Chapter 8

Disclosures and Due Diligence in Residential Transactions

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§ 8.1 INTRODUCTION

This chapter summarizes the disclosures required for residential real estate transactions in Minnesota. It is organized according to the individual or entity that must make the disclosure. First, in section 8.2, the disclosures to be made by sellers are reviewed. Next, in section 8.3, the disclosures required by brokers and agents (collectively referred to as "licensees") are discussed. Finally, in sections 8.4 through 8.9, this chapter discusses the various due diligence concerns that may arise in connection with residential real estate transactions.

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 nonresidential 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 occupancy of residential property); MINN. STAT. §§ 515B.4-101–515B.4-106 (establishing disclosure obligations of declarants for common interest communities (CICs)). This chapter also does not address disclosures in connection with residential leases.

§ 8.2 SELLER DISCLOSURES

There are various disclosures that a seller must make in connection with residential real estate transactions. Attorneys representing sellers in transactions should be aware of both the statutory requirements under Minnesota Statutes sections 513.52 to 513.61, as well as the various common law claims that can arise from errors or omissions that may be made by their clients in disclosures. 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.

COMMENT

Although Minnesota Statutes section 513.61 regarding radon disclosures was added in 2013, the cross references in the statutes regarding disclosures continue to only reference Minnesota Statutes sections 513.52 to 513.60.

A. Statutory Provisions – MINN. STAT. §§ 513.52–513.61

1. Applicable Transactions

The protections afforded by the statutory duty to disclose material facts apply to prospective purchasers of residential real property. MINN. STAT. § 513.55. The obligations apply to property that is occupied or intended to be occupied as a single-family residence. This *includes* a unit in a CIC. MINN. STAT. § 513.52, SUBD. 4.

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. MINN. STAT. § 513.53.

PRACTICE TIP

To the extent a licensee actively assists a seller in completing a property disclosure form, he or she may be subject to liability under Minnesota Statutes section 513.53. The liability of licensees for such claims is discussed *infra* in section 8.3.

2. Excluded Transactions

Minnesota Statutes section 513.54 states that the disclosure requirements do not apply to the following types of transfers or transactions:

- nonresidential real property;
- gifts;
- transfers pursuant to a court order;
- transfers to a government or governmental agency;
- foreclosures and deeds in lieu of foreclosure;
- transfers to heirs or devisees of a decedent;
- transfers between co-tenants;
- transfers among immediate family members (a spouse, parent, grandparent, grandchild, or child of the seller);
- transfers between divorced spouses;
- new construction;
- transfers to tenants-in-possession; and
- certain CIC transactions.

3. Timing

Minnesota Statutes section 513.55 requires the seller to make the disclosures before signing the agreement to convey. Note also that under Minnesota Statutes section 513.58, subdivision 1, 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

Minnesota Statutes section 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: (1) an ordinary buyer's use and enjoyment of the property; or (2) any intended use of the property of which the seller is aware." "Material facts" might include physical defects in the property, de-

velopment near the property, existing damage to the property, failed mechanical systems, water intrusion problems, construction defects, or repairs related to such problems.

But, under Minnesota Statutes section 513.57, subdivision 1, the seller is not liable for any error, inaccuracy, or omission of any information:

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

PRACTICE TIP

Review the following in connection with any failure to disclose claim: (1) Was the fact a material fact? (2) Was the 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? (7) Could the information only be discovered by an expert?

5. What Does Not Need to Be Disclosed

Minnesota Statutes section 513.56 provides that there is no duty to disclose the fact that residential property:

- is or was occupied with someone infected with HIV or diagnosed with AIDS;
- "was the site of a suicide, accidental death, natural death, or perceived paranormal activity";
- "is located in a neighborhood containing any adult family home, community based residential facility, or nursing home";
- is in any way impacted by a 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 Minnesota Department of Corrections; or
- is impacted by "airport zoning regulations if the seller, in a timely manner, provides 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."

Under Minnesota Statutes section 513.56, subdivision 4, any common law duties based upon the disclosures above are also modified.

6. Impact of Professional Inspections

Minnesota Statutes section 513.56, subdivision 3 provides that if the buyer has obtained or been provided with a written report from a professional inspector or governmental agency that discloses information, then the seller does *not* need to furnish written disclosure of the information. In *Zehrer v. Helland*, No. C2-98-214, 1998 WL 346651, at *1 (Minn. Ct. App. June 30, 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.

COMMENT

Many municipalities (e.g., the cities of Bloomington, Minneapolis, and St. Louis Park) require a code compliance inspection prior to offering the home for sale or at the time of sale. These are commonly referred to as "truth in housing," "time of sale," or "point of sale" inspections. The results of these inspections may also be used in lieu of a written disclosure of information by the seller. Some ordinances may require the home to be brought up to code prior to sale. In Minneapolis, for example, the seller must either fix certain required repairs, or the buyer can assume responsibility and complete the required repair within 90 days of closing. MINNEAPOLIS, MINN. CODE ch. 248. A copy of the report is filed with the municipality and can be accessed by a buyer as part of its due diligence. Finally, some local units of government may impose requirements for inspection of individual sewage treatment systems.

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 TIP

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.

COMMENT

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. 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, the seller can argue that it wasn't even detectable to a trained expert.

8. Liability for Nondisclosure

Minnesota Statutes sections 513.57 and 513.59 provide that in the event of nondisclosure, the sale is not invalidated, but that the buyer may seek damages and other equitable relief. The equitable remedy of rescission may be available.

9. Statute of Limitations

Minnesota Statutes section 513.57, subdivision 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." Note that the statutes of limitations differ for CICs, and they differ based on when the CIC was created. *See* MINN. STAT. §§ 515B.4-102, 515B.4-1021 & 515B.4-103.

PRACTICE TIP

Check whether there is an arbitration provision in the purchase agreement that requires all claims relating to the property be arbitrated. Also, check whether there is a time limitation in any arbitration provision. Frequently, the arbitration provision will contain a reduction in the applicable statute of limitations.

10. Written Waiver by Parties

Under Minnesota Statutes section 513.60, the parties may sign a writing waiving the statutory disclosure requirements under Minnesota Statutes sections 513.52 to 513.60. Such a waiver, however, does not waive, limit, or abridge any obligation for seller disclosure created by any other law.

PRACTICE TIP

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."

11. Radon Disclosure

In 2013, the disclosure statutes were amended to include a radon disclosure requirement. Minnesota Statutes section 513.61 provides that the seller must comply with the requirements of the Minnesota Radon Awareness Act contained in Minnesota Statutes section 144.486. The radon disclosure is discussed *infra* in section 8.2.L.

B. Relationship of Statute to Common Law Claims

Minnesota Statutes section 513.57, subdivision 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 Minnesota Statutes sections 513.52 to 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:

- negligent misrepresentation. *See Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976) (failure to exercise reasonable care in obtaining or communicating information);
- fraudulent misrepresentation. *See Davis v. Re-Trac Mfg. Corp.*, 149 N.W.2d 37 (Minn. 1967) (traditional fraud factors apply);
- Minnesota Consumer Fraud Act. *See Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2002) (citing MINN. STAT. § 325F.68); and
- estoppel, unjust enrichment, and 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 TIP

Most plaintiffs will plead both common law and statutory claims. This allows claims to survive some of the statutory defenses found in Minnesota Statutes section 513.57, subdivision 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.

- **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).
- **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.
- **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.").

See Chapter 14, Defaults and Remedies, for a more detailed discussion of remedies.

PRACTICE TIP

Although there is no specific statutory requirement, sellers often disclose the existence of wetlands, shoreland, or flood plains on the property before signing an agreement to sell. Minnesota State Bar Association (MSBA) form RPF-08 may be used for these disclosures.

D. CIC Disclosures

The seller of a unit in a CIC subject to Minnesota Statutes chapter 515B is obligated to make specific disclosures regarding the community, and the purchaser is granted certain rights to cancel the purchase transaction. *See* MINN. STAT. §§ 515B.4-101–515B.4-118. The disclosure requirements differ as between a declarant, as defined in Minnesota Statutes section 515B.1-103(15), and a person other than a declarant. In both declarant sales and non-declarant sales, the delivery of the disclosure information is coupled with the right of the purchaser to cancel the purchase agreement following the purchaser's receipt of the disclosure statement or resale disclosure certificate. *See* Chapter 18, Special Issues for Common Interest Communities.

1. Applicable Transactions and Exceptions

Neither a disclosure statement nor a resale disclosure certificate is required to be prepared or delivered in the following cases:

- a gratuitous transfer;
- a transfer pursuant to court order;

- a transfer to a government or governmental agency;
- a transfer to a secured party by foreclosure or deed in lieu of foreclosure;
- an option to purchase a unit, until exercised;
- a transfer to a person who controls or is controlled by the grantor, as those terms are defined with respect to a declarant under Minnesota Statutes section 515B.1-103(2);
- a transfer by inheritance;
- a transfer of special declarant rights under Minnesota Statutes section 515B.3-104; and
- a transfer in connection with a change of form of the CIC under Minnesota Statutes section 515B.2-123.

2. Purchaser's Cancellation Rights

In a sale of a unit by a declarant, the purchaser has 10 days after the receipt of a disclosure statement complying with Minnesota Statutes section 515B.4-102 within which to cancel the purchase agreement without penalty. *See* MINN. STAT. § 515B.4-106. A purchaser has a similar right after receipt of a resale disclosure certificate in connection with a sale by a person other than a declarant. *See* MINN. STAT. § 515B.4-108. The purchaser's right to cancel terminates, in any case, upon the purchaser's acceptance of a conveyance of a unit. MINN. STAT. § 515B.4-106(c). The purchaser's 10-day rescission period commences upon receipt of the appropriate disclosure documents, notwithstanding the time that the purchaser signs the purchase agreement for the unit.

