corp., 149 N.W.2d 37 (Minn. 1967) (traditional fraud factors apply).
3. **MINNESOTA CONSUMER FRAUD ACT:** *See* Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2002) (citing Minn. Stat. §325F.68).
4. **ESTOPPEL, UNJUST ENRICHMENT, BREACH OF WARRANTY:** Miller v. Lankow, 776 N.W. 2d 731 (Minn. Ct. App. 2009) (alleging such claims in addition to breach of real estate disclosure laws in connection with mold intrusion case.)

***PRACTICE POINTER**: Most plaintiffs will plead both common law and statutory claims. This allows claims to survive some of the statutory defenses found in Minn. Stat. § 513.57, subd. 1. Pleading common law claims also allows the buyer to avoid the relatively short two-year statute of limitations for statutory claims.*

C. **DAMAGES:** In order to prevail, the plaintiff in a failure to disclose case must prove every element of a claim, including the existence of damages.

1. **PROOF OF DAMAGES IS REQUIRED:** Speculative damages, or those based upon an "off-the-cuff estimate," may not be recovered. Hill v. Tischer, 385 N.W.2d 329, 332 (Minn. Ct. App. 1986).
2. **OUT OF POCKET RULE:** Because the amount of damages is determined by the difference between the sale price and the fair market value of the home with the problem, plaintiffs will need to provide evidence of the fair market value of the home with the defect.
3. **DIFFICULT TO PROVE:** This is not always easy, as it is not necessarily determined by simply presenting evidence regarding what it would cost to fix or repair the defect. *See* Bryan v. Kissoon, 767 N.W.2d 491, 496 (Minn. Ct. App. 2009)("In jurisdictions like Minnesota that follow the 'out-of-pocket' rule, if the property is worth what a party paid for it, then that party has suffered no damages. [R]epair costs alone are not sufficient to show damages for fraudulent misrepresentation in a real-estate transaction.")

PRACTICE POINTER**: Although there is no specific statutory authority, sellers often disclose the existence of wetlands, shoreland, or flood plains on the property before signing the agreement to sell. Typically MSBA Form 8 is used for these disclosures.**

II. SELLER - COMMON INTEREST COMMUNITY UNIT

The seller of a unit in a common interest community is obligated to make specific disclosures regarding the community. Under Minn. Stat. §§ 515B.4-101 – 515B.4-118, sales of common interest community property require disclosure of various association documents and related materials at least ten days before the purchase agreement is signed.

A. **APPLICABLE TRANSACTIONS AND EXCEPTIONS:** The disclosure statements and resale disclosure certificate are required in any resale of the unit. The only exceptions are in the case of:

1. Gratuitous transfer;
2. Transfer pursuant to a court order;
3. Transfer to a government or governmental agency;
4. Foreclosure or deed in lieu of foreclosure;
5. An option to purchase, until exercised;
6. Transfer to a person who controls or is controlled by the grantor;
7. Transfer by inheritance; or
8. Transfers of special declarant rights or in connection with a change of form of the CIC.

B. **LIABILITY FOR NON-DISCLOSURE:** Failure to make these disclosures in a timely fashion entitles the buyer to rescind the purchase agreement within ten days after receiving the information. Minn. Stat. § 515B.4-106.

PRACTICE POINTER: *Under Minn. Stat. § 515B.4-101, the purchase agreement in the resale of a unit must contain the following notice: "The following notice is required by Minnesota Statutes. The purchaser is entitled to receive a disclosure statement or resale disclosure certificate, as applicable. The disclosure statement or resale disclosure certificate contains important information regarding the common interest community and the purchaser's cancellation rights."*

C. **WAIVER**: The parties may modify or waive the ten-day rescission period in writing after the buyer receives the information.

PRACTICE POINTER: *The contents of the required disclosures are quite detailed and space limitations do not allow them to be reproduced in this Chapter. It is strongly recommended that attorneys review Minn. Stat. §§ 515B.4-101 – 515B.4-108 for a detailed description of what must be disclosed.*

III. SELLER - HAZARDOUS WASTE DISPOSAL OR CONTAMINATION

Sellers of property that is known to have been used as a site for hazardous waste disposal are obligated to disclose the same by filing an affidavit with the county recorder pursuant to Minn. Stat. § 115B.16.

A. **APPLICABLE TRANSACTIONS:** Before any transfer of ownership of any property which the seller knew or should have known was used as the site of a

hazardous waste disposal facility, or that the seller knew or should have known was subject to extensive contamination by release of a hazardous substance, the owner must record an affidavit with the county recorder of the county in which the property is located.

B. **CONTENTS OF DISCLOSURE:** Under Minn. Stat. § 515B.16, subd. 2, the affidavit must include a legal description of the property as well as the following statements:

1. That the land has been used to dispose of hazardous waste or that the land is contaminated by a release of a hazardous substance;
2. The identity, quantity, location, condition and circumstances of the disposal or contamination to the full extent known or reasonably ascertainable; and
3. That the use of the property or some portion of it may be restricted as a result and pursuant to Minnesota law.

C. **LIABILITY FOR NON-DISCLOSURE:** Under Minn. Stat. § 115B.16, subd. 4, penalties of up to $100,000 may be assessed for knowing violations of the statute. In addition, the person who fails to record the affidavit shall be liable for any release or threatened release of any hazardous substance resulting from the violation.

PRACTICE POINTER: *Failure to record an affidavit as provided does not affect or prevent any transfer of ownership of the property. Rather, a civil penalty may be imposed and recovered. The penalty would be sought in an action brought by a county attorney or by the attorney general in the district court of the county in which the property is located, and the penalty is paid into the remediation fund.*

D. **TIMING:** The affidavit must be filed "before any transfer of ownership." After the first affidavit is filed, another affidavit must be filed "within 60 days after any material change in any matter required to be disclosed."

IV. SELLER - INDIVIDUAL SEWAGE TREATMENT SYSTEM

Under Minn. Stat. § 115.55, sellers of properties with individual sewage treatment systems located upon them - - whether in use or abandoned - - must make disclosures including a map showing the location of the system.

A. **APPLICABLE TRANSACTIONS:** Under Minn. Stat. § 115.55, subd. 6, any seller or transferor of real property must make a written disclosure of information regarding how sewage generated at the property is managed. The statement must disclose whether or not the sewage goes to a permitted sewage treatment facility.

B. **WHAT MUST BE DISCLOSED IF SEWAGE IS NOT SENT TO A PERMITTED FACILITY:**

1. A description of the system in use, including a legal description of the property and the county in which it is located,
2. A map drawn from available information showing the location of the in-use system on the property,
3. If the seller or transferor has knowledge that an abandoned system exists on the property, a map showing its location,
4. What the seller or transferor has knowledge of relative to the compliance status of the system, and whether, to the best of the seller's knowledge, a straight-pipe system exists, and
5. If available, a copy of any previous inspection report completed by a licensed inspection business or certified local government inspector.

***PRACTICE POINTER**: The statute imposes liability if the vendor "knew or had reason to know of the . . . known status" of the system, which expands the relevant state of mind beyond actual knowledge, to include what the seller or transfer should reasonably know about the condition of the septic system. Kellogg v. Woods, 720 N.W.2d 845 (Minn. Ct. App. 2006); see JEM Acres, LLC v. Bruno, 764 N.W.2d 77 (Minn. Ct. App. 2009).*

C. **LIABILITY FOR NON-DISCLOSURE:** A seller or transferor who fails to disclose the existence or known status of a system at the time of sale, and who knew or had reason to know of the existence or known status of the system, is liable to the buyer or transferee for costs relating to bringing the system into compliance with the subsurface sewage treatment system rules. This includes reasonable attorneys' fees.

***PRACTICE POINTER:** Because the statute explicitly provides for regulation of septic systems by local governments and allows local governments to enact more restrictive ordinances, state law does not preempt local ordinances regulating septic systems. In Re Appeal of Rochelean, 686 N.W.2d 882 (Minn. Ct. App. 2004).*

D. **WAIVER**: Under Minn. Stat. § 115.55, subd. 6 (b), the buyer or transferee and the seller or transferor may agree in writing before the closing of the sale that liability is waived.

V. SELLER - LEAD PAINT

Under 42 U.S.C. § 4852d, sellers (and lessors) of properties are obligated to make disclosures regarding lead paint hazards found in their housing and provide a ten-day period to conduct an inspection of the property for the presence of lead-based paint hazards. As discussed infra, sales or leasing agents must also ensure compliance with these requirements.

A. **APPLICABLE TRANSACTIONS:** Every contract for the purchase and sale or lease of any interest in any housing with at least one bedroom that was constructed prior to 1978. There is a limited exception for housing for the elderly or persons with disabilities (unless children under the age of six reside there).

