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Heads up! when it comes to Permission to disclose

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(This is the 22nd in a series of articles about issues that sellers and buyers face when negotiating a purchase-offer contract.)

Often found in the standard, pre-printed, real-estate purchase contract that brokers use is a section titled: Permission.

It will say something like this: Buyer and Seller grant permission [to Brokers] to advise the public of this sale upon execution of this Contract, and Brokers may disclose price and terms herein after close of escrow.

This language benefits brokers representing both buyer and seller in as much as they can advertise a sale they've finished and reveal selling price and terms if it's advantageous. This information is also useful in acquiring back-up contracts. Brokers may want this information for any private data base they develop on market conditions.

Here's the rub. "Execute a contract" can mean either when a contract comes into force with the last required signature or when it is fully carried out (that is, after the sale is closed). In real-estate contracts, it's often taken to mean the first, not the second. Buyer or seller may not want this information disclosed before closing.

Not permitted under Permission is disclosure of the buyer's offer PRIOR TO its acceptance. Here's an example.

A client of mine put a full-price offer on about 500 acres in West Virginia several years ago. The buyer was a developer, following up on land that I had looked into. He included a 30-day study contingency and a pro-forma financing contingency. The seller was given a three-day window to respond. I did not see the contract he submitted.

What did the listing broker do the minute he received my client's offer? He shopped it around to another buyer who had expressed interest. The buyer in the wings came in immediately with a full-price offer and no contingencies. The broker did not come back to my client and give him an opportunity to better his offer, which I think he would have done. The arrangement between the broker and the successful buyer smelled fishy.

This broker's behavior in "backdooring" my client is not allowed under the standard Permission language, which authorizes disclosure of price and terms AFTER the contract is executed, that is, signed by both parties. This broker revealed price and terms BEFORE my client's offer was executed under either interpretation of "execute."

My client could not, of course, prove that the broker had backdoored him in this manner. The second full-price offer could have been just a coincidence. That's what the broker and new owner would have claimed in court.

To prevent future coincidences, buyers might include offer-confidentiality language in their contracts. In one form or another, this section would state that the price and terms of the buyer's offer shall not be disclosed by the broker, seller, or associates of either one, at any time, starting from the moment the offer is received by the broker or seller, except as required by recordation. If broker or seller breaches this requirement and the buyer suffers harm, the buyer can choose to pursue either remedy in the law or a fixed amount as liquidated damages.

This language would void the standard Permission as well. If the buyer and seller want to allow disclosure under Permission, they can adapt and limit the language I've included above.

My client in this affair did not include the full-Monty offer-confidentiality language. For lack of that language, he probably lost two or three million dollars in net profit.

The boilerplate Permission language allows disclosure after the contract is signed or, at the very least, after the purchase contract has been satisfied. However, either buyer or seller may have reasons to object to disclosure at either point in the timeline.

As a buyer coming into a new community, I might object to having my new neighbors readily know what I paid or my financing details. Selling price can usually be found in the deed itself or by calculations based on the tax (stamps) levied on the sale. But to dig that out of the recorded documents takes some investigative motivation.

Sellers may be embarrassed by the price they accepted, either for being too low or too high. Or they may want to conceal sale terms from heirs, relations and those to whom they are in debt.

If you -- buyer or seller -- object to Permission boilerplate, cross it out and write in your initials and date.

If you don't want to be "backdoored," include offer-confidentiality language in your contract. It's hard for a backdoored buyer to prove that he has been backdoored, but language of this sort provides at least a shot across the bow of both seller and broker.