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# Considerations for Handling Multiple Offers

**WHILE** multiple offers are certainly enviable for listing agents, they also may be stressful and sometimes confusing. Most agents are well versed in the concept that an offer or counteroffer may be accepted, rejected, countered, or revoked. However, when offers come in multiples and there is urgency to formulate responses, it is imperative for the agent to develop a plan of action.

An agent with multiple offers on a listing should take time to strategize with the seller about options for proceeding and review the pros and cons associated with each option. This is not only a matter of the listing agent's fiduciary duty to the seller, but also an important means of risk management. The listing agent then must follow the seller's instructions for the handling of the multiple offers.

## When a Contract Is Formed

Begin with ensuring that the seller client understands when an offer or counteroffer becomes a contract. Generally speaking, contracts for the sale of real estate need to be in writing and signed by the parties to the agreement. This is a matter of law under most states' versions of the "Statute of Frauds." There is no contract until such time as the latter of the two parties signs the agreement without making a material change to it, and delivers the document to the other. "Delivery" occurs when the party or the party's agent is notified of the acceptance, unless the contract terms specify otherwise. Given that offers to purchase may be generated by the buyer's agent, listing agents and sellers need to carefully review the offer terms relating to acceptance if the standard form used is unfamiliar.

A buyer's agent likewise must be sure that the buyer understands that there is no contract until the agreement is fully executed. Agents should not tell a buyer "we have a deal" before the documents are signed. If the seller receives a more favorable offer in the interim, that offer may be accepted.

## Disclosure of Multiple Offers

Standard of Practice of the REALTOR® Code of Ethics states that the existence of offers should only be disclosed with the seller's consent. The seller alone determines whether one or more of the prospective buyers will be informed that there are multiple offers. Sellers who elect to disclose multiple offers risk that a buyer will walk away from a possible "bidding war." Alternatively, sellers may elect to leverage the existence of multiple offers to get the best price and terms.

Buyers frequently believe that they are entitled to notification that they are in a multiple offer situation; this is not true. A prudent buyer's agent will make certain that a buyer understands that multiple offers need not be disclosed by the seller or listing agent.

## Confirming Offer Presentation and Rejection

Offers may be rejected verbally. However, the best practice is to indicate in writing on the offer itself that it has been "reviewed and respectfully rejected." This notation should include the seller's signature and date. This confirms not only that the offer was rejected, but also that the offer was actually presented.

It is particularly advisable to confirm the presentation and rejection in writing if the amount of the offer is at or in excess of the listing price. Oftentimes, buyers do not understand when their full price offer is rejected and sometimes suspect that their offer was not presented.

## Avoiding Multiple Offer "Beartraps"

- A counteroffer constitutes the rejection of the offer. A party cannot extend a counteroffer, have it rejected, and then attempt to accept the original offer.
- The seller should not counter more than one offer at a time. To do so creates a risk that both buyers will accept and there will be two binding contracts.
- A seller is not required to accept a full price offer, and indeed may elect to accept a competing offer for less than the listing price if the terms are more favorable to the seller, e.g., a cash offer with a quick title transfer date as opposed to an offer with a financing contingency.

- A seller is not obligated to give the first prospective buyer an opportunity to increase their offer before accepting a second offer.
- Agents should use the words “offer” versus “contract” with precision so as not to create any misunderstanding. A buyer writes an offer on a property, not a “contract.” There is no contract until acceptance and delivery.

### Accepting Offers Via Email

Real estate professionals who indicate a client’s offer or acceptance via email, or who forward a communication from their client evidencing terms of an offer or acceptance, may unwittingly bind their client to a real estate purchase or lease agreement. While it is still the conventional practice to have an original document executed by the parties, courts nationwide are now considering electronic agreements to have the same legal effect. In that regard, agents must exercise caution in conveying information about an acceptance, counteroffer, or rejection to the other agent or party in the transaction. For example, if a listing agent sends an email to the buyer’s agent saying “my seller accepts your offer,” it is arguable that the listing agent will be deemed to have acted on behalf of their principal, and that the agent’s action is binding upon the principal.

Agents similarly should use care in relaying emails from clients to another party or their agent. For example, if the seller tells their agent in an email containing their signature that “the offer is acceptable and I will sign the paperwork upon my return from vacation” and the agent forwards the seller’s email to the buyer’s agent or to the buyer, the seller’s email may be deemed to create a binding agreement. Given that the email from the seller conveys their acceptance of the offer terms and the agreement is signed electronically by the seller, it is arguably an acceptable contract under the statute of frauds. The seller may find themselves compelled to sell if the listing agent forwards the seller’s email to the other party or their agent. This may become a sticky legal issue for the listing agent if the seller later claims that the agent was not authorized to forward the “acceptance” email to the buyer’s agent.

Courts seem to be increasingly inclined to honor email communications as binding. In *Shattuck v. Klotzbach* (Mass. Super. 2001), 14 Mass.L.Rptr. 360, a Massachusetts court held that “the typed name at the end of an e-mail is more indicative of a party’s intent to authenticate than that of a telegram as the sender of an e-mail types and sends the message on his own accord and types his own name as he so chooses.”

Real estate brokers and agents should consider including a standard disclaimer in all email communications clearly stating that the content may not be deemed an offer, counteroffer, or acceptance until paper documents are mutually executed between the parties. This is the case for any email communications relaying an offer, counteroffer, terms of a purchase or lease, or any other communication where it is arguable that the communication forms the basis of the terms of an offer, counteroffer, or acceptance.

### Obtaining Advice from Legal Counsel

If at any point in time an agent is uncertain about how to advise any client in a multiple offer situation, the agent should promptly seek advice from a management level licensee or counsel to the brokerage. Sometimes talking through the situation and getting a second opinion can help to clarify the next steps to be taken. The client likewise should be advised in writing to consult with independent legal counsel if they have questions about the legal ramifications of how to proceed.

In rare circumstances, a buyer may believe that he is entitled to purchase a property even though a binding contract has not been formed. If a buyer threatens to assert legal action in the event that the seller does not sell to them, an agent should promptly advise the client to consult with an attorney. The agent should also immediately notify their broker or management.

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