B. **REQUIREMENTS**: Sellers or lessors must disclose the presence of any known lead-based paint or hazards, and must provide a copy of any available lead hazard evaluation report for the property. In addition, every purchaser or lessee must be given a copy of a lead hazard information pamphlet (as prescribed by the EPA), and every purchase or lease agreement must contain a Lead Warning Statement and a statement signed by the buyer that the buyer has: (1) read the Lead Warning Statement and understands its contents; (2) received a lead hazard information pamphlet; and (3) had a 10-day opportunity (unless the parties mutually agreed upon a different period of time) before becoming obligated under the contract to purchase the housing to conduct a risk assessment or inspection for the presence of lead-based paint hazards.

PRACTICE POINTER: *The following Lead Warning Statement must be printed in large type on a separate attachment to the purchase or lease agreement: "Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase."*

C. **LIABILITY FOR VIOLATIONS:** In addition to civil money penalties that may be imposed, any person who knowingly violates the statute may be held jointly and severally liable to the purchaser or lessee in an amount equal to three times the amount of damages incurred. The court may also award court costs, reasonable attorneys' fees, and any expert witness fees to the prevailing party. 42 U.S.C. § 4852d(b).

PRACTICE POINTER: *Merely informing the buyers that lead paint is present and alerting them to the existence of a lead paint report is not a defense to a violation under the law, as nothing in the law allows for a "substantial compliance" defense.* Smith v. Coldwell Banker Real Estate Services, *122 F.Supp.2d 267 (D. Conn. 2000).*

D. **WAIVER**: The statute does allow the parties to mutually agree on a different period of time to conduct a risk assessment or inspection than the 10-day opportunity provided.

PRACTICE POINTER: *As discussed infra, if the seller or lessor has entered into an agreement with an agent for the purpose of leasing or selling a home, the agent, on behalf of the seller or lessor, is also obligated to ensure compliance with the law. 42 U.S.C. §4852d(a)(4).*

E. **IMPACT ON SALE OR LEASE:** The statute specifically states that a violation does not affect the validity or enforceability of any sale or lease. It also does not affect any loan, mortgage, or lien made or arising in connection with a mortgage loan, and does not create a defect in title. 42 U.S.C. § 4852d(c).

VI. SELLER - LOCATION OF WELLS / WASHINGTON COUNTY "SPECIAL WELL CONSTRUCTION AREA"

Under Minn. Stat. § 103I.235, sellers must disclose in writing information regarding the location of all known wells on the property or, in the alternative, provide a statement that they do not know of any such wells on the property.

A. **APPLICABLE TRANSACTIONS AND TIMING:** The disclosure must be made before signing an agreement to sell or transfer any real property.

B. **EXCEPTIONS:** These requirements do not apply to the sale, exchange, or transfer of real property: (1) that consists solely of a sale or transfer of severed mineral interests; or (2) that consists of an individual condominium unit. Minn. Stat. § 103I.235, subd. 1(e)(1) & (2).

C. **BEFORE SELLING - WELL DISCLOSURE *STATEMENT*:** Before signing the agreement to sell or transfer the property, the seller must disclose either: (1) That he or she does not know of any wells on the property, or (2) Make or a disclosure statement concerning the wells of which he or she is aware.

PRACTICE POINTER: *To the extent the seller knows of any wells on the property, the disclosure statement must include the following: (1) The legal description of the subject property; (2) The county; (3) A map drawn from available information showing the location of each well to the extent practicable; and (4) For each well, a statement whether it is in use, not in use, or sealed. Minn. Stat. § 103I.235 subd. 1(a).*

D. **AT CLOSING—WELL DISCLOSURE *CERTIFICATE*:** At the time of closing of the sale, the seller must also provide a signed well disclosure certificate that includes the disclosure statement information, the name and mailing address of the buyer, and the quartile, section, township, and range in which each well is located. Minn. Stat. § 103I.235, subd. 1(b).

1. A well disclosure certificate need not be provided if the seller does not know of any wells on the property and the deed or other instrument of conveyance contains the statement: "The Seller certifies that the Seller does not know of any wells on the described real property."

2. If the seller fails to provide a required well disclosure certificate at the closing, the buyer may sign the well disclosure certificate based on the information provided on the disclosure statement, or based on other available information.

E. **ALTERNATIVE – STATEMENT OF NO CHANGES:** No new well disclosure certificate is required if the buyer or seller certifies on the deed or other instrument of conveyance that the status and number of wells on the property have not changed since the last previously filed well disclosure certificate. This may be on the front or back of the deed or on an attached sheet. An acknowledgment of the statement is not required for the deed or instrument to be recordable.

PRACTICE POINTER: *The following signed statement is sufficient to comply with the statement of no changes: "I am familiar with the property described in this instrument and I certify that the status and number of wells on the described real property have not changed since the last previously filed well disclosure certificate." Minn. Stat. § 103I.235, subd. 1(i).*

F. **CONTRACT FOR DEED:** If a deed is given pursuant to a contract for deed, the well disclosure certificate must be signed by the buyer. If the buyer does not know of any wells on the property, a well disclosure certificate is not required and instead the following statement must appear on the deed along with the signature of at least one grantee: "The Grantee certifies that the Grantee does not know of any wells on the described real property."

G. **CONSEQUENCE FOR NON-COMPLIANCE:** A seller who fails to disclose the existence or known status of a well at the time of sale and knew or had reason to know of the existence or known status of the well, is liable to the buyer for costs relating to sealing of the well and reasonable attorney fees for collection of costs from the seller. Equally important, a county recorder or registrar of titles generally may not record a deed or other instrument of conveyance unless it contains the well disclosure statement or it is accompanied by a well disclosure certificate containing all of the required information.

PRACTICE POINTER: *Failure to comply with the disclosure requirement does not impair: (1) the validity of a deed as between the parties or as to any other person who otherwise would be bound by the deed or instrument; or (2) the record, as notice, of any deed accepted for filing or recording despite violating the requirements.*

H. **WAIVER**: The buyer and seller may agree in writing, prior to the closing of the sale that the seller will not be liable to the buyer for costs relating to sealing of the well and reasonable attorney fees for collection of costs from the seller.

PRACTICE POINTER: *An action against a seller for failing to disclose the existence or known status of a well must be commenced within six years after the date the buyer closed the purchase of the property.*

I. **ADDITIONAL WASHINGTON COUNTY REQUIREMENT – SPECIAL WELL CONSTRUCTION AREA**: Under Minn. Stat. § 103I.236, the seller of property located in Washington County must also state in writing whether, to the seller's knowledge, the property is located within a "special well construction area" designated by the commissioner of health under Minnesota Rules part 4725.3650.

1. This disclosure must be made before signing an agreement to sell or transfer property in Washington County.
2. It applies to property that is not served by a municipal water system.
3. But if there is an unsealed well on the property (as disclosed pursuant to Minn. Stat. §103I.235, subd. 1), the disclosure of whether the property is located within a special well construction area must be made regardless of whether it is served by a municipal water system.
4. Purpose: This is sometimes referred to as a "well advisory," and it provides for controls on the drilling or alteration of wells in an area where groundwater contamination has (or may) result in risks to the public health.

VII. SELLER - <u>METHAMPHETAMINE PRODUCTION</u>

Under Minn. Stat. § 152.0275, sellers must disclose in writing whether, to their knowledge, methamphetamine production has occurred on the property. If it has, the seller must further disclose whether any "no occupancy" orders have been issued, as well as the status of the removal and remediation of the property. This statute preempts all local ordinances relating to the sale or transfer of real property designated as a clandestine lab site.

A. **BACKGROUND:** After discovering a methamphetamine lab, the health department or sheriff issues an order that the property may not be used until it has been remediated. The health department or sheriff also records an affidavit with the county recorder or registrar of titles which contains: (1) the name of the owner, (2) a legal description, and (3) a map showing the property boundary and location of the contaminated area. After remediation is complete, the order is vacated and another affidavit regarding the vacation is recorded with the county recorder or registrar of titles. An interested party may also file an affidavit regarding remediation of the property. Minn. Stat. § 152.0275, subd. 2.

PRACTICE POINTER: *Because the law requires affidavits to be filed both upon the discovery of the meth lab and upon its remediation, any property that has been the subject of an investigation will likely have the information filed of record. A public records search should be conducted as part of buyer's due diligence.*

B. **DISCLOSURE REQUIREMENT:** Before signing an agreement to sell or transfer real property, the seller must disclose in writing if, to their knowledge,

methamphetamine production has occurred on the property. Minn. Stat. § 152.0275, subd. 2(m).

C. **CONTENTS OF DISCLOSURE:** If methamphetamine production has occurred on the property, the disclosure must include a statement to the buyer informing the transferee:

1. Whether an order has been issued on the property that it not be used or occupied as a result of the lab;
2. Whether any order issued against the property has been vacated following remediation; or
3. If there was no order issued and the seller is aware that methamphetamine production has occurred on the property, the status of removal and remediation.