PRACTICE TIP

Under Minnesota Statutes section 515B.4-101(d), 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.'"

3. Waiver

The obligation of the seller to deliver a disclosure statement or resale disclosure certificate may be modified or waived by written agreement of the purchaser of a unit that is restricted to nonresidential use. In addition, the 10-day cancellation period may be modified or waived by a purchaser of a residential unit, in writing, under certain limited circumstances described in Minnesota Statutes section 515B.4-108.

PRACTICE TIP

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 Minnesota Statutes sections 515B.4-101 to 515B.4-118 for a detailed description of what must be disclosed.

4. Penalty for Failure to Deliver Disclosure

There is a substantial penalty if a declarant fails to deliver to a purchaser a disclosure statement satisfying the requirements of Minnesota Statutes section 515B.4-102. *See* Chapter 18, Special Issues for Common Interest Communities.

E. 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 this by filing an affidavit with the county recorder pursuant to Minnesota Statutes section 115B.16.

1. Applicable Transactions

Before any transfer of ownership of any property that 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.

2. Contents of Disclosure

The affidavit must, under Minnesota Statutes section 115B.16, subdivision 2, include a legal description of the property, as well as the following:

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

3. Liability for Nondisclosure

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. MINN. STAT. § 115B.16, SUBD. 4. 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 may 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.

4. 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." MINN. STAT. § 115B.16, SUBD. 2.

F. Individual Sewage Treatment System

Under Minnesota Statutes section 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.

1. Applicable Transactions

Under Minnesota Statutes section 115.55, subdivision 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.

2. What Must Be Disclosed if Sewage is Not Sent to a Permitted Facility

Under Minnesota Statutes section 115.55, subdivision 6, the following must be disclosed:

- "a description of the system in use, including a legal description of the property and the county in which it is located, and a map drawn from available information showing the location" of the in-use system on the property;
- if the seller or transferor has knowledge that an abandoned system exists on the property, a map showing its location;
- 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
- if available, a copy of any previous inspection report completed by a licensed inspection business or certified local government inspector.

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. MINN. STAT. § 115.55, SUBD. 6; *Kellogg v. Woods*, 720 N.W.2d 845 (Minn. Ct. App. 2006). *See also JEM Acres, LLC v. Bruno*, 764 N.W.2d 77 (Minn. Ct. App. 2009).

3. Liability for Nondisclosure

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 attorney's fees. 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 Rocheleau*, 686 N.W.2d 882 (Minn. Ct. App. 2004).

4. Waiver

Under Minnesota Statutes section 115.55, subdivision 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.

G. 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 to provide a 10-day period to conduct an inspection of the property for the presence of lead-based paint hazards. As discussed *infra* in section 8.3.H, sales or leasing agents must also ensure compliance with these requirements.

1. Applicable Transactions

The lead paint disclosure requirement applies to 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).

2. 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 Environmental Protection Agency (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.

42 U.S.C. § 4852d(a)(3) requires the following lead warning statement to 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.

3. 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 attorney's fees, and any expert witness fees to the prevailing party. 42 U.S.C. § 4852d(b).

PRACTICE TIP

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 Servs.*, 122 F. Supp. 2d 267, 273 (D. Conn. 2000).

4. Waiver

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

PRACTICE TIP

As discussed *infra* in section 8.3.H, 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).

5. 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).

H. Location of Wells

Under Minnesota Statutes section 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.

1. Applicable Transactions and Timing

The disclosure must be made before signing an agreement to sell or transfer any real property.

2. 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).

3. 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) provide a disclosure statement concerning the wells of which he or she is aware. 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).

4. 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). "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.'" MINN. STAT. § 103I.235, SUBD. 1(c). 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 other available information. MINN. STAT. § 103I.235, SUBD. 1(g).

5. 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. A separate acknowledgment of the statement is not required for the deed or instrument to be recordable.

PRACTICE TIP

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).

6. Contracts 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.'" MINN. STAT. § 103I.235, SUBD. 1(d).

7. Consequences for Noncompliance

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's 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 is accompanied by a well disclosure certificate containing all of the required information. 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.

8. 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's fees for collection of costs from the seller.

PRACTICE TIP

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.

9. Additional Washington County Requirement – Special Well Construction Area

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 Administrative Rules part 4725.3650. MINN. STAT. § 103I.236. This disclosure must be made before signing an agreement to sell or transfer property in Washington County, and applies to property that is not served by a municipal water system. If there is an unsealed well on the property (as disclosed pursuant to Minnesota Statutes section 103I.235, subdivision 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. 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 resulted (or may result) in risks to the public health.

I. Methamphetamine Production

Sellers must disclose in writing whether, to their knowledge, methamphetamine production has occurred on the property. MINN. STAT. § 152.0275. 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.

1. 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 that 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 TIP

Because the law requires affidavits to be filed both upon the discovery of the methamphetamine lab and upon its remediation, any property that has been the subject of an investigation will likely have the information recorded. A title search will disclose the existence of any recorded information.

2. Disclosure Requirement

Before signing an agreement to sell or transfer real property, the sellers must disclose in writing if, to their knowledge, methamphetamine production has occurred on the property. MINN. STAT. § 152.0275, SUBD. 2(m).

3. Contents of Disclosure

If methamphetamine production has occurred on the property, the disclosure must include a statement to the buyer informing the transferee:

- whether an order has been issued on the property that it not be used or occupied as a result of the lab;
- whether any order issued against the property has been vacated following remediation; or
- 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.

Id.

4. Liability for Nondisclosure

A seller or transferor who fails to disclose, to the best of the seller's 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's fees for collection of costs from the transferor. MINN. STAT. § 152.0275, SUBD. 2(n).

PRACTICE TIP

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.

5. 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).

J. Underground Storage Tanks

Pursuant to Minnesota Statutes section 116.48, sellers must record an affidavit if the property contains an aboveground 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.

1. Applicable Transactions

This disclosure applies to any owner of property that 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.

2. 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.

Id.

3. 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 TIP

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 title search should be conducted as part of buyer's due diligence.

4. Exemptions

Under Minnesota Statutes section 116.47, the following are exempt from the disclosure requirements:

- "farm or residential tanks of 1,100 gallons or less used for storing motor fuel for noncommercial purposes";

- "tanks of 1,100 gallons or less used for storing heating oil for consumptive use on the premises where stored";
- certain regulated pipeline facilities;
- "surface impoundments, pits, ponds, or lagoons";
- "storm water or waste water collection systems";
- "flow-through process tanks";
- "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";
- "septic tanks";
- "tanks used for storing liquids that are gaseous at atmospheric temperature and pressure"; or
- tanks used for storing certain regulated agricultural chemicals.

K. Valuation Exclusion

Sellers must also 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. MINN. STAT. § 273.11, SUBD. 18.

1. Applicable Transactions

This applies to any sale of real property.

2. Required Disclosure

The seller must:

- disclose the existence of the excluded valuation to the buyer;
- "[inform] the buyer that the exclusion will end upon the sale of the property"; and
- inform the buyer that "the property's estimated market value for property tax purposes will increase accordingly."

Id.

3. Forms

Both the Minnesota Association of REALTORS® (MAR) and the MSBA have forms for this disclosure.

L. Radon

Minnesota Statutes section 513.61 requires that sellers comply with the radon disclosure requirements of Minnesota Statutes section 144.496. Section 144.496 provides that sellers must disclose in writing any knowledge the seller has of radon concentrations in the dwelling. Note that the requirement is not limited to disclosure of elevated radon concentration.

1. Applicable Transactions and Timing

This disclosure applies to the transfer of any interest in residential real estate (e.g., sale, exchange, deed, contract for deed, and lease with option to purchase), including CIC units, and must be made before signing an agreement to sell or transfer the real property. MINN. STAT. § 144.496, SUBDS. 2 & 3.

2. Exceptions

Per Minnesota Statutes section 144.496, subdivision 3(d), the radon disclosure requirement does not apply in the following instances:

- nonresidential real property;
- gratuitous transfer;
- transfer made pursuant to court order;
- transfer to a government or government agency;
- transfer by foreclosure or deed in lieu of foreclosure;
- transfer to heirs or devisees of a decedent;
- transfer from a cotentant to one or more other cotenants;
- transfer to a spouse, parent, grandparent, child, or grandchild of the seller;
- transfer between spouses resulting from a decree of marriage dissolution or property settlement;
- option to purchase a unit in a CIC, until exercised;
- transfer to a person who controls or is controlled by the grantor as those terms are defined with respect to a declarant under Minnesota Statutes section 515B.1-103(2);
- transfer to a tenant in possession; or
- transfer of special declarant rights under Minnesota Statutes section 515B.3-104.

3. Contents of Disclosure

The radon disclosure must include:

- whether a radon test has occurred on the property;
- the most current radon records and reports;
- a description of any radon concentrations, mitigation, or remediation;
- information regarding the radon mitigation system, including system description and documentation, if installed;
- the radon warning statement as required in Minnesota Statutes section 144.496, subdivision 4.

The seller must also provide the buyer with a copy of the Minnesota Department of Health publication entitled "Radon in Real Estate Transactions," *available at* <www.health.state.mn.us/divs/eh/indoorair/radon/rnrealestateweb.pdf>. MINN. STAT. § 144.496, SUBD. 3(a)(2).

4. Liability for Nondisclosure

A seller who fails to make a radon disclosure and is aware of material facts pertaining to radon concentrations is liable to the buyer. A buyer who is injured may bring a civil action and recover damages and "receive other equitable relief as determined by the court." MINN. STAT. § 144.496, SUBD. 5. The failure to make the radon disclosure does not automatically invalidate the transfer and the statute specifically reserves for the court the ability to order a rescission of the transfer.

