



# LEGAL HOTLINE Q&A

*FROM GET THE FACTS, JUNE 16, 2020*

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## QUESTION :

I have two listings that just went pending and I want to make sure, as a Listing Broker, that I know exactly what is happening with the buyer's financing. I do not want any surprises because it seems like buyers losing jobs at any moment is now happening more frequently. To be A+, when should I give the Buyer's Broker form 22AP, on what day and how many times in the transaction? Also if there is anything else I can do or another form I am not aware of, please advise.

## ANSWER:

First, listing broker is commended for understanding the importance of protecting seller's interests in the transaction and using the mechanisms included in buyer's financing contingency intended for seller's protection. Too few listing brokers actually represent seller's interests as they relate to buyer's financing contingency and listing broker's efforts to do so comply with broker's legal obligations owing to seller. Because quality representation of a seller in this situation is still developing within the industry, however, listing broker should expect the potential for resistance from buyer's broker. That leads to the first action listing broker should take in her effort to safeguard seller's interests in this situation.

Listing broker should talk to buyer's broker. The best way to lay the foundation for buyer's efficient performance and seller's confidence in that performance, is communication. Listing broker should let buyer's broker know, immediately after mutual acceptance, that as buyer has invited seller to do, seller will send the Form 22AL on day 10 and will send the Form 22AR on day 30 (or as allowed by the language of buyer's financing contingency). The communication should be delivered in a spirit of collaboration. All parties want this transaction to succeed and the elimination of surprises is good for everyone. Buyer should not be surprised to receive seller's Form 22AL and Form 22AR and seller should not be surprised, near closing, to learn that buyer was unable to secure financing. Instead, a positive transactional outcome will be fostered through good communication allowing both parties the opportunity to plan and react. The message of listing broker's communication at the time of mutual acceptance should not just be that seller will be delivering the forms as buyer has invited seller to do but



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also that buyer should be prepared to receive those forms by hiring a competent lender and promptly proceeding to make loan application, supply the lender with all requested documents and press for underwriting approval as quickly as possible.

Then, on day 10 following mutual acceptance (or whatever day the parties negotiated in Form 22A, paragraph 2), seller should deliver to buyer a Form 22AL which requires buyer to respond with the Form 22AP. Listing broker does not deliver the Form 22AP to buyer. Seller and listing broker deliver the Form 22AL, triggering buyer's obligation to respond on the Form 22AP.

Once seller and listing broker receive the Form 22AP, which will disclose the lender to whom buyer made loan application, listing broker should establish efficient communication directly with buyer's lender. Listing broker should communicate with buyer's lender frequently enough to know the status of buyer's loan at all times. Has the appraisal been ordered? Has the appraiser scheduled? Is the buyer's loan package complete? If not, why not? Has the loan been submitted to underwriting? Has the appraisal come back? Did the buyer receive underwriting approval? These are examples of questions to which listing broker should always know the answer. There are others that will be transaction specific.

If buyer fails to timely provide the Form 22AP or otherwise, when allowed by Form 22A, paragraph 3, seller should deliver to buyer, a Form 22AR, Notice of

Right to Terminate. With delivery of that form, buyer will have the opportunity to waive buyer's financing contingency. If buyer chooses not to waive the financing contingency within three days following receipt of the Form 22AR, seller will then have the opportunity, but not the obligation, to terminate the transaction. Seller and listing broker will have to evaluate everything they know about the particular transaction, other offers, the market and all other significant factors in determining whether seller's best option is to remain in the transaction with buyer still protected by the financing contingency, or terminate the transaction and return buyer's EM to buyer. If buyer waives the financing contingency anytime prior to seller terminating the transaction, buyer's waiver will prevent seller's termination.

Broker should work with her managing broker to understand the forms, to counsel seller and to advocate for seller. Again, listing broker should not allow herself to be intimidated from representing seller's best interests if she receives an unwelcome reaction from buyer's broker. Listing broker should, of course, display professionalism in response and in all interactions.

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