D. **LIABILITY FOR NON-DISCLOSURE:** a seller or transferor who fails to disclose, to the best of their knowledge, at the time of sale any of the facts required, and who knew or had reason to know of methamphetamine production on the property, is liable to the buyer or transferee for costs relating to remediation of the property. This includes reasonable attorney' fees for collection of costs from the transferor. Minn. Stat. § 152.0275, subd. 2(n).

PRACTICE POINTER: *An action must be commenced within six years after the date on which the buyer or transferee closed the purchase or transfer of the real property where the methamphetamine production occurred.*

E. **WAIVER**: The buyer or transferee and the seller or transferor may agree in writing before the closing of the sale to waive any liability for violations of the disclosure requirements. Minn. Stat. § 152.0275, subd. 2 (n).

VIII. SELLER - UNDERGROUND STORAGE TANKS

Under Minn. Stat. § 116.48, sellers must record an affidavit if the property contains an above-ground or underground storage tank or if there has been a release from a tank for which no corrective action was ever taken. There are various exceptions to the requirement, including certain farm tanks and tanks in basements located upon or above the surface of the floor.

A. **APPLICABLE TRANSACTIONS:** This disclosure applies to any owner of property which the owner knows (1) contains an underground or aboveground storage tank or (2) contained an underground or aboveground storage tank that had a release for which no corrective action was taken. Minn. Stat. § 116.48, subd. 6.

B. **DISCLOSURE REQUIREMENTS – TO RECORDER/REGISTRAR:** Before transferring ownership, the owner must record with the county recorder or registrar of titles of the county in which the property is located an affidavit containing:

1. A legal description of the property where the tank is located;
2. A description of the tank, of the location of the tank, and of any known release from the tank of a regulated substance;
3. A description of any restrictions currently in force on the use of the property resulting from any release; and
4. The name of the owner.

C. **DISCLOSURE REQUIREMENTS – TO PURCHASER:** Before transferring ownership, the owner must also deliver to the purchaser a copy of the affidavit and any additional information necessary to make the facts in the affidavit accurate as of the date of transfer of ownership.

PRACTICE POINTER: *If an affidavit has been recorded and the tank and any regulated substance removed from the property, the owner or any other interested party may also file with the county recorder or registrar of titles a removal affidavit. Minn. Stat. § 116.48, subd. 7. A public records search should be conducted as part of buyer's due diligence.*

D. **EXEMPTIONS:** Under Minn. Stat. § 116.47, the following are exempt from the disclosure requirements:

1. Farm or residential tanks of 1,100 gallons or less used for storing motor fuel for noncommercial purposes;
2. Tanks of 1,100 gallons or less used for storing heating oil for consumptive use on the premises where stored;
3. Certain regulated pipeline facilities
4. Surface impoundments, pits, ponds, or lagoons;
5. Storm water or waste water collection systems;
6. Flow-through process tanks;
7. Tanks located in an underground area, including basements, cellars, shafts, or tunnels, if the storage tank is located upon or above the surface of the floor;
8. Septic tanks;
9. Tanks used for storing liquids that are gaseous at atmospheric temperature and pressure; or
10. Tanks used for storing certain regulated agricultural chemicals.

IX. SELLER – VALUATION EXCLUSION

Under Minn. Stat. § 273.11, subd. 18, sellers must disclose the existence of any exclusion from market value due to home improvements, and that the exclusion will end upon the sale of the property and result in an increase in taxes.

A. **APPLICABLE TRANSACTIONS**: Any sale of real property.

B. **REQUIRED DISCLOSURE**: The seller must:

1. Disclose the existence of the excluded valuation to the buyer;
2. Inform the buyer that the exclusion will end upon the sale of the property; and
3. Inform the buyer that the property's estimated market value for property tax purposes will increase accordingly.

C. **FORMS:** Both the Minnesota Association of Realtors and the Minnesota State Bar Association have forms for this disclosure. MAR Forms: "Seller's Property Disclosure Statement"; "Seller's Disclosure Alternatives"; MSBA Form 15-2007.

LICENSEES

Licensed real estate brokers and agents ("Licensees") must make several disclosures in residential real estate transactions. The disclosures are required by the licensing and other statutes, as well as the common law.

I. LICENSEE - AGENCY RELATIONSHIPS & DUAL AGENCY

Under Minn. Stat. § 82.22, real estate brokers and salespersons must discuss what type of agency representation or relationship they desire. They must provide an agency disclosure form at the first substantive contact with the consumer, and dual agency situations require additional disclosures.

A. **APPLICABLE TRANSACTIONS:** The disclosure is required in residential real property transactions involving a broker or agent salesperson. It applies in any transaction involving property occupied or intended to be occupied by one to four families as their residence.

B. **CONTENTS OF DISCLOSURE:** Minn. Stat. § 82.22, subd. 4 provides the form of disclosure, and the actual disclosure must be "in substantially the form" as provided for in the statute. This includes a description and explanation of the various types of agency representation that are available, including the following:

1. Seller's Broker
2. Subagent
3. Buyer's Broker
4. Dual Agency-Broker Representing both Seller and Buyer
5. Facilitator

C. **TIMING OF DISCLOSURE:** The disclosure must be made at the time of the "first substantive contact" with the consumer.

D. **CIRCUMSTANCES CREATING A DUAL AGENCY:** If the circumstances create a dual agency situation, the broker is obligated to make full disclosure to all of the parties to the transaction as to the change. The broker must also obtain the consent of all parties in the purchase agreement itself.

PRACTICE POINTER: *If the circumstances create a dual agency, the notice of dual agency in the purchase agreement must be set off in a boxed format to draw attention to it, and must include the following language: "Broker represents both the seller(s) and the buyer(s) of the property involved in this transaction, which creates a dual agency. This means that broker and its salespersons owe fiduciary duties to both seller(s) and buyer(s). Because the parties may have conflicting interests, broker and its salespersons are prohibited from advocating exclusively for either party. Broker cannot act as a dual agent in this transaction without the consent of both seller(s) and buyer(s)." The statute also requires specific language concerning the use of confidential information, the inability to represent one party's interest to the detriment of another, and the attempt to work diligently to facilitate the sale. See the statute for the specific language required.*

E. **LIABILITY FOR NON-DISCLOSURE:** There are several implications that could arise from the failure to comply with these requirements:

1. Under Minn. Stat. § 82.48, subd. 2, as well as § 82.35, subd. 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
2. Under Minn. Stat. § 82.18, subd. 3, if the licensee's agency relationships have not been disclosed as required under the statute, that licensee is not entitled to bring an action to recover any fee, commission, or other compensation with respect to the transaction.
3. Under Minn. Stat. § 82.40, any person who violates any provision of Minn. Statutes Chapter 82 shall be guilty of a gross misdemeanor.

II. LICENSEE – <u>ADVERTISING</u>

Under Minn. Stat. § 82.22, subd. 1, licensees must identify themselves as either a broker or an agent salesperson in any advertising.

A. **APPLICABLE TRANSACTIONS:** In any advertising by a licensee for the purchase, sale, lease, exchange, mortgaging, transfer, or other disposition of real property. The disclosure must be made whether the advertising pertains to the licensee's own property or the property of others.

B. **LIABILITY FOR NON-DISCLOSURE:** The implications that could arise from the failure to comply with the disclosure requirement are as follows:

1. Under Minn. Stat. § 82.48, subd. 2, as well as § 82.35, subd. 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
2. Under Minn. Stat. § 82.40, any person who violates any provision of Minn. Statutes Chapter 82 shall be guilty of a gross misdemeanor.

PRACTICE POINTER: *Licensees who list interstate land sales of lots in a subdivision having at least 25 lots have an additional disclosure to make – they must make a public filing of an informational statement under the Interstate Land Sales Disclosure Act, 15 U.S.C. § 1701 et seq. This law makes it unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails . . . to sell or lease any lot" unless it makes a public filing of an informational statement under 15 U.S.C. § 1705 The statue applies to licensees because it applies to "agents," which are defined as "any person who represents, or acts for or on behalf of, a developer in selling or leasing." 15 U.S.C. § 1701.*

III. LICENSEE TO SELLER – RIGHT TO CHOOSE CLOSER

Under Minn. Stat. § 507.45, subd. 4, sellers are not required to use any particular person or entity in connection with a residential real estate closing, and licensees must inform their clients of their right to choose the closer.

A. **APPLICABLE TRANSACTIONS:** Minn. Stat. § 507.45, subd. 4 provides that no real estate salesperson or broker may require a person to use any particular closing agent in connection with a residential real estate closing.