PRACTICE TIP

Note that Minnesota Statutes section 144.496, subdivision 5 does not expressly provide for an award of attorney's fees to a prevailing buyer. Instead, it will be up to the prevailing buyer to argue that attorney's fees fall under the "other equitable relief" language of the statute.

5. No Waiver

Minnesota Statutes section 144.496 does not provide for a waiver of the radon disclosure. The waiver provision of Minnesota Statutes section 513.60 does not include Minnesota Statutes section 513.61.

6. Licensee

The seller may provide the radon disclosure to the prospective buyer's real estate licensee. The buyer's licensee must then provide a copy to the prospective buyer. MINN. STAT. § 144.496, SUBD. 3(e).

§ 8.3 LICENSEE DISCLOSURES

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.

A. Agency Relationships and Dual Agency

Under Minnesota Statutes section 82.67, real estate brokers and salespersons must discuss with consumers 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.

1. 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.

2. Contents of Disclosure

Minnesota Statutes section 82.67, subdivision 3 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:

- seller's broker;
- buyer's broker;
- dual agency (where the broker represents both seller and buyer); and
- facilitator.

3. Timing of Disclosure

The disclosure must be made at the time of the "first substantive contact" with the consumer.

4. 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.

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. MINN. STAT. § 82.67, SUBD. 4. 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.

5. Liability for Nondisclosure

There are several implications that could arise from the failure to comply with these requirements:

- Under Minnesota Statutes sections 82.73, subdivision 2 and 82.82, subdivision 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
- 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. MINN. STAT. § 82.85, SUBD. 3.
- Any person who violates any provision of Minnesota Statutes chapter 82 shall be guilty of a gross misdemeanor. MINN. STAT. § 82.83.

B. Advertising

Under Minnesota Statutes section 82.69, licensees must identify themselves as either a broker or an agent salesperson in any advertising.

1. Applicable Transactions

The statute applies 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.

2. Liability for Nondisclosure

The implications that could arise from the failure to comply with the disclosure requirement are as follows:

- Under Minnesota Statutes sections 82.73, subdivision 2 and 82.82, subdivision 1, failure to comply with this requirement constitutes grounds for license denial, suspension, or revocation, as well as censure of the licensee.
- Any person who violates any provision of Minnesota Statutes chapter 82 shall be guilty of a gross misdemeanor. MINN. STAT. § 82.83.

C. Right to Choose Closer

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. MINN. STAT. § 507.45, SUBD. 4.

1. Applicable Transactions

Minnesota Statutes section 507.45, subdivision 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.

2. 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.

D. Material Facts Concerning the Principal's Right and Interests

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

1. 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 the principal.

2. Duty and Obligation

As part of the duty of good faith and loyalty, the licensee must disclose all facts of which the licensee has knowledge that might affect the principal's rights or interests. "The agent is bound to disclose to the seller *all*

facts of which [the agent] has knowledge which *might* reasonably affect the principal's rights and interests." *White*, 322 N.W.2d at 564 (emphasis in original). This includes a full disclosure of "the financial status of a prospective purchaser." *Id.* at 565. The breach must be material, which means that the seller would not have contracted with the buyer if the licensee had furnished the information to the seller.

The rule also applies when one offer is pending and the licensee receives a better one—he or she must disclose that information to the seller. *See Remes v. Burnet Realty, Inc.*, No. C6-96-1815, 1997 WL 88950, at *2 (Minn. Ct. App. Mar. 4, 1997) (holding that broker breached fiduciary duty where he failed to inform seller that another buyer offered to "meet or beat any offer").

3. Liability for Nondisclosure

Generally, the licensee will forfeit the right to a commission from the transaction if the licensee violates this duty. The licensee may also be liable for restitution of any profits that the principal missed out on. *See Handy v. Garmaker*, 324 N.W.2d 168 (Minn. 1982) (affirming trial court's determination that agent's failure to disclose results in forfeit of both commission and profits).

PRACTICE TIP

If there is a potential claim against a licensee, check to see whether there is an arbitration provision in the listing agreement that requires all claims to be arbitrated. The arbitration provision will often contain a reduction in the applicable statute of limitations.

E. Material Facts Concerning Condition of Property

Licensees must make disclosures to prospective purchasers similar to those that the seller must make under the common law and Minnesota Statutes section 513.55, discussed *supra* in section 8.2. MINN. STAT. § 82.68, SUBD. 3.

1. Applicable Transactions

Licensees shall disclose to any prospective purchaser all material facts of which the licensees are aware that could "adversely and significantly affect: (1) an ordinary purchaser's use or enjoyment of the property; or (2) any intended use of the property of which the [licensee] is aware." *See* MINN. STAT. § 513.55.

Brokers also have obligations under the common law to disclose whether there is hazardous waste on the property, and may be responsible for hazardous waste disclosure under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *See Welch v. Buller*, 481 N.W.2d 856, 859–60 (Minn. Ct. App. 1992) (concluding that nondisclosure of possibly contaminated water was a material fact in inducing the contract); 42 U.S.C. § 9607(a)(3) & (c)(2); *cf. Lentz v. Mason*, 961 F. Supp. 709, 716–17 (D.N.J. 1997) (finding no liability under CERCLA for brokers who did not know that hazardous waste had been disposed of on the property).

PRACTICE TIP

Generally, whatever a seller is obligated to disclose to the buyer, the licensee is also obligated to disclose (to the extent licensee 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.

2. Certain Facts are Nonmaterial

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, including:

- 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;
- whether the property "was the site of a suicide, accidental death, natural death, or perceived paranormal activity"; or
- whether the property "is located in a neighborhood containing any adult family home, community-based residential facility, or nursing home."

MINN. STAT. § 82.68, SUBD. 3(b).

3. 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 Minnesota Statutes section 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 Minnesota Department of Corrections. MINN. STAT. § 82.68, SUBD. 3(c).

PRACTICE TIP

The statute expressly provides that any common law duties arising under the nonmaterial facts and sex offender information identified above are also modified accordingly. MINN. STAT. § 82.68, SUBD. 3(g).

4. 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. § 82.68, SUBD. 3(d).

5. 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. MINN. STAT. § 82.68, SUBD. 3(e).

6. Truth-in-Housing Requirements

Many municipalities (e.g., the cities of Bloomington, Minneapolis, and St. Louis Park) require a code compliance inspection before the property may be offered for sale, or at the time of sale. The results of these inspections may also be used in lieu of a written disclosure of information by the seller. Some municipalities may require the home to be brought up to code prior to sale. In Minneapolis, for instance, the seller must either fix certain required repairs, or the buyer can assume responsibility and complete the required repair within 90 days of closing. MINNEAPOLIS, MINN. CODE ch. 248. A copy of the report is filed with the municipality, and can be accessed by a buyer as part of its due diligence.

7. Disclosure Must Be Made of Contradictions in Written Reports

If a copy of the report is provided to the licensee, and the licensee knows of any facts that contradict the information, those contradictory facts must be disclosed to all of the parties in the transaction. MINN. STAT. § 82.68, SUBD. 3(f).

PRACTICE TIP

In connection with any claims, attorneys should determine whether the buyer's agent ever provided the buyer's inspection report to the seller. If a seller (or the seller's agent) was given a copy, and if the seller was aware of information adverse to the inspection report, that contradictory information must be disclosed. 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.

8. Liability for Nondisclosure

The implications that could arise from the failure to comply with the disclosure requirement are as follows:

- Under Minnesota Statutes sections 82.73, subdivision 2 and 82.82, subdivision 1, failure to comply with the disclosure requirement constitutes grounds for license denial, suspension, or revocation, as well as censure of the licensee.
- Any person who violates any provision of Minnesota Statutes chapter 82 shall be guilty of a gross misdemeanor. MINN. STAT. § 82.83.

PRACTICE TIP

As with sellers, remember that 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 Mfg. 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).

F. Controlled Business Relationships

Licensees must also 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. MINN. STAT. § 507.45, SUBD. 4.

1. 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.

2. What Constitutes a "Controlled Business Arrangement"?

Minnesota uses the definition for a CBA that is found in 12 U.S.C. § 2602. That federal statute defines a CBA to be an arrangement in which:

- a person in a position to refer settlement service business who has either (1) "an affiliate relationship with" or (2) "a direct or beneficial ownership interest" of more than one percent in a provider of settlement services; and
- that person "directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider...."

12 U.S.C. § 2602(7).

COMMENT

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 yet been updated to reflect the substitution of the word "affiliated" in place of the word "controlled" in the federal definition.

3. "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 "affiliated business arrangement":

- "a spouse, parent, or child";
- "a corporation or business entity that controls, is controlled by, or is under common control with such person";
- "an employer, officer, director, partner, franchisor, or franchisee of such person"; or
- "anyone who has an agreement, arrangement, or understanding with such person, the purpose or substantial effect of which is to enable the person to benefit financially from the referrals of such business."

12 U.S.C. § 2602(8).

G. Financial Interest of Licensee

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. MINN. STAT. § 82.68, SUBD. 2.

1. Applicable Transactions

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

a. 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.

b. Options

The disclosure must be made regardless of the type of interest being acquired, including options to purchase an interest.

2. Timing

The disclosure must be made prior to the negotiation or consummation of any transaction.

3. Liability for Nondisclosure

The implications that could arise from the failure to comply with the disclosure requirement are as follows:

- Under Minnesota Statutes sections 82.73, subdivision 2 and 82.82, subdivision 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.

- Any person who violates any provision of Minnesota Statutes chapter 82 shall be guilty of a gross misdemeanor. MINN. STAT. § 82.83.

H. Lead Paint

Under federal law, licensees for sellers (or lessors) of properties are obligated to ensure compliance with the lead paint disclosure requirements discussed *supra* in section 8.2.G. 42 U.S.C. § 4852d(a)(4).

