



LEGAL HOTLINE Q&A

FROM GET THE FACTS, June 11, 2024

Question:

If a Broker represents a Buyer and closes a transaction without the Form 41 and escrow sends a Commission check to the Firm and Buyer wont sign the 41 (I know it should be signed when services begin but if it wasn't). What should the firm do with the check?

Does the Firm deposit it and not pay the Buyer Broker, do they send it back to escrow, do they just hold it...?

Answer:

In that (hopefully) rare circumstance where a transaction closes without a buyer agency agreement between buyer and buyer broker firm, buyer broker's firm is going have to decide how to proceed. Will it accept compensation and hope it doesn't get caught? Will it take some other approach, such as returning the funds? If the funds are returned, to whom will the funds be returned? It seems unlikely that the correct answer is for the firm to retain the funds without paying broker the share of compensation that broker would have earned had the relationship between broker and buyer been properly documented. It is important to remember that under state law, the broker is not the only person who committed error. The firm's DB, who supervises brokers licensed to the firm, is responsible for all brokerage services provided by the firm. It is up to the firm to ensure that brokers are trained and that any broker licensed to the firm complies with the law. If brokers licensed to the firm will not consume education sufficient to know the law and then will not comply with the law, then the DB of the firm must consider whether the broker's license should be maintained at the firm. None of these are issues or questions that the Hotline lawyer can answer or resolve for the firm. These are questions that an individual firm will have to answer with the assistance of its own legal counsel.

In deciding, with legal counsel, how to proceed, it is important to understand that in this set of facts, the law has already been violated and that cannot be changed. There is no solution at this point that "unbreaks" the law. One of the factors that DB and the firm's counsel will likely consider is the likelihood that the broken law will be discovered and whether that risk is tolerable. Again, this is an analysis and assessment that only the firm and its own legal counsel can undertake. In analyzing the likelihood of discovery, the question will be ... who will complain about the broken law and what is the likelihood of that complaint? Will the Department of Licensing discover the error in a routine audit of the firm's files? Will one of the parties to the lawsuit, most likely the buyer, file a complaint? In either case, the firm may have difficulty in response. If neither of those sources generate a complaint, however, there is no other person likely to make a complaint and the firm will probably avoid scrutiny over this set of facts. When the firm is analyzing the issue with its legal counsel, part of the analysis will have to include a comparison of likely adverse consequences to the firm from withholding compensation from the broker versus the likelihood of discovery of the violation of law. If compensation is withheld, what will the broker do? Will the broker sue the firm?

There is no perfect solution in this situation. Perhaps the primary takeaway, after DB and counsel determine how to resolve the instant problem, is the development of training protocols that make it impossible for brokers to operate without knowledge of Washington law and office policies that make clear the consequences to brokers who continue to provide brokerage services with indifference to the law. DB should work with the firm's counsel to develop office policies that make clear to all brokers licensed to the firm, what will happen to the compensation earned in a transaction and what will happen to the broker's license, if broker fails to adhere to state law, including the law regarding agreements for brokerage services.

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