B. **NOTICE REQUIREMENT:** All listing agreements must include a notice informing sellers of their rights to choose the closing agent. The notice must require the seller to indicate in writing whether the licensee may arrange for closing services or whether the seller wishes to do so.

IV. LICENSEE TO SELLER – MATERIAL FACTS CONCERNING THE PRINCIPAL'S RIGHTS AND INTERESTS

Under the common law, the licensee is obligated to make a full disclosure of all facts which the broker or agent is aware which might affect the principal's rights or interests in the transaction. This arises from the fiduciary duty between the licensee agent and seller.

A. **APPLICABLE TRANSACTIONS:** In White v. Boucher, 322 N.W.2d 560 (Minn. 1982), the Minnesota Supreme Court held that upon the execution of a listing agreement the broker becomes the agent of the seller. Hence, the licensee owes the utmost good faith and loyalty to his principal.

B. **DUTY AND OBLIGATION**: As part of his duty of good faith and loyalty, the licensee must disclose "all facts of which he has knowledge which might affect the principal's rights or interests."

1. "The agent is bound to disclose to the seller *all* facts of which he has knowledge which *might* reasonably affect the principal's rights and interests." White v. Boucher, 322 N.W.2d at 565 (emphasis in original).
2. This includes a full disclosure of "the financial status of a prospective purchaser." Id.

C. **LIABILITY FOR NON-DISCLOSURE:** Generally, the licensee will forfeit the right to a commission from the transaction if it violates this duty.

PRACTICE POINTER: *Check to see whether there is an arbitration provision in the listing agreement that requires all claims to be arbitrated. Oftentimes the arbitration provision will contain a reduction in the applicable statute of limitations.*

V. LICENSEE TO BUYER - MATERIAL FACTS CONCERNING CONDITION OF PROPERTY

Under Minn. Stat. § 82.22, subd. 8, licensees must make disclosures to prospective purchasers similar to those that the seller must make under the common law and Minn. Stat. § 513.55, discussed supra.

A. **APPLICABLE TRANSACTIONS:** Licensees shall disclose to any prospective purchaser all material facts of which the licensees are aware, which could:

1. Adversely and significantly affect an ordinary purchaser's use or enjoyment of the property, or
2. Any intended use of the property of which the licensee is aware.

PRACTICE POINTER: *Generally, whatever a seller is obligated to disclose to the buyer, the licensee is obligated to disclose (to the extent it is aware of the fact or information). If the seller's agent is provided the required written disclosure from the seller, then that agent has a duty to provide that document to the prospective buyer. Minn. Stat. § 513.55, subd. 2. Furthermore, any information passed to the agent (or known independently by the agent) must in turn be communicated to the buyer.*

B. **CERTAIN FACTS ARE NON-MATERIAL:** The statute provides that several matters do not constitute material facts relating to real property offered for sale, regardless of whether they are a mere suspicion or an actual fact:

1. Whether the property is or was occupied by an owner or occupant who is or was suspected to be infected with HIV or diagnosed with AIDS;
2. Whether the property was the site of a suicide, accidental death, natural death, or perceived paranormal activity; or
3. Whether the property is located in a neighborhood containing any adult family home, community-based residential facility, or nursing home.

C. **NO DUTY REGARDING SEX OFFENDER INFORMATION**: The licensee also has no duty to disclose information regarding an offender who is required to register as a sex offender under Minn. Stat. § 243.166, or about whom notification is made under that section, provided that the broker or salesperson, in a timely manner, provides a written notice that information about the offender registry may be obtained by contacting local law enforcement where the property is located or the Department of Corrections.

***PRACTICE POINTER**: The statute expressly provides that any common law duties arising under the non-material facts and sex offender information identified in sections B and C above are also modified accordingly.*

D. **NO DISCLOSURE OF AIRPORT ZONING REGULATIONS**: In 2007 the statute was amended to provide that a licensee has no duty to disclose information regarding airport zoning regulations if the broker or salesperson, in a timely manner, provides a written notice that a copy of the airport zoning regulations can be reviewed or obtained at the office of the county recorder where the zoned area is located. Minn. Stat. § 82.22, subd. 8(d).

E. **INFORMATION IN CERTAIN WRITTEN REPORTS NEED NOT BE DISCLOSED**: A licensee is also not required to disclose any information relating to the physical condition of the property (or any other information relating to the transaction) if a written report that discloses the information has been prepared by a governmental agency, or by any person reasonably believed to have the requisite expertise who is acceptable to the person to whom the disclosure is being made.

F. **DISCLOSURE MUST BE MADE OF CONTRADICTIONS IN WRITTEN REPORTS:** But if a copy of the report is provided to the licensee, and it knows of any facts that contradict the information, it must disclose those contradictory facts to all of the parties in the transaction.

***PRACTICE POINTER:** In connection with any claims, attorneys should determine whether the buyer's agent ever provided the buyer's inspection report to the seller. For if the seller (or seller's agent) was given a copy, and if the seller was aware of information adverse to the inspection report, they would have been obligated to disclose the contradictory information. Indeed, agents for sellers should ensure that their sellers have reviewed any reports and disclosed any condition in the report that is contradictory to the seller's knowledge. Furthermore, attorneys should determine whether sellers had any inspection reports from any previous buyers whose sales fell through - - for the same might have been required to be disclosed by sellers or their agents to any future buyers as well.*

G. **LIABILITY FOR NON-DISCLOSURE:** The implications that could arise from the failure to comply with the disclosure requirement are as follows:

1. Under Minn. Stat. § 82.48, subd. 2, as well as § 82.35, subd. 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
2. Under Minn. Stat. § 82.40, any person who violates any provision of Minn. Statutes Chapter 82 shall be guilty of a gross misdemeanor.

PRACTICE POINTER: *As with sellers, licensees may also have liability for failure to disclose or for misrepresentation of material facts under common law theories, including both intentional and negligent misrepresentation. See Berryman v. Riegert, 175 N.W.2d 438 (Minn. 1970); Davis v. Re-Trac Manufacturing Corp., 149 N.W.2d 37 (Minn. 1967); Sawyer v. Tildahl, 148 N.W.2d 131 (Minn. 1967); Walker & Co., Ltd. v. Lawrence, 416 N.W.2d 154 (Minn. Ct. App. 1987).*

VI. LICENSEE TO SELLER - CONTROLLED BUSINESS RELATIONSHIPS

Under Minn. Stat. § 507.45, subd. 4, licensees must disclose any controlled business arrangements between themselves and the closing agent who is proposed to handle the closing. The purpose of this requirement is to avoid kickbacks and unearned fees based on the selection of the closer.

A. **APPLICABLE TRANSACTIONS:** All listing agreements must include the disclosure of any controlled business arrangement (CBA) between the licensee and the real estate closing agent through which the licensee proposes to arrange closing services.

B. **WHAT CONSTITUTES A CONTROLLED BUSINESS ARRANGEMENT**: Minnesota uses the definition for a CBA that is found in United States Code, title 12, section 1602. That federal statute defines a CBA to be an arrangement in which:

1. A person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, as either an affiliate relationship with or a direct or beneficial ownership interest of more than 1% in a provider of settlement services; and
2. Either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider.

PRACTICE POINTER*: A 1996 amendment to 12 U.S.C. § 2602 substitutes the words "affiliated business arrangement" for the definition of "controlled business arrangement." The Minnesota Statute has not been updated to reflect this substitution of the word "affiliated" in place of the word "controlled" in the federal definition.*

C. "**ASSOCIATES" ARE INCLUDED AND MUST BE DISCLOSED**: The federal statute specifically includes any of the following "associates" of persons in a position to refer business in the definition of an affiliated business arrangement:

1. A spouse, parent, or child;
2. A corporation or business entity that controls, is controlled by, or is under common control with such person;
3. An employer, officer, director, partner, franchisor, or franchisee of such person; or

4. Anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement business to benefit financially from the referrals of such business.

VII. LICENSEE TO SELLER - FINANCIAL INTEREST OF LICENSEE

Under Minn. Stat. § 82.22, subd. 7(a), before negotiating a real estate transaction in which he or she is acquiring an interest, a licensee must reveal to the seller that he or she is a broker or agent salesperson, as well as the capacity in which he or she is acting in the transaction.

A. **APPLICABLE TRANSACTIONS:** The disclosure must be made if the licensee acquires or intends to acquire or purchase any interest in real property.

1. **DIRECT AND INDIRECT ACQUISITIONS:** The disclosure must be made regardless of whether the licensee is acting directly in the transaction, or is acting indirectly through a third party.
2. **OPTIONS:** The disclosure must be made regardless of the type of interest being acquired, including options to purchase an interest.