1. Applicable Transactions

The lead paint disclosure applies 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 TIP

It may be fairly easy to obtain a civil judgment against a real estate agent or broker for a violation—and perhaps easier than establishing liability against the seller. 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 Servs.*, 122 F. Supp. 2d 267 (D. Conn. 2000). Although a seller may be able to claim ignorance, the agent most likely cannot due to experience and training, and therefore would be limited to the defenses of mistake or accident.

2. 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. As discussed *supra* in section 8.2.G, the seller is also obligated to ensure compliance with the lead-paint disclosure law. Liability is joint and several.

3. 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 attorney's fees, and any expert witness fees to the prevailing party.

PRACTICE TIP

The statute only requires the seller's broker or agent to ensure compliance, and it does not place any duty on a buyer's 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 buyer's own broker for failure to ensure compliance with act, as only seller's broker can be held liable).

4. 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.

I. Licensed Name of Broker

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. MINN. STAT. § 82.68, SUBD. 1.

1. Timing

The licensee must "affirmatively disclose" the licensed name of the broker under whom he or she is authorized "before the negotiation or consummation of any transaction." *Id.*

2. Liability for Nondisclosure

The implications that could arise from the failure to comply with the disclosure requirement are as follows:

- Under Minnesota Statutes sections 82.73, subdivision 2 and 82.82, subdivision 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
- Any person who violates any provision of Minnesota Statutes chapter 82 shall be guilty of a gross misdemeanor. MINN. STAT. § 82.83.

J. Nonperformance by a Party

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. MINN. STAT. § 82.68, SUBD. 4.

1. 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. *Id.*

2. Notice to Nonperforming 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. *Id.*

3. Exception

The only exception is for situations where the nonperformance is based upon the inability to keep or fulfill a contingency to which the real estate transaction has been made subject. *Id.*

4. Timing

The disclosure must be made immediately after being put on notice of the nonperformance.

5. Liability for Nondisclosure

The implications that could arise from the failure to comply with the disclosure requirement are as follows:

- Under Minnesota Statutes sections 82.73, subdivision 2 and 82.82, subdivision 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
- Any person who violates any provision of Minnesota Statutes chapter 82 shall be guilty of a gross misdemeanor. MINN. STAT. § 82.83.

K. Licensee's Relationship to Principal in Transaction

Licensees must disclose in writing whether they are a principal in the transaction, or if the principal is a relative or business associate. MINN. STAT. § 82.68, SUBD. 2(b).

1. Timing

The disclosure must occur "[b]efore the negotiation or consummation of any transaction." MINN. STAT. § 82.68, SUBD. 2(a).

2. Liability for Nondisclosure

The implications that could arise from the failure to comply with the disclosure requirement are as follows:

- Under Minnesota Statutes sections 82.73, subdivision 2 and 82.82, subdivision 1, failure to comply with this requirement shall constitute grounds for license denial, suspension, or revocation, as well as censure of the licensee.
- Any person who violates any provision of Minnesota Statutes chapter 82 shall be guilty of a gross misdemeanor. MINN. STAT. § 82.83.

L. Foreign Investment in Real Property Tax Act of 1980

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 tax under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). *See* 26 U.S.C. § 1445.

1. Licensee Liable

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.

2. Limit of Liability

The licensee's liability under such a situation is limited to the amount of its commission.

M. Guaranteed Sale Program

A broker who offers a guaranteed sale program has statutory disclosure obligations. MINN. STAT. § 82.74.

1. Applicable Transactions

A "guaranteed sale program" is one whereby a licensee agrees to purchase real property if it fails to sell the property to a third party within a specified period of time. *Id.*

2. Requirements

Under the statute, the licensee must provide a written disclosure to the seller that sets forth the general terms and conditions under which the broker agrees to purchase the property. The licensee must also inform the seller if it makes a profit when the property is resold. *See Murray v. Harvey Hansen-Lake Nokomis, Inc.*, 360 N.W.2d 658, 660–61 (Minn. Ct. App. 1985) (awarding sellers compensatory damages when the guaranteed sale agreement was ambiguous about the effect of certain expenditures incurred in reselling the property for less than the guaranteed price that it had paid the sellers).

N. Radon

If the seller provides a copy of the radon disclosure to the potential buyer's licensee, the licensee must provide a copy to the potential buyer. MINN. STAT. § 144.496, SUBD. 3(e).

§ 8.4 DUE DILIGENCE: FINANCING

A. Financing Contingencies

1. Purpose

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

COMMENT

In Minnesota, residential transactions are typically very form-driven, so reference is made to commonly used forms, specifically those drafted by the MSBA and MAR. Reference to the forms 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 them.

a. MSBA Forms

Available addenda include: "Financing Addendum for Conventional or Privately Insured Mortgage;" "Financing Addendum for F.H.A. Insured Mortgage;" and "Financing Addendum for DVA Guaranteed Mortgage." One of the options available to the seller is to negotiate receipt of a formal, enforceable loan commitment, as defined in Minnesota Statutes section 47.20, to satisfy the contingency in the MSBA forms. This provides the seller with a heightened degree of assurance that the buyer will be able to close.

b. MAR Forms

Available addenda include: "Financing Addendum Conventional or Privately Insured Conventional Mortgage;" "Financing Addendum FHA Insured Mortgage;" and "Financing Addendum DVA Guaranteed Mortgage." The "Financing Addendum Conventional or Privately Insured Conventional Mortgage" form, for example, provides for the buyer to make application for a mortgage within five business days of final acceptance of the purchase agreement, and for cancellation if the buyer cannot obtain financing. The MAR "Buyer's Financial Disclosure Statement" is available to confirm the buyer's ability to close by providing information to the seller from the mortgage lender, via the buyer.

2. Terminology: Pre-Approval, Loan Commitment, and Rate Lock

One industry website says, "'[p]re-approval' means [the borrower has] met with a loan officer, [the borrower's] credit files have been reviewed and the loan officer believes [the 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 [the borrower's] financial strength and ... the ability to go through with a purchase...." Realtor.com, 10 Steps to Home Ownership, Step 3: Get Loan Pre Approval, <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.

Minnesota Statutes section 47.20, subdivision 2(8) 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...."

The buyer will also be concerned with the applicable interest rate. The "rate lock" is a lender's promise to hold a certain interest rate for the borrower; otherwise, the interest rate could fluctuate prior to loan approval and closing. *See* A Consumer's Guide to Mortgage Lock-Ins, <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. Todd J. Anlauf, Kimball Foster & John D. Rice, *The Important Role of an Attorney in a Residential Real Estate Transaction – A Step-by-Step Guide to Protect Your Client* at 16, REAL ESTATE INST. MANUAL 2005 (Minn. CLE 2005).

B. Disclosure of Settlement Costs to Borrower: The Good-Faith Estimate

The lender is required to provide a good-faith estimate (GFE) pursuant to 24 C.F.R. § 3500.7 within three business days of the loan application. *See* 24 C.F.R. § 3500.7(a). The GFE discloses charges such as the interest rate, origination charge, transfer taxes, lender-required settlement and title insurance fees, and governmental recording fees. This regulation is implemented under the Real Estate Settlement Procedures Act (RESPA), codified at 12 U.S.C. § 2601 *et seq.*, passed to provide "advance disclosure ... of settlement costs."

On November 12, 2008, the Department of Housing and Urban Development (HUD) published a new rule under RESPA. The new rule is intended to make it easier for consumers to understand the costs of settlement practices and encourage competition. HUD News Release No. 08-175 (Nov. 12, 2008). The most significant changes include a new standardized GFE and a new HUD-1 settlement (closing) statement. *See* 24 C.F.R. §§ 3500.7 & 3500.8. The new standardized GFE and HUD-1 must be used in connection with all loan originations occurring on and after January 1, 2010. HUD News Release No. 08-175 (Nov. 12, 2008).

Lenders are required to keep some of the stated GFE costs open—the interest rate, for example, is excepted—for a minimum of 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. *See* 24 C.F.R. § 3500.7(c). There are various tolerances allowed regarding the differences between the estimated and actual costs. 24 C.F.R. § 3500.7(e).

Also, note that under Minnesota Statutes section 507.45, closers—including real estate brokers, attorneys, and closing agents—must disclose certain 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

Loan disclosures are also called for under the Truth in Lending Act (TILA), codified at 15 U.S.C. § 1601 *et seq.* "Regulation Z" (12 C.F.R. § 226.1 *et seq.*) was implemented pursuant to this Act. TILA does not apply to commercial, agricultural, or governmental transactions. 15 U.S.C. § 1603.

Like the GFE, this disclosure must be provided within three business days after application for the loan. 12 C.F.R. § 226.19. Regulation Z requires that the disclosure 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 C.F.R. § 226.18.

§ 8.5 DUE DILIGENCE: CONDITION OF THE PROPERTY

A. Disclosure Requirements Under Minnesota Statutes Sections 513.52 *et seq.*

Of course, under Minnesota Statutes sections 513.52 to 513.61, the seller is obligated to advise the buyer of the condition of the property, unless it obtains an appropriate waiver from the buyer.

The MAR standard disclosure form, "Seller's Property Disclosure Statement," complies with requirements of Minnesota Statutes sections 513.52 *et seq*. It provides a detailed checklist regarding the condition of the property, and addresses disclosures required under the law.

The MSBA form, "Condition of the Property" (numbered "RPF-15 Add"), also complies with the requirements of sections 513.52 *et seq*. This from recites the statute in its entirety, and contains a blank area for disclosures under the statute. It also provides an "Optional and Supplemental Disclosures" checklist.

1. Waiver

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. Presumably, the radon disclosure requirement in Minnesota Statutes section 513.61 cannot. Disclosures required under other statutes, such as private sewer systems, private wells, and the 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.

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

B. Property Inspections

1. Property Inspection Contingency

From the buyer's perspective, it is advisable to include a contingency for an inspection of the property in the purchase agreement.