B. **TIMING**: The disclosure must be made prior to the negotiation or consummation of any transaction.

C. **LIABILITY FOR NON-DISCLOSURE:** The implications that could arise from the failure to comply with the disclosure requirement are as follows:

1. Under Minn. Stat. § 82.48, subd. 2, as well as § 82.35, subd. 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
2. Under Minn. Stat. § 82.40, any person who violates any provision of Minn. Statutes Chapter 82 shall be guilty of a gross misdemeanor.

VIII. LICENSEE TO BUYER - LEAD PAINT

Under 42 U.S.C. 4852d(a)(4), licensees for sellers (or lessors) of properties are obligated to ensure compliance with the lead paint disclosure requirements discussed above.

A. **APPLICABLE TRANSACTIONS:** Whenever a licensee enters into a contract with a seller or lessor for the purpose of selling or leasing a home. It applies to homes with at least one bedroom that were built prior to 1978. There is a limited exception for housing for the elderly or persons with disabilities (unless children under the age of six reside there).

PRACTICE POINTER: *It may be fairly easy to obtain civil liability against a real estate agent and/or broker for a violation - - and perhaps easier than establishing liability against the seller. For, in order to impose civil liability on the broker or agent, the commonly understood definition of "knowingly" requires only that the agent be aware of his or her conduct and not perform it merely through ignorance, mistake, or accident. It does not require a showing of bad faith or willfulness. Smith v. Coldwell Banker Real Estate Services, 122 F.Supp.2d 267 (D. Conn. 2000). Although a seller may be able to claim ignorance, the agent most likely cannot due to their experience and training, and therefore would be limited to the defenses of mistake or accident.*

B. **REQUIREMENTS**: Licensees must ensure compliance with the seller's obligation to disclose the presence of any lead-based paint or hazards, and to provide a copy of any available lead hazard evaluation report for the property. In addition, the licensee must ensure compliance with the requirement that a copy of the lead hazard information pamphlet (as prescribed by the EPA) is provided, and that every purchase or lease agreement contains a Lead Warning Statement and a statement signed by the buyer that the buyer has: (1) read the Lead Warning Statement and understands its contents; (2) received a lead hazard information pamphlet; and (3) had a 10-day opportunity (unless the parties mutually agreed upon a different period of time) before becoming obligated under the contract to purchase the housing to conduct a risk assessment or inspection for the presence of lead-based paint hazards.

PRACTICE POINTER: *As discussed supra, the seller is also obligated to ensure compliance with the lead paint disclosure law. Liability is joint and several.*

C. **LIABILITY FOR VIOLATIONS:** Any person who knowingly violates the statute may be held jointly and severally liable to the purchaser or lessee in an amount equal to three times the amount of damages incurred. In addition, the court may award court costs, reasonable attorneys' fees, and any expert witness fees to the prevailing party.

PRACTICE POINTER: *The statute does not place any duty on a buyer's real estate broker or agent to ensure compliance with the Act. See Flowers v. Era Unique Real Estate, Inc., 170 F.Supp.2d 840 (N.D. Ill. 2001) (buyer had no cause of action against her broker or agent for their alleged failure to ensure compliance with Act).*

D. **WAIVER**: The statute does allow the parties to mutually agree on a different period of time to conduct a risk assessment or inspection than the 10-day opportunity provided.

E. **IMPACT ON SALE OR LEASE:** The statute specifically states that a violation does not affect the validity or enforceability of any sale or lease. It also does not

affect any loan, mortgage, or lien made or arising in connection with a mortgage loan, and does not create a defect in title.

IX. LICENSEE TO PARTIES - LICENSED NAME OF BROKER

Under Minn. Stat. § 82.22, subd. 6, licensees must disclose to all parties the licensed name of the broker to whom they are licensed. Furthermore, the licensee must not conduct business under any name except for the name of the broker to which he or she is licensed.

A. **APPLICABLE TRANSACTIONS:** The disclosure requirement applies to any business transaction conducted by a licensee.

B. **TIMING**: The licensee must "affirmatively disclose" the licensed name of the broker under whom they are authorized "before the negotiation or consummation of any transaction."

C. **LIABILITY FOR NON-DISCLOSURE:** The implications that could arise from the failure to comply with the disclosure requirement are as follows:

1. Under Minn. Stat. § 82.48, subd. 2, as well as § 82.35, subd. 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
2. Under Minn. Stat. § 82.40, any person who violates any provision of Minn. Statutes Chapter 82 shall be guilty of a gross misdemeanor.

X. LICENSEE TO PARTIES - NON-PERFORMANCE BY A PARTY

Under Minn. Stat. § 82.22, subd. 9, if a licensee has been notified that a party will not perform under an agreement to convey real estate, it must disclose that information to any other parties to the transaction.

A. **APPLICABLE TRANSACTIONS:** This applies to any purchase agreement or other similar agreement to convey real estate.

B. **REQUIRED DISCLOSURE:** The licensee must disclose the fact of the party's intent not to perform to the other party or parties to the transaction.

C. **NOTICE TO NON-PERFORMING PARTY**: Whenever reasonably possible, before it makes the disclosure to the other parties, the licensee must also inform the party who will not perform of the licensee's obligation to disclose this fact to the other party or parties.

D. **EXCEPTION:** The only exception is for situations where the non-performance is based upon the inability to keep or fulfill a contingency to which the real estate transaction has been made subject.

E. **TIMING:** The disclosure must be made immediately after being put on notice by a party of the non-performance.

F. **LIABILITY FOR NON-DISCLOSURE:** The implications that could arise from the failure to comply with the disclosure requirement are as follows:

1. Under Minn. Stat. § 82.48, subd. 2, as well as § 82.35, subd. 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
2. Under Minn. Stat. § 82.40, any person who violates any provision of Minn. Statutes Chapter 82 shall be guilty of a gross misdemeanor.

XI. LICENSEE TO PARTIES - LICENSEE'S RELATIONSHIP TO PRINCIPAL IN TRANSACTION

Under Minn. Stat. § 82.22, subd. 7(b), licensees must disclose if they are a principal in the transaction, or if the principal is a relative or business associate.

A. **APPLICABLE TRANSACTIONS:** When a principal in the transaction is a licensee, or a relative or business associate of the licensee, that fact must be disclosed in writing.

B. **TIMING:** Prior to the negotiation or consummation of any transaction.

C. **LIABILITY FOR NON-DISCLOSURE:** The implications that could arise from the failure to comply with the disclosure requirement are as follows:

1. Under Minn. Stat. § 82.48, subd. 2, as well as § 82.35, subd. 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
2. Under Minn. Stat. § 82.40, any person who violates any provision of Minn. Statutes Chapter 82 shall be guilty of a gross misdemeanor.

PRACTICE POINTER: *In situations where the seller is a foreign person and the sale price exceeds $300,000, licensees should also notify the buyer of the buyer's duty to withhold funds for payment of the 1980 Foreign Investment in Real Property Tax (FIRPTA). Under 26 U.S.C. § 1445, the licensee may be held liable for payment of the FIRPTA tax if the licensee failed to notify the buyer in writing of its withholding obligation. The licensee's liability under such a situation is limited to the amount of their commission.*

PART TWO – DUE DILIGENCE

I. INTRODUCTION

This section will examine the due diligence typically involved in a residential real estate purchase transaction, and is intended to be used to help spot issues that can arise during that process.

In Minnesota, residential transactions are typically very form-driven, so reference is made to commonly used forms, specifically those drafted by the Minnesota State Bar Association ("MSBA") and the Minnesota Board of Realtors ("MAR"). Reference to them here is not intended to imply that parties to a residential transaction in Minnesota cannot or should not negotiate different provisions from those set out in the forms.

This discussion is organized by category, not participants in the transaction. This is because certain items apply to both Seller and Buyer, and some may involve negotiations between them.

II. FINANCING

A. FINANCING CONTINGENCY

A financing contingency is often used to protect a Buyer from liability for breach of the purchase agreement in case Buyer is unable to obtain financing. It can also be used to lessen the harm to Seller should Buyer ultimately lack the wherewithal to close, by requiring Buyer to make prompt application for a mortgage and providing for reports on progress made towards obtaining financing. A form should be used that is tailored to the financing used in transaction, as is discussed below.

1. **MSBA Forms**:

   a. Available addenda include "Financing Addendum: Conventional or Privately Insured Mortgage;" "Financing Addendum: FHA Insured Mortgage;" "Financing Addendum: DVA Guaranteed Mortgage;" "Financing Addendum: Contract for Deed;" and "Financing Addendum: Assumption."

b. One of the options available to Seller is to negotiate receipt of a "formal, enforceable loan commitment" as defined in Minn. Stat. § 47.20 to satisfy the contingency in the MSBA forms. MSBA Form 2, Paragraph 3. This provides the Seller with a heightened degree of assurance that the Buyer will be able to close.

2. **MAR Forms**:

a. MAR forms are available to cover the same financing possibilities, including: "Financing Addendum: Conventional or Privately Insured Conventional Mortgage;" "Financing Addendum: FHA Insured Mortgage;" "Financing Addendum: DVA Guaranteed Mortgage;" "Financing Addendum: Contract for Deed;" "Financing Addendum Assumption."

b. Provides for Buyer to make prompt application for a mortgage; and for cancellation if Buyer cannot obtain financing. The degree of assurance of wherewithal is negotiable. MAR Form "Buyer's Financial Disclosure Statement" is available to confirm Buyer's ability to close by providing information to Seller from the mortgage lender.

3. **Terminology: Pre-Approval, Loan Commitment, Rate Lock**.

a. One industry website says, "'[p]re-approval' means [Borrower has] met with a loan officer, [their] credit files have been reviewed and the loan officer believes [Borrower] can readily qualify for a given loan amount.. . . Although not a final loan commitment, the pre approval letter can be shown to listing brokers when bidding on a home. It demonstrates [Borrower's] financial strength and . . . the ability to go through with a purchase. . ." http://www.realtor.com/home-finance/buyers-basics/guide-how-to-buy-a-home-3.aspx?source=web. It should be remembered that this is a preliminary indicator.

b. A Seller seeking enhanced assurance of a Borrower's ability to close may require a loan commitment to satisfy the contingency; which is a binding agreement by the mortgage lender to make a loan. See, e.g., Minn. Stat. § 47.20, subd. 2 (8), which states "'Borrower's loan commitment' means a binding commitment made by a lender to a borrower wherein the lender agrees to make a . . . loan pursuant to the provisions, including the interest rate, of the commitment."

c. The Buyer will also be concerned with the applicable interest rate. The "rate lock" is a lender's promise to hold a certain interest rare for the borrower; otherwise, the interest rate could fluctuate prior

to loan approval, and closing. See www.federalreserve.gov/pubs/lockins. Written confirmation of rate locks should be obtained, and the confirmation should specify the date of the election to lock, the rate, and the dates of the rate lock period.

B. DISCLOSURE OF SETTLEMENT COSTS TO BORROWER: THE GOOD FAITH-ESTIMATE

1. Lender is required to provide the Good Faith Estimate pursuant to 24 C.F.R. § 3500.7, within three business days of applying for a loan. The Good Faith Estimate discloses charges such as interest rate, origination charge, transfer taxes, lender-required settlement and title insurance fees, and governmental recording fees That regulation is implemented under the Real Estate Procedures Settlement Act ("RESPA"), codified at 12 U.S.C.A. § 2601, passed to provide "advance disclosure . . . of settlement costs."

2. On November 17, 2008, the Department of Housing and Urban Development (HUD) published a new rule under the Real Estate Settlement Procedures Act, 12 USC § 2601 through 2617 (RESPA). The new rule is intended to make it easier for consumers to understand the costs of settlement practices, and to encourage competition. The most significant changes include a new standardized Good Faith Estimate (GFE) and new HUD-1 Settlement (closing) statement. The new standardized GFE and new HUD-1 must be used in connection with all loan originations occurring on and after January 1, 2010.

3. Lenders are required to keep the stated GFE costs open for a minimum of ten (10) business days to allow the consumer the opportunity to shop between various providers of settlement services, thus bringing the costs of those services down. The GFE must be provided within three (3) days of the consumer's application to the loan originator. There are various tolerances allowed regarding the differences between the estimated and actual costs.

4. Also note that, under Minn. Stat. § 507.45, real estate closers must disclose the fees or charges arising from closing services at least five business days before a closing.

C. DISCLOSURE OF THE COST OF MORTGAGE FINANCING TO BORROWER: REGULATION Z

1. Loan disclosures are also called for under the Truth in Lending Act ("TILA"), codified at 15 U.S.C.A. § 1601 et seq. Regulation Z, 12 CFR 226.1 et seq., was implemented pursuant to this statute. TILA does not

apply to commercial, agricultural, or governmental transactions. 15 U.S.C. § 1603.

2. Like the Good Faith Estimate, this disclosure must be provided within three business days after application for the loan. 12 CFR 226.19. Regulation Z requires that it set forth cost-of-credit particulars, including the creditor making the disclosures; the actual amount financed; the prepaid finance charge; the finance charge "using that term, and a brief description such as 'the dollar amount the credit will cost you;' the 'annual percentage rate,' using that term, and a brief description such as 'the cost of your credit as a yearly rate;'" details regarding loan rate changes if the loan is a variable rate loan, the payment schedule; [and] the total of payments." 12 CFR § 226.18.

III. CONDITION OF THE PROPERTY

A. REQUIREMENTS UNDER MINN. STAT. §§ 513.52 -513.60

1. Of course, under Minn. Stat. §§ 513.52 -513.60, discussed above, Seller is obligated to advise Buyer of the condition of the property, unless it obtains an appropriate waiver from Buyer (more on that, below).

2. MAR Form: "Seller's Property Disclosure Statement." Intended to comply with requirements of §§ 513.52 -513.60. Provides a detailed checklist regarding the condition of the property, and addresses disclosures required under Minnesota law.

3. MSBA Form: RPF 15: "Condition of the Property." Also intended to comply with requirements of §§ 513.52 -513.60. Recites the statute in its entirety, also contains a blank area for disclosure under the statute. Also provides an "Optional and Supplemental Disclosures" checklist.

4. **Waiver.**

   a. These statutory requirements may be waived. "The written disclosure required under sections 513.52 to 513.60 may be waived if the seller and the prospective buyer agree in writing." Minn. Stat. § 513.60.

   b. Disclosures required under other statutes, such as private sewer systems, private wells, and valuation exclusion, are still required. "Waiver of the disclosure required under sections 513.52 to 513.60 does not waive, limit, or abridge any obligation for seller disclosure created by any other law." Minn. Stat. § 513.60.

c. Waiver Forms: The MAR form, "Seller's Disclosure Alternatives" can be used to waive the chapter 513 disclosures. MSBA Form 15, "Condition of the Property" also contains a waiver.

B. PROPERTY INSPECTION CONTINGENCY

1. From Buyer's perspective, it is advisable to include a contingency for an inspection of the property in the Purchase Agreement.

   a. MSBA Form 18, and MAR "Inspection Contingency Addendum" form are available. The MAR form refers (at line 27) to "issues" to be brought to seller's attention, while the MSBA form references (at line 19) the existence of an "Unsatisfactory Condition."

   b. If issues are discovered, the parties must reach an agreement to address them, or waive them by a deadline. Otherwise, the Purchase Agreement will be terminated, as provided for in the addendum.

PRACTICE POINTER: THE INSPECTION MUST BE ARRANGED QUICKLY. *Inspections are typically done on a short time frame – one of the options dates on the MSBA form is within three days after execution of the Purchase Agreement. Check this deadline right away and make sure Buyer complies; failure to obtain a timely inspection will constitute a waiver of the contingency.*

2. Government mandated inspections: County and municipal ordinances should be reviewed, as in some locales they impose inspection requirements, typically for the purpose of informing the prospective purchaser of the condition of the property. Some of the ordinances require immediate correction of any hazardous conditions. E.g., Code of Ordinances, City of Minneapolis Minnesota, § 248.10 et seq. ; City of St. Louis Park City Code, § 6-176 et seq., Bloomington City Code, § 14.251 et seq. Many municipal ordinances can be reviewed over the internet.

3. Impact of Inspection on Required Disclosures.

   a. "[S]eller is not required to disclose information relating to the real property *if* a written report that discloses the information has been prepared by a qualified third party and provided to the prospective buyer." Minn. Stat. § 513.56 (emphasis added).

   b. However, "A seller shall disclose to the prospective buyer material facts known by the seller that contradict any information included in a written report under paragraph . . . If a copy of the report is provided to the seller." Minn. Stat. § 513.56.

c. If a municipal inspection is required, does that change the Seller's duty to disclose? "It is unclear whether Minnesota's Condition of the Property disclosure law. . . allows a municipal code inspection to serve as the third party inspection report. To conclude 'yes' is a tenuous judgment." Todd J. Anlauf, Kimball Foster, and John D. Rice, "*The Important Role of an Attorney in a Residential Real Estate Transaction – A Step By Step Guide to Protect Your Client*" 5, MINNESOTA REAL ESTATE INSTITUTE 2005 *(*Minn. Continuing Legal Ed., 2005).

C. ENVIRONMENTAL CONCERNS

1. Phase I Inspections: If the existence of hazardous waste has been disclosed as required above, or Buyer otherwise has a serious environmental concern, these issues can be investigated by ordering a Phase I Environmental Site Assessment, although to do so is unusual for residential transactions. *See*, Note: "*Poison in Our Own Backyards: What Minnesota Legislators are Doing to Warn Property Purchasers of the Dangers of Former Clandestine Methamphetamine Labs*," WM. MITCHELL L. REV. 1601, 1647 (2005) (stating, "most residential homebuyers would not think to conduct contamination testing on properties they are considering purchasing; whereas, in contrast, Phase I testing is standard in nearly all commercial property purchases today,") (citing to EILEEN M. ROBERTS ET AL., MINN. PRACTICE SERIES REAL ESTATE LAW § 9.20 (2004)). Obviously, environmental issues can be very, very expensive to resolve.