MSBA's form RPF-18 and the MAR's "Inspection Contingency Addendum" are available for that purpose. The MAR form refers (at line 27) to "issues" to be brought to the seller's attention, while the MSBA form references (at line 19) the existence of an "unsatisfactory condition."

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 TIP

The inspection must be arranged quickly. Inspections are typically done on a short timeframe—one of the options on the MSBA form provides that the inspection must occur within three days after execution of the purchase agreement. Check applicable deadlines right away, and make sure the buyer complies. Failure to obtain a timely inspection, or to timely provide the seller with a list of issues found during the inspection, will result in a waiver of the contingency.

2. Government-Mandated Inspections

County and municipal ordinances should be reviewed, as some cities impose inspection requirements, typically for the purpose of informing the prospective purchaser of the condition of the property. Some ordinances require correction of certain conditions. *See, e.g.*, MINNEAPOLIS, MINN. CODE ch. 248; ST. LOUIS PARK, MINN. CODE § 6-176 *et seq.*; BLOOMINGTON, MINN. CODE § 14.521 *et seq.* As is the case with those just cited, many municipal ordinances can be reviewed over the Internet.

3. Impact of Inspection on Required Disclosures

"A seller 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, SUBD. 3(a) (emphasis added).

However, "A seller shall disclose to the prospective buyer material facts known by the seller that contradict any information included in a written report ... if a copy of the report is provided to the seller." MINN. STAT. § 513.56, SUBD. 3(b).

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 & John D. Rice, *The Important Role of an Attorney in a Residential Real Estate Transaction – A Step-by-Step Guide to Protect Your Client* at 5, REAL ESTATE INST. MANUAL 2005 (Minn. CLE 2005).

C. Environmental Concerns

1. Phase I Inspections

If the existence of hazardous waste has been disclosed as required above, or the buyer otherwise has reason for concern regarding environmental issues, these issues can be investigated by ordering a Phase I environmental site assessment, which may lead to additional environmental testing. That said, it is unusual to order a Phase I for residential transactions. *See* Signe Land Levine, *Poison in Our Own Backyards: What Minnesota Legislators are Doing to Warn Property Purchasers of the Dangers of Former Clandestine Methamphetamine Labs*, 31 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 25 EILEEN M. ROBERTS ET AL., MINN. PRACTICE SERIES – REAL ESTATE LAW § 9.20 (2004)). Obviously, environmental issues can be very expensive to resolve.

2. Radon

A seller of residential real property is required to "comply with the radon disclosure requirements under section 144.496." MINN. STAT. § 513.61. Minnesota Statutes section 144.496, subdivision 3 provides that, subject to certain exclusions, "before signing an agreement to sell or transfer residential real property, the seller shall disclose in writing to the buyer any knowledge the seller has of radon concentrations in the dwelling." *See also* section 8.2.L, *supra*.

3. Lead Paint

If the property was constructed before 1978, the buyer has 10 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.

If any of these issues are concerns, make sure the inspection contingency allows sufficient time for testing and investigation.

D. Walk-Through Inspection on Day of Closing

It is advisable to confirm that the condition of the property has not changed since the purchase agreement was entered into. This should be provided for in the purchase agreement. A walk-through is provided for in the MAR's purchase agreement (see Appendix B to this book) at line 217. The MSBA purchase agreement form provides, at paragraph 8, that the seller is to give 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 the buyer is acquainted with the condition of the property, and that it is in acceptable condition.

§ 8.6 DUE DILIGENCE: TITLE

A. Objectives of Title Review

The purchase agreement should state that the seller is to provide evidence of marketable title prior to closing. The standard forms do so. "Marketable title" is defined as:

> [O]ne 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. Minn. Fed. Sav. & Loan Ass'n, 389 N.W.2d 763, 764 (Minn. Ct. App. 1986) (citations omitted). A thorough discussion of the title examination process can be found in Chapter 9, Title Issues and Title Insurance.

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, agreements 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 & John D. Rice, *The Important Role of an Attorney in a Residential Real Estate Transaction – A Step-by-Step Guide to Protect Your Client* at 18, REAL ESTATE INST. MANUAL 2005 (Minn. CLE 2005).

B. Evidence of Title

The 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 the buyer has any concern that the buyer will be called upon later to provide an abstract, the buyer should attempt to negotiate having the seller provide an updated abstract; otherwise, the buyer will face the substantial expense of having a new abstract prepared.

The MAR's purchase agreement states (at lines 111–130) that "Seller shall surrender any abstract of title and a copy of any owner's title insurance policy for the property, if in Seller's possession or control, to Buyer or Buyer's designated title service provider."

The MSBA's purchase agreement states (at paragraph 14) that the 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.

If the buyer receives an updated abstract, the buyer can either obtain an attorney's title opinion, or order a commitment to issue a policy of title insurance itself. The process of examining title and preparing a title opinion is specialized, complex, and outside the scope of this chapter. For a discussion of that topic, see Richard G. Kunkel, *Writing a Professional Title Opinion*, HOW TO EXAMINE TITLE TO REAL PROPERTY (Minn. CLE 2008). Of course, a title insurance policy provides for indemnification in case of loss, while an attorney's title opinion does not.

C. Form of Title Commitment

The "Conditions" section of the American Land Title Association (ALTA) commitment form for an owner's policy of title insurance lists conditions of coverage. Schedule A describes the property, lists the owner, names the insureds, and states the dollar values of the coverage amounts. Schedule B-I states the requirements that the title insurer will impose to insure title. Schedule B-II states the exceptions from coverage. These exceptions from coverage will likely appear on the policy if they are not removed through the title objection process. *See* Chapter 9, Title Issues and Title Insurance, for a more detailed discussion.

Another issue is the policy form to be used, which will impact on the coverage provided. You may wish to request the "Expanded Coverage Residential Loan Policy," which broadens coverage to address even post-closing issues such as "[t]he encroachment onto the Land of an improvement constructed after [the] Date of Policy." *See* ALTA Expanded Coverage Residential Loan Policy, Revised 07-26-10, "Covered Risks," ¶ 19.

D. Making Title Objections

1. Timing of Objections

The MAR's purchase agreement provides (at line 126) that "Seller shall use Seller's best efforts to provide marketable title by the date of closing." Therefore, there is no hard deadline in the form for the 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.

By contrast, the MSBA form contains a specific timeframe for objections. If an abstract is provided, the buyer has 10 business days to have its attorney examine title and make title objections, or order its own commitment for a title insurance policy. If the buyer receives a commitment, it has 10 days from receipt to provide the seller with its title objections. Objections not timely made are waived.

PRACTICE TIP

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.

2. Form and Substance of Objections

Objections to any issues raised by a review of the evidence of title should, of course, be made in writing.

a. Buyer's Title Commitment Review

The buyer should provide written objections to the seller or the seller's counsel, and to the closing agent issuing the commitment. The attorney making the objections should thoroughly review the commitment to determine which objections to make, which can include those discussed in the following paragraphs, as may be appropriate under the circumstances.

As to Schedule A of the title commitment, the buyer should 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 the buyer. The buyer should also require that buyer be shown as owner (including status as joint tenants, or tenants in common, as applicable—confirm the client's preference) in fee simple, and review the rest of Schedule A to confirm accuracy and consistency with the provisions of the purchase agreement.

Regarding Schedule B-I of the title commitment, the buyer should request copies of all "Schedule B documents" from the closing agent. The buyer should also require satisfaction of all of issuing closing agent's requirements and informational notes, and the deletion of these items from the pro forma owner's policy. The rest of Schedule B-I should be reviewed to confirm accuracy and consistency with the provisions of the purchase agreement.

As to Schedule B-II of the title commitment, the buyer should review any previously recorded easements, covenants, and restrictions which are to remain as exceptions to make sure they do not present problems for Buyer. The buyer should require deletion of other exceptions from coverage, e.g., "defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the Effective Date but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this commitment," which would be addressed by the gap coverage referenced above; and the standard exceptions of "facts which would be disclosed by a comprehensive survey of the premises herein described," which can be addressed as stated in the following Practice Tip, and "rights or claims of parties in possession" and "Mechanics', Contractors' or Materialsmens' lines and lien claims, if any, where no notice thereof appears of record," which may be addressed by a standard form seller's affidavit. The buyer should also 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. Finally, the buyer should review the rest of Schedule B, section II to confirm accuracy, and consistency with the provisions of the purchase agreement.

PRACTICE TIP

Delete the standard survey exception. Boundary line encroachments are among the most likely sources of litigation for property owners, but the ALTA Owner's Policy, for example, contains a standard 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." Of course, surveys are not typically ordered for residential transactions. However, closing agents may delete that survey exception for residential properties upon request, if a visual inspection of the property is made, or if a plat drawing is obtained. Plat drawings are typically much cheaper than a survey.

If the property is registered Torrens property, compare the commitment to the most recent certificate of title for the property issued by the county's registrar of titles.

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

§ 8.7 DUE DILIGENCE: THE CLOSING PROCESS

A. Proper Closing Documentation is Critical Because of the Merger Doctrine

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 Enters., Inc.*, 591 N.W.2d 705, 708 (Minn. 1999) (citation omitted). Therefore, it is critical to make sure that any requirements of the client are provided for in the closing documents.

PRACTICE TIP

It goes without saying that the purchase of an owner's policy of title insurance is recommended, yet many clients question the expense. The policy provides coverage for "loss or damage" incurred by the insured, in addition to the cost of defense. If there is a problem with title later, the premium at closing (a few dollars per each 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 the lender's policy only covers losses by the lender, and typically the lender will not suffer a loss even if the owner does. Finally, some enhanced coverages are available in the ALTA homeowner's policy.