2. Radon: The typical home inspection does not include a radon inspection, but Buyer can ask for one if there is a concern. The test for this issue can require leaving equipment in the property overnight.

3. Lead Paint. If the property was constructed before 1978, the Buyer is to have ten days to investigate the possibility of the presence of lead or lead paint. "Before a purchaser is obligated . . . the seller shall permit the purchaser a 10-day period (unless the parties mutually agree, in writing, upon a different period of time) to conduct a risk assessment or inspection . . . a purchaser may waive the opportunity to conduct the risk assessment or inspection by so indicating in writing." 24 C.F.R. § 35.90.

D. WALK THROUGH INSPECTION ON DAY OF CLOSING

a. Advisable to confirm that the condition of the property has not changed since the purchase agreement was entered into.

b. Provided for in MAR Form: "Purchase Agreement" at line 213. Walk-through on day of closing is not provided for in standard MSBA purchase agreement form, though the Seller is obligated, at Paragraph 8, to provide

notice of any damage to the property that occurs between the execution of the Purchase Agreement and Closing.

E. "AS- IS" STATUS

When a client has agreed to purchase property on an "As-Is" basis, it is particularly important to undertake thorough inspection(s) to make sure Buyer is acquainted with the condition of the property, and that it is in acceptable condition.

IV. TITLE

A. OBJECTIVES OF TITLE REVIEW

1. The purchase agreement should provide that Seller is to provide evidence of marketable title prior to closing. The standard forms do so (more detail on that, below). Marketable title is defined as "one that is free from reasonable doubt and one that a prudent person with full knowledge of the facts would be willing to accept. The primary purpose of marketable title is to protect the purchaser from the burden of litigation that may be necessary to remove apparent or real defects in the title." *Glaser v. Minnesota Federal Sav. & Loan Ass'n*, 389 N.W.2d 763, 764 (Minn. Ct. App. 1986) (citations omitted).

2. Another part of the title review process is to make sure the property to be purchased will be suitable for client needs. "Buyers should also consider whether easements, restrictions, covenants, agreement and other matters of record would interfere with Buyer's intended use of the property (e.g., utility easement over or under an area where buyer intends to install a swimming pool.)" Todd J. Anlauf, Kimball Foster, and John D. Rice, "*The Important Role of an Attorney in a Residential Real Estate Transaction – A Step By Step Guide to Protect Your Client*" 18, MINNESOTA REAL ESTATE INSTITUTE 2005 *(*Minn. Continuing Legal Ed., 2005).

B. EVIDENCE OF TITLE

1. Seller provides evidence of title either by furnishing an updated abstract with related searches, or a commitment to provide an owner's policy of title insurance. If Buyer has any concern that Buyer will be called upon later to provide an abstract, Buyer should attempt to negotiate having Seller provide an updated abstract; otherwise, Buyer will face the substantial expense of having an abstract prepared from scratch.

2. MAR form "Purchase Agreement": Provides (at lines 109-130) that Seller is to provide either a commitment for an owner's policy of title insurance, or an abstract of title certified to date. Includes related searches for

relevant bankruptcies, state judgments, federal judgments, liens, and special assessments, which could affect marketability of title.

3. MSBA Form 1: Provides (at Paragraph 14) that Seller is to provide either an updated abstract of title or registered property abstract, including related searches for relevant bankruptcies, state judgments, federal judgments, liens, and special assessments, or a commitment to issue an owner's policy of title insurance.

C. FORM OF TITLE COMMITMENT

The Conditions section of the ALTA commitment form lists conditions of coverage. See Form, "ALTA Commitment (6-17-06)." Then, Schedule A describes the property, lists the owner, names the insureds, and states the dollar value of the coverage amounts. Schedule B-1 states the requirements that title insurer will impose to insure title. Schedule B-II states the exceptions from coverage. These exceptions from coverage will appear on the policy, if not removed.

D. MAKING TITLE OBJECTIONS.

1. Timing of Objections.

   a. Care should be taken to make sure that the deadlines for making title objections are not missed. Objections not timely made are waived. Check the purchase agreement promptly to ascertain applicable deadlines.

   b. MAR Form "Purchase Agreement" provides (at line 123) that "Seller shall use Seller's best efforts to provide marketable title by the date of closing." Therefore, there is no hard deadline for Buyer to state objections to title, but it is best to do so promptly after receipt of the Title Commitment or Abstract, to make sure there is time to address issues prior to closing.

   c. By contrast, the MSBA form contains specific and tight timeframes. If an abstract is provided, Buyer has ten days to either make title objections, or order its own commitment for a title insurance policy. If Buyer receives a commitment, it has ten days from receipt of it to provide Seller with Buyer's title objections.

2. Form and Substance of Objections.

   a. Objections to any issues raised by a review of the evidence of title should, of course, be made in writing. In some case, they can be provided with the closing instructions (see below).

b. Buyer's Title Commitment Review:

i. Provide written objections both to Seller and the title agent issuing the commitment.

ii. As to Schedule A of the Commitment: Require "gap coverage" by requiring that the effective date of the title policy be the date and time of the recording of the deed to Buyer; require that Buyer be shown as owner [including status as joint tenants, or tenants in common, as applicable] in fee simple under the applicable paragraph; review the rest of Schedule A to confirm accuracy, and consistency with the provisions of the Purchase Agreement.

iii. As to Schedule B, Section I of the Commitment: Request copies of all "Schedule B" documents from the title agent. Require satisfaction of all of issuing Title Agent's Requirements and Informational Notes, and deletion of them from the pro forma Owner's policy. Review the rest of Schedule B, Section 1 to confirm accuracy, and consistency with the provisions of the Purchase Agreement.

iv. As to Schedule B, Section II of the Commitment: Require deletion of exceptions from coverage, unless acceptance of them is the basis of prior agreement with Seller. Exception: Require modification of exceptions relating to taxes and special assessments to show that all such taxes and assessments due to be paid as of the closing date have been paid in full. Exception: Matters outside of the parties' control, such as reservation of mineral rights to the State of Minnesota. Exception: Easements, covenants, and restrictions previously recorded (do review these to make sure they don't present problems for Buyer). Provide an instruction not to add any further exceptions without Buyer's express consent. Review the rest of Schedule B, Section II to confirm accuracy, and consistency with the provisions of the Purchase Agreement.

PRACTICE POINTER: PLAT DRAWING. *Boundary line encroachments are one of the most likely sources of litigation for property owners, yet most owner's policies of title insurance contain an exception in Schedule B-II: for "[a]ny encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land." However,, some title agents will delete that survey exception if a plat drawing is obtained and/or a visual inspection of the property is made. These are much cheaper than a survey*.

v. If the property is Registered Torrens property, compare the commitment to the most recent Certificate of Title for the property issued by the County Registrar of Titles.

vi. Reserve the right to make additional objections or add requests (but keep in mind any applicable deadlines will still apply).

PRACTICE POINTER: MEDICAL ASSISTANCE LIENS AND UNRECORDED CLAIMS. *As of the date of publication of this chapter, there is heightened uncertainty concerning whether any given property is subject to medical assistance liens or unrecorded claims running in favor of the State of Minnesota or counties located therein. Minn. Stat. §§ 519.05, 256B.15, subd. 1a, and 256B.0595 subds. 1, 1a, 1h, and 2 were amended in 2009 after the Minnesota Supreme Court issued its opinion in In re Estate of Barg, 752 N.W.2d 52 (Minn. 2008).*

One commentator has noted that "[t]he 2009 amendments do not provide for recording of any notice of when or if the modified marital property rights of a medical assistance recipient or the recipient's spouse become effective. There is no way to determine from county land records whether an individual's real property rights are affected by the 2009 amendments. As a result, title is clouded by the 2009 amendments with respect to all property in Minnesota owned by all natural persons. As a result, title examiners will require a medical assistance clearance certificate in all real estate transactions where the seller is a natural person." Julian Z. Zweber, "Medical Assistance Estate Recovery and Marital Property Rights – Another Trip Through the Rabbit Hole" 11, REAL ESTATE INSTITUTE 2009 (Minn. Continuing Legal Ed., 2009).

Therefore, it can be envisioned that title examiners, or cautious buyers, may require clearance certificates to be obtained if there is any possibility of a medical assistance lien or unrecorded claim. Requests for clearance certificates should be directed, in the case of a county interest or lien, to the county agency in the county in which the property is situated, and in the case of a state interest or lien, to the State's Department of Human Services' Special Recovery Unit. See, e.g., Minn. Stat. § 507.071 (request for approval to county agency, applying to transfer on death deeds).