B. Closing Instructions

Buyers can use a closing instruction letter to confirm that purchase funds will not be distributed until the buyer's conditions of sale are met. The buyer has an additional reason to provide written closing instructions—certain protections in the ALTA closing protection letter, discussed below, are based on protecting the owner or mortgagee from the closing agent's failure to follow written closing instructions. Sellers can use a closing instruction letter to make sure that the deed will not be conveyed until the seller's conditions of sale have been met. The closing instructions should be provided to the closing agent in advance of closing. Note that the ALTA Closing Protection Letter form requires that "[i]f the closing is to be conducted by an Approved Attorney [as opposed to a title agent], a Commitment must have been received by [y]ou prior to the transmittal of [y]our final closing instructions to the Approved Attorney." ALTA Closing Protection Letter–Single Transaction, Revised 12-1-11 04-02-14, "Conditions and Exclusions," ¶ 4.

If the buyer or seller decides to provide closing instructions, they should review the details of the transaction thoroughly to determine an appropriate list of instructions to provide. Such instructions can be similar to escrow closing instructions, but must be adapted for this purpose. *See* 2 ALVIN L. ARNOLD & MYRON KOVE, MODERN REAL ESTATE PRACTICE FORMS AND COMMENTARY § 29.1 *et seq.* (2009) (sample escrow agreement forms).

The seller's instructions can include the following:

- A list of closing documents required by the seller, and a request to review all closing documents in advance of closing.
- A list of conditions to close, including a statement that the closing agent cannot close, or record the deed to the buyer, until the closing agent accepts closing instructions (with a line provided for an officer of the closing agent to sign and indicate acceptance of the instructions); the buyer has satisfied all requirements and obligations of the buyer under the purchase agreement, which can be listed specifically; the closing agent has received delivery of the buyer's documents, and has confirmed proper execution and acknowledgment of them; the closing agent has received payment of the purchase price; the buyer and closing agent have both approved and executed the settlement statement; and the closing agent has complied with all conditions stated in any prior closing instructions.
- Instructions for what the closing agent is to do once those conditions are met, including delivery and recording of the deed.
- A request for a copy of all closing documents, as signed.
- Instructions regarding what is to happen if the transaction does not close by the closing date specified in the purchase agreement and any amendments thereto.

Buyers' instructions can include the following:

- A list of closing documents required by the buyer, and a request to review all closing documents in advance of closing.
- Specific instructions regarding the title commitment. *See supra* section 8.6.C.
- A request for title endorsements. This might include requests for endorsements including ALTA Form 9.2-06, Owner's Comprehensive; ALTA Form 1-06, Street Assessments; ALTA Form 3-06, Zoning for Unimproved Land; ALTA Form 3.1-06, Zoning for Completed Structure; ALTA Form 17-

06, Access and Entry (to particular roadway); ALTA Form 17.1-06, Indirect Access and Entry (to particular roadway); ALTA Form 18-06, Single Tax Parcel; and ALTA Form 22-06 Location. There are typically fees for certain endorsements, particularly the zoning endorsement.

- Request for a marked-up binder; i.e., a copy of the title commitment edited in accordance with title objections/closing instructions, and the pro forma endorsements to the title policy.
- Request for a closing protection letter.
- Instructions regarding the order of recording for documents, if applicable.
- A list of conditions to close, including a statement that the closing agent cannot close, and cannot release the purchase price to the seller, until:

  > Closing agent accepts closing instructions [with a line provided for an officer of the closing agent to sign and indicate acceptance of said instructions]; until closing agent shall have received all of Seller's documents required under the purchase agreement [which can be listed specifically], including the deed for the subject property, and shall have verified that said documents have been properly executed and acknowledged; until Seller shall have satisfied all requirements and obligations of Seller under the Purchase Agreement [which can be listed specifically]; until Seller and closing agent shall have both approved and executed the Settlement Statement; until closing agent is prepared to issue the title insurance requested by Buyer according to Buyer's instructions and title objections; until closing agent shall have complied with all Closing Instructions; and until closing agent is prepared to issue the title insurance requested by Buyer's lender pursuant to said lender's separate instructions to closing agent, if applicable.

- Request for a copy of all closing documents, as signed.
- Instructions regarding what is to happen if the deal does not close by the closing date specified in the purchase agreement and any amendments thereto.

C. The Closing Protection Letter

A closing protection letter is issued by the title insurance underwriter to indemnify the recipient "for actual loss of Funds incurred ... in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney on or after the date of this letter, subject to the Conditions and Exclusions" listed therein. ALTA Closing Protection Letter – Single Transaction, Revised 04-02-14.

Covered losses are those "solely caused" by:

> (a) "failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions that relate to ... the disbursement of Funds necessary to establish the status of the Title or the validity, enforceability, or priority of the lien of the Insured Mortgage;" *Id.*; or
>
> (b) "the obtaining of any document, specifically required by You, but only to the extent that the failure to obtain the document affects the status of the Title or the validity, enforceability, or priority of the lien of the Insured Mortgage; or fraud, theft, dishonesty, or misappropriation of the Issuing Agent or Approved Attorney in handling Your Funds or docu-

> ments in connection with the closing, but only to the extent that the fraud, theft, dishonesty, or misappropriation relates to the status of the Title or to the validity, enforceability, or priority of the lien of the Insured Mortgage." *Id.*

Certain conditions and exclusions apply. For example, losses due to the "failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions that require title insurance protection inconsistent with that set forth in the Commitment" are not covered. *Id.*

The Michigan Court of Appeals has discussed the reason closing protection letters are issued: "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 Mortg. Corp. v. Globe Mortg. Corp.*, 761 N.W.2d 832, 842–43 (Mich. Ct. App. 2008) (quoting 2 PALOMAR, TITLE INSURANCE LAW, § 20:11) (emphasis added).

The underwriter executes the closing protection letter in favor of the insured, so allow time for the closer to request the letter.

COMMENT

Closing protection letters: If a closing agent fails to follow closing instructions, or mishandles escrowed funds, the underwriter may not be liable for the closing agent's actions unless the underwriter has issued a closing protection letter.

D. Review Documents Prior to Closing

Review the buyer's and seller's documents, including deeds, affidavits, the certificate of real estate value, and (in the case of the borrower) the loan documents and truth-in-lending disclosures, to make sure they are accurate, consistent with clients' expectations, and consistent with the purchase agreement; and that all expenses comply with the disclosures previously made under Regulation Z and RESPA.

PRACTICE TIP

It is particularly important to review the deed for accuracy, to make sure a typographical error in a name or legal description will not create a title issue that can be expensive and difficult to cure later.

A complete set of closing documents can typically be obtained from the closing agent "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. "The settlement agent shall permit the borrower to inspect the HUD-1 or HUD-1A settlement statement, completed to set forth those items that are known to the settlement agent at the time of inspection, during the business day immediately preceding settlement. Items related only to the seller's transaction may be omitted from the HUD-1." 12 C.F.R. § 1024.10.

Review the closing 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 any commitment on the part of the client to sign additional documents in the future is reasonable.

A marked-up title commitment binder or pro forma title policy should reflect that the buyer's and seller's closing requirements have been met, including modifications to Schedules A, B-I, B-II, and the issuance of endorsements.

E. 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 authors' 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.

F. Post-Closing Follow-Up

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.

Appropriate steps to take include the following:

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

See Todd J. Anlauf, Matthew J. Foli, Kimball Foster, Lee W. Mosher, John D. Rice & Steven G. Thorson, SUMMARY GUIDE TO RESIDENTIAL REAL ESTATE (Minn. CLE 2005).

APPENDIX A
SUMMARY OF REQUIRED DISCLOSURES

DISCLOSURE TYPE	BY	LEGAL AUTHORITY	DISCLOSURE TO BE MADE	TIMING	FORMS
1. Statutory provisions regarding condition of property	Seller	MINN. STAT. § 513.52 *et seq.*	Minnesota Statutes section 513.55 provides, "seller shall make a written disclosure to the prospective buyer. The disclosure must include all material facts of which the seller is aware that could adversely and significantly affect: (1) an ordinary buyer's use and enjoyment of the property; or (2) any intended use of the property of which the seller is aware." Includes any issues materially affecting the property, including defects with the structures or mechanical systems; pest infestations; existence of protected sites (e.g., burial grounds or historic sites); presence of human remains which cannot be disturbed; preferential tax treatment that will terminate upon sale of property (e.g., disability, green acres, CRP, RIM status); environmental concerns; water intrusion and mold growth; existence of shorelands or wetlands on the property; water table contamination. Also disclose applicable issues in other statutes (such as underground storage tanks, hazardous materials, and private septic systems). Minnesota Statutes section 513.54 creates exceptions for certain transactions, including nonresidential property and gratuitous transfers. Minnesota Statutes section 513.56 excludes certain items from required disclosures, including HIV issues, suicides, accidental or natural death, perceived paranormal activity, and existence of family homes, residential facilities, or nursing homes in the neighborhood. Minnesota Statutes section 513.56 provides various conditional exceptions: 1. No duty to report presence of a predatory offender "*if* the seller, in a timely manner, provides a written notice that information about the predatory offender registry and persons registered with the registry may be obtained" by contacting certain authorities. (Emphasis added.) 2. "[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." (Emphasis added.) 3. "[S]eller has no duty to disclose information regarding airport zoning regulations *if* the seller, in a timely manner, provides a written notice that a copy of the airport zoning regulations" can be obtained from certain authorities. (Emphasis added.) 4. But, "[a] seller shall disclose to the prospective buyer material facts known by the seller that contradict any information included in a written report … if a copy of the report is provided to the seller."	"Before signing an agreement to sell or transfer residential real property…." MINN. STAT. § 513.55, SUBD. 1. Note the continuing nature of the obligation: "A seller must notify the prospective buyer in writing as soon as reasonably possible, but in any event before closing, if the seller learns that the seller's disclosure required by [Minnesota Statutes] section 513.55 was inaccurate." MINN. STAT. § 513.58, SUBD. 1.	MSBA Form RPF-15. MAR form: Seller's Property Disclosure Statement. MSBA Form RPF-08: Wetlands, Shoreland and Flood Plain Disclosure. For disclosures related to protected site status, see MSBA Form RPF-17. Predatory offender notice contained in MSBA Form RPF-1 and in MAR Purchase Agreement. Airport zoning regulation provisions contained in MSBA Form RPF-1; also in MSBA Form RPF-15 Add: Notice of Airport Zoning Regulations. Disclosure, inspections, and waiver options listed in MSBA Form RPF-1.
2. Wetlands, shoreland, flood plains	Seller	MINN. STAT. § 513.52 *et seq.*	Existence of wetlands, shoreland, or flood plain on property. No specific statutory authority, but Minnesota Statutes section 513.52 *et seq.* apply.	"Before signing an agreement to sell or transfer residential real property…." MINN. STAT. § 513.55, SUBD. 1.	MSBA Form RPF-08: Wetlands, Shoreland and Flood Plain Disclosure. MAR form: Seller's Property Disclosure Statement.