V. PREPARING FOR CLOSING

A. PROPER CLOSING DOCUMENTATION IS CRITICAL BECAUSE OF THE MERGER DOCTRINE.

1. The merger doctrine provides that a deed, once executed and delivered, will control over differing provisions in a purchase agreement: "The merger doctrine generally precludes parties from asserting their rights under a purchase agreement after the deed has been executed and delivered." *Bruggeman v. Jerry's Enterprises, Inc.*, 591 N.W.2d 705, 708 (Minn. 1999) (citation omitted).

2. Therefore, it is critical to make sure that any requirements of buyer or seller are met before or at the closing.

PRACTICE POINTER: OWNERS POLICY OF TITLE INSURANCE. *It goes without saying that the purchase of an owner's policy is recommended; yet many clients question the expense. The policy provides coverage for "loss or damage" incurred by the insured, in addition to cost-of-defense. See Form: "ALTA Owners Policy of Title Insurance, 6-17-06." If there is a problem with title later, the premium at closing (a few dollars per thousand dollars of value covered) will seem very cheap. Also, the lender's purchase of a lender's policy will not sufficiently protect the homeowner, as many issues for homeowners do not result in losses for lenders.*

B. PROVIDE CLOSING INSTRUCTIONS TO SETTLEMENT AGENT.

1. Buyers should use a closing instruction letter to confirm that purchase funds will not be distributed until Buyer's conditions of sale are met. Buyer has an additional reason, as well: Many of the protections in the ALTA form Closing Protection Letter, discussed below, are based on protecting the owner or mortgagee from the title agent's failure to follow written closing instructions. Sellers should use a closing instruction letter to make sure that the deed will not be conveyed until Seller's conditions of sale have been met. As the goal is to not be surprised by any of the events at closing, the closing instructions should be provided to the Closer in advance of closing.

2. Seller's instructions should include the following:

    a. Request to review all closing documents in advance of closing.

    b. Statement that Closer cannot release Deed to Buyer until Closer accepts closing instructions (with a line provided for Closer to sign and indicate acceptance of said instructions); has verified that Buyer has performed specifics required in the Purchase Agreements; has received delivery of Buyer's documents and confirmation of proper execution and acknowledgment of same; has confirmed execution of the settlement statement by Buyer; and until Closer shall have complied with all conditions stated in the prior Closing Instruction Letters.

    c. Request for a copy of all closing documents, as signed.

    d. Instructions for what the closer is to do once those conditions are met, including delivery of the Deed.

3. Likewise, Buyers' instructions should include the following:

    a. Request to review all closing documents in advance of closing.

b. Specific instructions regarding the title commitment (see Title Objections section, above).

c. A request for title endorsements. You may wish to include requests for Owner's Comprehensive (ALTA Form 9.5-06); Street Assessments (ALTA Form 1-06); Zoning – ALTA Form 3-06 (for Unimproved Land); Zoning – ALTA Form 3.1 - 06 (for Completed Structure); Access (to particular roadway)– ALTA Form 17 – 06; Single Tax Parcel – ALTA Form 18 - 06, Location – ALTA Form 22. There are fees for some of these endorsements, particularly the zoning endorsement.

d. Request for a marked-up binder, i.e., the title commitment edited in accordance with title objections/closing instructions, and the pro-forma endorsements to the title policy.

e. Request for a Closing Protection Letter.

f. Request for a copy of all closing documents, as signed

g. Statement that Closer cannot release sales proceeds to Seller until: Closer accepts closing instructions (with a line provided for Closer to sign and indicate acceptance of said instructions); Closer shall have received all of the documents required under the Purchase Agreements to be delivered by Seller, and shall have verified that they have been properly executed and acknowledged; Seller shall have satisfied all requirements and obligations of Seller under the Purchase Agreements, including without limitation, delivery of a valid, executed deed for the subject property; Seller shall have both approved and executed the Settlement Statement; and Closer shall have complied with all conditions stated in the all Closing Instructions, including instructions regarding title objections (see above section on title objections) and requests for endorsement.

C. CLOSING PROTECTION LETTER

1. Prepared and issued by the title insurance underwriter to protect Buyer (or lender, as the case may be) against:

a. "Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land."

b. "Fraud or dishonesty of the Issuing Agent of Approved Attorney in handling your funds or documents in connection with such closings to the extent such fraud or dishonesty relates to the status

of the title to said interest in land or to the validity, enforceability, and priority of the lien of said mortgage on said interest in land."

See, ALTA Form "Closing Protection Letter (10-17-98)."

c. Although there are no Minnesota cases on the issue of closing instruction letters, the Michigan Court of Appeals recently discussed them: "A closing protection letter is typically issued by a title insurance underwriter '[t]o verify the agent's authority to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors or dishonesty with escrow or closing funds." *New Freedom Mortgage Corp. v. Globe Mortg. Corp.* 761 N.W.2d 832, 842 – 843 (Mich.App.,2008), (emphasis added), quoting 2 PALOMAR, TITLE INSURANCE LAW, § 20:11.

2. The underwriter executes the Closing Protection Letter in favor of the insured, so allow ample time to the title agent to request the letter.

PRACTICE POINTER: OBTAIN CLOSING PROTECTION LETTERS WHEREVER APPROPRIATE. *If a title agent fails to follow closing instructions, or mishandles escrowed funds, the underwriter will not be liable for the title agent's actions unless the underwriter has issued a Closing Protection Letter.*

D. REVIEW DOCUMENTS PRIOR TO CLOSING.

1. Review Buyer and/or Seller Documents, including deeds, affidavits, the Certificate of Real Estate Value, and (in the case of Borrower) the loan documents and truth-in-lending disclosures, to make sure they are accurate, consistent with client expectations, consistent with the purchase agreement, and that all expenses comply with the disclosures previously made under Regulation Z and RESPA (see above).

   It is particularly important to review the deed for accuracy, to make sure a wrong name or legal description will not create a title issue that will be expensive and difficult to cure later, particularly if a Seller becomes unable, unavailable or unwilling to execute a corrective document.

2. A complete set of closing documents can typically be obtained from the closer "at least a day or two" in advance of the closing. LUCY A. MARSH, REAL PROPERTY TRANSACTIONS 231 (1992). Under Federal law, the HUD-1 settlement statement is to be available on the day before closing. "Upon the request of the borrower to inspect the form prescribed under this section during the business day immediately preceding the day of settlement, the person who will conduct the settlement shall permit the borrower to inspect those items which are known to such person during

such preceding day." 12 U.S.C.A. § 2603. HUD-1 statements frequently contain inaccuracies.

3. Review the title agent's agreement prepared for the purpose of assuring future cooperation from the parties -- which may be titled "Compliance Agreement" or "Closing Acknowledgment" -- to make sure your client is not making open-ended commitment to sign additional documents in the future, Also make sure the document does not inappropriately relieve the Title Agent of any liability it would otherwise have. See, Todd J. Anlauf, Kimball Foster, and John D. Rice, "*The Important Role of an Attorney in a Residential Real Estate Transaction – A Step By Step Guide to Protect Your Client*" 21, MINNESOTA REAL ESTATE INSTITUTE 2005 (Minn. Continuing Legal Ed., 2005).

4. Marked up Title Commitment Binder and Pro Forma title policy -- should reflect that Buyer's and Seller's closing requirements have been met, including modifications to Schedules A, B-I, B-II, and the issuance of endorsements.

VI. ATTENDING CLOSING.

Whether the expense of counsel's attendance at a residential closing is justified depends on the particulars of the deal. There are differing schools of thought on this: While it is the author's experience that attendance is uncommon, it is not unheard of for changes to be made at the closing table, and sometimes loan documents are not available until the last minute.

VII. POST CLOSING.

A. Discuss the appropriate level of post-closing involvement with the client in advance. The client may expect that once the closing is complete, there is no longer any need for counsel regarding the transaction.

B. Appropriate steps to take include the following:

1. Get a complete set of documents signed at closing.
2. Review closing documents to make sure instructions have been complied with.
3. Verify recording of documents.
4. Verify title policy issued in accordance with instructions.
5. Verify that the client has applied for homestead status, if applicable.
6. Verify that taxes, liens, and prior loans have been paid as provided for in settlement statement, and that any applicable satisfactions or releases of liens have been obtained.
7. Follow up on any escrows.

See, Todd J. Anlauf, Matthew J. Foli, Kimball Foster, Lee W. Mosher, John D. Rice, and Steven G. Thorson, SUMMARY GUIDE TO RESIDENTIAL REAL ESTATE, (Minnesota Continuing Legal Education 2005).