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3. Common interest community (resale)	Seller	MINN. STAT. §§ 515B.4-101, 515B.4-107 & 515B.4-108	"In the event of a resale of a unit by a unit owner other than a declarant … the unit owner shall furnish to a purchaser … the following documents relating to the association or to the master association, if applicable: (1) copies of the declaration (other than any CIC plat), the articles of incorporation and bylaws, any rules and regulations, and any amendments or supplemental declarations; (2) the organizational and operating documents relating to the master association, if any; and (3) a resale disclosure certificate from the association dated not more than 90 days prior to the date of the purchase agreement or the date of conveyance, whichever is earlier, containing the information set forth in [Minnesota Statutes section 515B.4-107,] subsection (b)." MINN. STAT. § 515B.4-107. Note exceptions at Minnesota Statutes section 515B.4-101(c).	"[M]ore than ten days prior to the execution of the purchase agreement for the unit, [or] the purchaser may, prior to the conveyance, cancel the purchase agreement within ten days after receiving the information." MINN. STAT. § 515B.4-108(a).	MSBA Form RPF-16. MAR form: Common Interest Community Resale Disclosure Certificate.
4. Hazardous waste disposal or contamination	Seller	MINN. STAT. § 115B.16	"Before any transfer of ownership of any property which the owner knew or should have known was used as the site of a hazardous waste disposal facility as defined in [Minnesota Statutes] section 115A.03, subdivision 10, or which the owner knew or should have known is subject to extensive contamination by release of a hazardous substance, the owner shall record with the county recorder of the county in which the property is located an affidavit containing a legal description of the property that discloses to any potential transferee: (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 provided in [Minnesota Statutes section 115B.16,] subdivision 1. An owner must also file an affidavit within 60 days after any material change in any matter required to be disclosed under clauses (1) to (3) with respect to property for which an affidavit has already been recorded. If the owner or any subsequent owner of the property removes the hazardous substance, together with any residues, liner, and contaminated underlying and surrounding soil, that owner may record an affidavit indicating the removal of the hazardous substance." MINN. STAT. § 115B.16, SUBD. 2. Also disclose directly to the buyer pursuant to Minnesota Statutes section 513.52 *et seq*.	Before any transfer of ownership of the property. MINN. STAT. § 513.58, SUBD. 1.	MSBA Form RPF-1 has a disclosure section for hazardous substances and petroleum products. The MAR Purchase Agreement has a disclosure section for "environmental concerns," including "hazardous substances" and "underground storage tanks."

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5. Individual sewage treatment system	Seller	MINN. STAT. § 115.55	"Before signing an agreement to sell or transfer real property, the seller or transferor must disclose in writing to the buyer or transferee information on how sewage generated at the property is managed. The disclosure must be made by delivering a statement to the buyer or transferee that either: (1) the sewage goes to a facility permitted by the agency; or (2) the sewage does not go to a permitted facility, and is therefore subject to applicable requirements. For sewage not sent to a permitted facility, the disclosure must include a description of the system in use, including the legal description of the property, the county in which the property is located, and a map drawn from available information showing the location of the system on the property to the extent practicable." MINN. STAT. § 115.55.	Before signing an agreement to sell or transfer the property. MINN. STAT. § 115.55, SUBD. 6(a).	MSBA Form RPF-1; MSBA Form RPF-14 (the actual disclosure form). MAR Purchase Agreement; *see also* MAR form: Private Sewer System Disclosure Statement.
6. Lead paint	Seller	42 U.S.C. § 4852d 24 C.F.R. part 35 (HUD) 40 C.F.R. part 745 (EPA)	"The seller ... shall disclose to the purchaser ... the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased. The seller ... shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces." 24 C.F.R. § 35.88(a)(2). Applies only to "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling." 24 C.F.R. § 35.86.	Before buyer is obligated under any contract to purchase. 24 C.F.R. § 35.88(a). "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.	MSBA Form RPF-1. MSBA Form RPF-11 (if housing located on property was built before 1978). MAR form: Addendum: Disclosure of Lead-Based Paint, and Lead-Based Paint Hazards.

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7. Location of wells/Washington County "special well construction area"	Seller	MINN. STAT. §§ 103I.235 & 103I.236 MINN. R. 4725.3650	"Before signing an agreement to sell or transfer real property, the seller must disclose in writing to the buyer information about the status and location of all known wells on the property, by delivering to the buyer either a statement by the seller that the seller does not know of any wells on the property, or a disclosure statement.... At the time of closing of the sale, the disclosure statement information, name and mailing address of the buyer, and the quartile, section, township, and range in which each well is located must be provided on a well disclosure certificate signed by the seller or a person authorized to act on behalf of the seller.... 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.'" MINN. STAT. § 103I.235, SUBD. 1. Note special requirements for Washington County: "Before signing an agreement to sell or transfer real property in Washington County that is not served by a municipal water system, the seller must state in writing to the buyer whether, to the seller's knowledge, the property is located within a special well construction area designated by the commissioner of health..." MINN. STAT. § 103I.236.	"Before signing an agreement to sell or transfer the real property...." MINN. STAT. §§ 103I.235 & 103I.236.	MSBA Form RPF-1. MSBA Form RPF-21. MAR Purchase Agreement. MAR form: Seller's Property Disclosure Statement. MAR form: Well Disclosure Statement.
8. Methamphet-amine production	Seller	MINN. STAT. § 152.0275	"Before signing an agreement to sell or transfer real property, the seller or transferor must disclose in writing to the buyer or transferee if, to the seller's or transferor's knowledge, methamphetamine production has occurred on the property. If methamphetamine production has occurred on the property, the disclosure shall include a statement to the buyer or transferee informing the buyer or transferee: (1) whether an order has been issued on the property... (2) whether any orders issued against the property ... have been vacated ...; or (3) if there was no order issued against the property and the seller or transferor is aware that methamphetamine production has occurred on the property, the status of removal and remediation on the property." MINN. STAT. § 152.0275, SUBD. 2(m).	"Before signing an agreement to sell or transfer the property...." MINN. STAT. § 152.0275, SUBD. 2(m).	MSBA Form RPF-22. MAR form: Methamphetamine Production Disclosure Statement.

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9. Underground storage tanks	Seller	MINN. STAT. § 116.48 Exemptions: MINN. STAT. § 116.47	"Before transferring ownership of property that the owner knows contains an underground or aboveground storage tank or contained an underground or aboveground storage tank that had a release for which no corrective action was taken, the owner shall 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.... Before transferring ownership of property that the owner knows contains an underground or aboveground storage tank, the owner shall 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." MINN. STAT. § 116.48, SUBD. 6. Exemptions include "farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes ... tanks of 1,100 gallons or less capacity used for storing heating oil for consumptive use on the premises where stored ... tanks located in an underground area, including basements, cellars, mine workings, drifts, shafts, or tunnels, if the storage tank is located upon or above the surface of the floor; [and] septic tanks...." MINN. STAT. § 116.47.	"Before signing an agreement to sell or transfer residential real property...." MINN. STAT. § 513.55, SUBD. 1. "Before transferring ownership of property that the owner knows contains an underground or aboveground storage tank, the owner shall deliver to the purchaser a copy of the affidavit...." MINN. STAT. § 116.48, SUBD. 6. Note: It is recommended to follow the earlier disclosure under Minnesota Statutes section 513.55.	MSBA Form RPF-1. MAR form: Seller's Property Disclosure Statement.
10. Valuation exclusion (property tax)	Seller	MINN. STAT. § 273.11, SUBD. 18	"No seller of real property shall sell or offer for sale property that, for purposes of property taxation, has an exclusion from market value for home improvements under [Minnesota Statutes section 273.11,] subdivision 16, without disclosing to the buyer the existence of the excluded valuation and informing the buyer that the exclusion will end upon the sale of the property and that the property's estimated market value for property tax purposes will increase accordingly." MINN. STAT. § 273.11, SUBD. 18.	At the time the property is offered for sale. MINN. STAT. § 273.11, SUBD. 18.	MSBA Form RPF-1. MAR form: Seller's Property Disclosure Statement.

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11. Radon	Seller	MINN. STAT. §§ 144.496 & 513.61	"The seller shall disclose in writing to the buyer any knowledge the seller has of radon concentrations in the dwelling. The disclosure shall include: (1) whether a radon test or tests have occurred on the real property; (2) the most current records and reports pertaining to radon concentrations within the dwelling; (3) a description of any radon concentrations, mitigation, or remediation; (4) information regarding the radon mitigation system, including system description and documentation, if such system has been installed in the dwelling; and (5) a radon warning statement meeting the requirements of subdivision 4." Seller must also provide the buyer with a copy of the Minnesota Department of Health publication entitled "Radon in Real Estate Transactions." MINN. STAT. § 144.496. Minnesota Statutes section 144.496, subdivision 3(c) contains various exceptions including real property that is not residential real property, gratuitous transfer, and intra-family transfers, among others.	Before signing an agreement to sell or transfer residential real property. MINN. STAT. § 144.496, SUBD. 3(a).	MSBA Form RPF-24. MAR form: Seller's Property Disclosure Statement; Seller's Disclosure Alternatives; and New Construction Purchase Agreement. Minnesota Department of Health, "Radon in Real Estate Transactions." Note: the electronically-available version of MSBA Form RPF-24 includes the "Radon in Real Estate Transactions" publication.
12. Agency relationships and dual agency	Licensee	MINN. STAT. § 82.67	"The agency disclosure form shall be intended to provide a description of available options for agency and facilitator relationships, and a description of the role of a licensee under each option. The agency disclosure form shall provide a signature line for acknowledgment of receipt by the consumer. The disclosures required by this subdivision apply only to residential real property transactions." MINN. STAT. § 82.67, SUBD. 1. "If circumstances create a dual agency situation, the broker must make full disclosure to all parties to the transaction as to the change in relationship of the parties to the broker due to dual agency. A broker, having made full disclosure, must obtain the consent of all parties to these circumstances in residential real property transactions in the purchase agreement in the form [contained in the statute]." MINN. STAT. § 82.67, SUBD. 4.	Agency disclosure: "at the first substantive contact with the consumer." MINN. STAT. § 82.67, SUBD. 1. Dual agency: statute does not say specifically, but presumably upon creation of dual agency situation.	Agency disclosure: statutory form contained in Minnesota Statutes section 82.67, subdivision 3. MAR form: Agency Relationships in Real Estate Transactions. Dual agency: statutory form contained in Minnesota Statutes section 82.67, subdivision 4. MAR Purchase Agreement.
13. Advertising	Licensee	MINN. STAT. § 82.69	"Any advertising by a licensee must include the real estate brokerage name more prominently displayed than the licensee's name. If a salesperson or broker is part of a team or group within the brokerage, the licensee may include the team or group name in the advertising only under the following conditions: (1) the inclusion of the team or group name is authorized by the primary broker of the brokerage to which the salesperson or broker is licensed; and (2) the real estate brokerage name is included and more prominently displayed than the team or group name in the advertising." MINN. STAT. § 82.69.	At the time of advertising. MINN. STAT. § 82.69.	Statutory form. MINN. STAT. § 82.69.

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14. Right to choose closer	Licensee	MINN. STAT. § 507.45, SUBD. 4	"No real estate salesperson ... may require a person to use any particular licensed attorney, real estate broker, real estate salesperson, or real estate closing agent in connection with a residential real estate closing.... All listing agreements must include a notice informing sellers of their rights under this subdivision. The notice must require the seller to indicate in writing whether it is acceptable to the seller to have the licensee arrange for closing services or whether the seller wishes to arrange for others to conduct the closing. The notice must also include the disclosure of any controlled business arrangement ... between the licensee and the real estate closing agent through which the licensee proposes to arrange closing services." MINN. STAT. § 507.45, SUBD. 4.	"All listing agreements must include a notice informing sellers of their rights under this subdivision." MINN. STAT. § 507.45, SUBD. 4(b).	MAR form: Exclusive Right to Sell Real Estate.
15. Material facts concerning principal's rights and interests	Licensee	*White v. Boucher*, 322 N.W.2d 560 (Minn. 1982)	"Upon the execution of a listing agreement, a broker becomes the agent of the seller and is subject to the general rules governing the principal-agent relationship.... The broker owes the utmost good faith and loyalty to his principal.... It is the broker's duty to communicate to the seller 'all facts of which he has knowledge which might affect the principal's rights or interests....' [E.g.,:] The broker is duty bound to make full disclosure of the financial status of a prospective purchaser." *White v. Boucher*, 322 N.W.2d 560, 564–65 (Minn. 1982).	The case does not say specifically; presumably within a reasonable time after learning of any such material facts.	No specific form. It is advisable to make necessary disclosures in writing.

DISCLOSURE TYPE	BY	LEGAL AUTHORITY	DISCLOSURE TO BE MADE	TIMING	FORMS
16. Material facts to prospective purchasers	Licensee	MINN. STAT. § 82.68, SUBD. 3	"[A]ll material facts of which the licensee is aware, which could adversely and significantly affect an ordinary purchaser's use or enjoyment of the property, or any intended use of the property of which the licensee is aware." MINN. STAT. § 82.68, SUBD. 3(a). **Exclusions:** 1. Property connection to human immunodeficiency virus. 2. Property connection to a suicide, accidental death, natural death, or perceived paranormal activity. 3. Property located in a neighborhood containing an adult family home, community-based residential facility, or nursing home. MINN. STAT. § 82.68, SUBD. 3(b). **Conditional Exceptions:** 1. No duty to disclose information regarding a predatory sexual offender *if* the licensee provides timely written notice that information may be obtained. 2. No duty to disclose information regarding airport zoning regulations *if* the licensee provides timely written notice that a copy of the airport zoning regulations can be reviewed or obtained. 3. No duty to disclose information relating to the physical condition of the property *if* a written report that discloses the information has been prepared by a qualified third party and provided. MINN. STAT. § 82.68, SUBD. 3(c)–(e) (emphasis added). **Conditional Duty:** "A licensee shall disclose to the parties to a real estate transaction any facts known by the broker or salesperson *that contradict any information included in a written report...*, *if* a copy of the report is provided to the licensee." MINN. STAT. § 82.68, SUBD. 3(f) (emphasis added). Remember, however, that "broker/salesperson will keep client(s)' confidences unless required by law to disclose specific information (such as disclosure of material facts to Buyers)." MINN. STAT. § 82.67, SUBD. 3.	The statute does not specifically mention timing; presumably within a reasonable time after learning of any such material facts.	No specific form. It is advisable to make necessary disclosures in writing, using an addendum to obtain signatures from the other parties in the transaction.
17. Controlled business relationships	Licensee	MINN. STAT. § 507.45, SUBD. 4 12 U.S.C. § 2602	"All listing agreements must include a notice ... [which] must also include the disclosure of any controlled business arrangement between the licensee and the real estate closing agent through which the licensee proposes to arrange closing services." MINN. STAT. § 507.45, SUBD. 4.	Must be included in the listing agreement.	MAR form: Exclusive Right to Sell Real Estate.
18. Financial interest of licensee	Licensee	MINN. STAT. § 82.68, SUBD. 2	"Before the negotiation or consummation of any transaction, a licensee shall affirmatively disclose to the owner of real property that the licensee is a real estate broker or agent salesperson, and in what capacity the licensee is acting, if the licensee directly, or indirectly through a third party, purchases for himself or herself or acquires, or intends to acquire, any interest in, or any option to purchase, the owner's property." MINN. STAT. § 82.68, SUBD. 2.	"Before the negotiation or consummation of any transaction...." MINN. STAT. § 82.68, SUBD. 2.	No specific form. It is advisable to make necessary disclosure in writing.

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19. Lead paint	Licensee	24 C.F.R. part 35 (HUD) 40 C.F.R. part 745 (EPA)	Presence of any known lead-based paint or lead based paint hazards in the home.	Before buyer is under any contract to purchase.	MSBA Form RPF-1. MAR form: Addendum: Disclosure of Lead-Based Paint, and Lead-Based Paint Hazards.
20. Licensed name of broker	Licensee	MINN. STAT. § 82.68, SUBD. 1	"A licensee shall affirmatively disclose ... the licensed name of the brokerage under whom the licensee is authorized to conduct business...." MINN. STAT. § 82.68, SUBD. 1.	"[B]efore the negotiation or consummation of any transaction...." MINN. STAT. § 82.68, SUBD. 1.	MAR form: Exclusive Right to Sell Real Estate.
21. Non-performance by a party	Licensee	MINN. STAT. § 82.68, SUBD. 4	"If a licensee is put on notice by any party to a real estate transaction that the party will not perform in accordance with the terms of a purchase agreement ... the licensee shall ... immediately disclose ... to the other party or parties to the transaction. Whenever reasonably possible, the licensee shall inform the party who will not perform of the licensee's obligation to disclose this fact ... before making the disclosure." MINN. STAT. § 82.68, SUBD. 4. Exception: "The obligation ... does not apply to notice of a party's inability to keep or fulfill any contingency to which the real estate transaction has been made subject." MINN. STAT. § 82.68, SUBD. 4.	"[T]he licensee shall immediately disclose the fact of [a] party's intent not to perform to the other party or parties to the transaction." MINN. STAT. § 82.68, SUBD. 4.	No specific form. It is advisable to make necessary disclosures in writing.
22. Licensee's relationship to a principal in a transaction	Licensee	MINN. STAT. § 82.68, SUBD. 2(b)	"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." MINN. STAT. § 82.68, SUBD. 2(b).	"Before the negotiation or consummation of any transaction...." MINN. STAT. § 82.68, SUBD. 2(a).	No specific form. The necessary disclosure must be made in writing.
23. FIRPTA	Licensee	26 U.S.C. § 1445	Where seller is a foreign person and the sale price exceeds $300,000, licensees should notify the buyer of buyer's duty to withhold funds for payment of tax under FIRPTA.	Before closing.	No specific form. The necessary disclosure must be made in writing.
24. Guaranteed sale program – terms and conditions	Licensee	MINN. STAT. § 82.74	Where a licensee agrees to purchase the real property if it fails to sell to a third party within a specified time period, the licensee must provide a written disclosure of the general terms and conditions. The licensee must also inform the seller if it makes a profit when the property is re-sold.	Prior to the execution of the listing agreement.	No specific form. The necessary disclosure must be made in writing.